In Search of a Job: Criminal Records as Barriers to Employment

by Amy L. Solomon

Editor's note: Ms. Solomon co-chairs the staff working group of the Attorney General's Reentry Council. This article is an adaptation of her July 26, 2011, testimony before the Equal Employment Opportunity Commission.

"I am writing this letter … out of desperation and to tell you a little about the struggles of re-entering society as a convicted felon." Thus began a letter that made its way to me at the U.S. Department of Justice (DOJ). The letter came from a 30-year-old man who — in 2003, at age 21 — lost control of his car after a night of drinking, killing his close friend. "Jay" was convicted of involuntary manslaughter and sentenced to 38 months in state prison.

"I have worked hard to turn my life around. I have remained clean for nearly eight years, I am succeeding in college, and I continue to share my story in schools, treatment facilities and correctional institutions, yet I have nothing to show for it. … I have had numerous interviews and sent out more than 200 resumes for jobs which I am more than qualified. I have had denial after denial because of my felony." Jay ends the letter saying, "I do understand that you are not responsible for the choices that have brought me to this point. Furthermore, I recognize that if I was not abiding by the law, if I was not clean, and if I was not focusing my efforts toward a successful future, I would have no claim to make."

Jay's story is not unusual.

A Substantial Share of the U.S. Population Has Arrest Records

A new study shows that nearly one-third of American adults have been arrested by age 23.[1] This record will keep many people from obtaining employment, even if they have paid their dues, are qualified for the job and are unlikely to reoffend. At the same time, it is the chance at a job that offers hope for people involved in the criminal justice system, as we know from research that stable employment is an important predictor of successful re-entry and desistance from crime.[2]

Criminal records run the gamut — from one-time arrests where charges are dropped to lengthy, serious and violent criminal histories. Most arrests are for relatively minor or nonviolent offenses. Among the nearly 14 million arrests recorded in 2009, only 4 percent were considered among the most serious violent crimes (which include murder, rape, robbery and aggravated assault).[3] (See Figure 1.) Another 10 percent of all arrests were for simple assault; these do not involve a weapon or aggravated injury but often include domestic violence and intimate partner violence. The remainder of the arrests in 2009 were for:

- Property crimes, which accounted for 18 percent of arrests. These include burglary, larceny-theft, motor vehicle theft, arson, vandalism, stolen property, forgery and counterfeiting, fraud, and embezzlement.
- Drug offenses, which accounted for 12 percent of arrests. These include production, distribution and use of controlled substances.
- Other offenses, which accounted for 56 percent of all arrests. These include disorderly conduct, drunkenness, prostitution, vagrancy, loitering, driving under the influence and weapons violations.

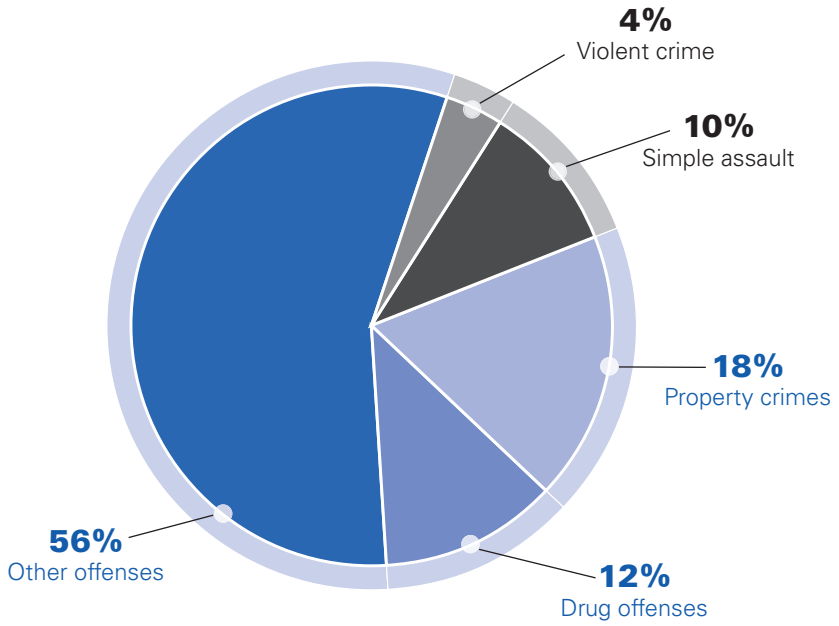
Although many of these "other" offenses are for behaviors that harm the community, they do not constitute the most serious violent offenses of murder, rape, robbery and aggravated assault.

Furthermore, what is often forgotten is that many people who have been arrested — and, therefore, technically have a criminal record that shows up on a background check — were never convicted of a crime. This is true not only among those charged with minor crimes, but also for many individuals arrested for serious offenses. A snapshot of felony filings in the 75 largest counties, for example, showed that approximately one-third of felony arrests did not lead to conviction.[4]

People of Color Are Disproportionately Impacted

The impact of having a criminal record is exacerbated among African Americans, who may already experience racial discrimination in the labor market and are more likely than whites to have a criminal record. Two prominent studies by Devah Pager involved employment audits of men in Milwaukee and New York City. Both studies, funded by NIJ, found that a criminal record reduces the likelihood of a job callback or offer by approximately 50 percent. This criminal record "penalty" was substantially greater for African Americans than for white applicants. The more recent study included Latinos in the test pool and showed they suffered similar "penalties" in the employment market.[5]

Figure 1. Arrests in 2009 by Offense



Source: *Crime in the United States, 2009,* Washington D.C.: U.S. Department of Justice, Federal Bureau of Investigation, 2010.

Nearly 75 percent of arrestees are male. African Americans account for less than 14 percent of the U.S. population[6] but 28 percent of all arrests. They are even more highly represented in the incarcerated population, comprising almost 40 percent of those behind bars.[7]

Although many arrests do not lead to conviction, and many convictions do not result in imprisonment, the incarcerated population is substantial. Each year, there are almost 13 million people admitted to — and released from — local jails[8] and more than 700,000 admitted to/released from state and federal prisons.[9] Incarceration rates in the United States are higher than in any other country in the world. The United States has less than 5 percent of the world's population but almost a quarter of the world's prisoners.[10] Over the last 30 years, the incarcerated population has more than quadrupled, and today, just under 2.3 million men and women are held in prisons and jails.[11]

In 2008, the Pew Center on the States brought heightened public attention to our nation's incarceration rate when it reported that 1 in 100 U.S. adults was behind bars on any given day.[12] (See Figure 2.) One in 100 is substantial, but it is also an average that does not hold evenly across all populations. One in 54 men is incarcerated, compared to 1 in 265 women. Looking just at men, we see that 1 in 106 white men is behind bars, compared to 1 in 36 Hispanic men and 1 in 15 African American men. When we consider young African American men (ages 20-34), the ratio lowers further to 1 in 9. In fact, young, male African American high school dropouts have higher odds of being in jail than being employed.[13] As these numbers make clear, incarceration is heavily concentrated among men, particularly young men of color.

There is also an intergenerational component at work. Forty-six percent of jail inmates have a family member who was incarcerated.[14] On any given day, 1 in 28 children has a parent behind bars. Again, communities of color are most acutely affected; 1 in 9 African American children has an incarcerated parent.[15] One recent study estimates that 25 percent of African Americans born after 1990 will witness their father being sent to prison before their 14th birthday.[16]

> The majority of employers indicate that they would "probably" or "definitely" not be willing to hire an applicant with a criminal record.

Incarceration is also a geographically concentrated phenomenon. A large number of prisoners come from — and return to — a relatively small number of already disadvantaged neighborhoods.[17] In many neighborhoods around the country, incarceration is no longer an unusual occurrence but a commonplace experience, especially for young men of color.

Incarcerated Populations Face a Broad Set of Challenges

The corrections population consists largely of men who have for many years exhibited a consistent pattern of criminal involvement, a lack of attachment to mainstream institutions of social integration and a multiplicity of interconnected problems. Among jail inmates:

- Sixty-eight percent meet the criteria for substance abuse or dependence.[18]
- Sixty percent do not have a high school diploma or general equivalency diploma.[19]
- Thirty percent were unemployed in the month before arrest, and almost twice as many were underemployed.[20]
- Sixteen percent are estimated to have serious mental health problems.[21]
- Fourteen percent were homeless at some point during the year before they were incarcerated.[22]

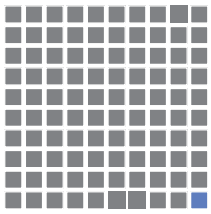
The need for treatment, training and assistance is great.[23] It is critical that individuals entering prisons and jails be screened and assessed to determine their criminogenic risks and needs, and that appropriate evidence-based interventions be applied during incarceration and after release to produce the best outcomes.[24]

Collateral Consequences Create Additional Barriers

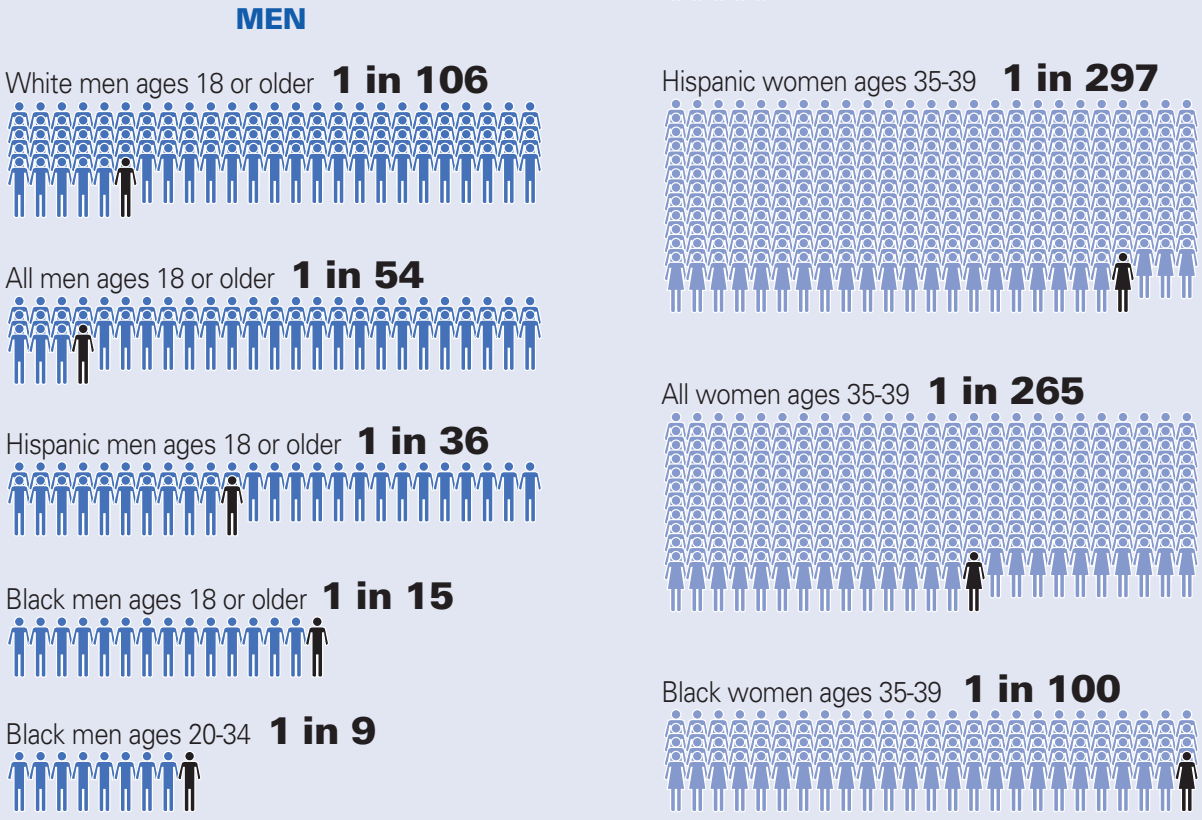
In addition to these significant and often overlapping challenges, an extra set of punishments, or "collateral consequences," is imposed on individuals as a direct result of their criminal convictions. NIJ is funding a national study, conducted by the American Bar Association's Criminal Justice Section, which has catalogued more than 38,000 statutes that impose collateral consequences on people convicted of crimes, creating barriers to jobs, housing, benefits and voting.[25] More than 80 percent of the statutes operate as a denial of employment opportunities.

Figure 2. U.S. Incarceration Rates by Race and Sex

According to data analyzed by the Pew Center on the States, as of Jan. 1, 2008, more than **1 in every 100 adults is behind bars.**



For the most part, though, incarceration is heavily concentrated among men, racial and ethnic minorities, and 20- and 30-year-olds. Among men the highest rate is with black males aged 20-34. Among women it's with black females aged 35-39.

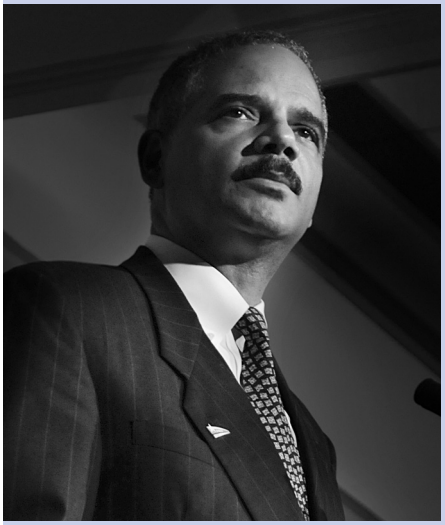


Source: The Pew Center on the States, *One in 100: Behind Bars in America 2008,* Washington, D.C.: The Pew Charitable Trusts, 2008, http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf.

Although some of these consequences serve important public safety purposes, others may be antiquated and create unnecessary barriers to legitimate work opportunities. A commonly cited example is that in some states, formerly incarcerated people who were trained as barbers cannot hold those jobs after release because state laws prohibit felons from practicing the trade, presumably because their access to sharp objects makes them a threat to the public.[26]

U.S. Attorney General Eric Holder recently wrote to every state

The Attorney General's Reentry Council



In January 2011, U.S. Attorney General Eric Holder established a Cabinet-level federal interagency Reentry Council, representing a significant executive branch commitment to coordinating re-entry efforts and advancing effective re-entry policies. The Reentry Council is premised on a real recognition that many federal agencies — not just the Department of Justice (DOJ) — have a major stake in re-entry. The re-entry population is one with which we are all already working — not only in prisons, jails and juvenile facilities, but in emergency rooms, homeless shelters, unemployment lines, child support offices, veterans hospitals and elsewhere. When we extend out to the children and families of returning prisoners, the intersection is even greater.

At its first meeting, the council adopted a mission statement to advance public safety and well-being through enhanced communication, coordination and collaboration across federal agency initiatives that: (1) make communities safer by reducing recidivism and victimization, (2) assist those who return from prison and jail in becoming productive citizens, and (3) save taxpayer dollars by lowering the direct and collateral costs of incarceration. The council has empowered staff — now representing 20 federal departments and agencies — to work toward a number of goals organized around coordinating and leveraging federal resources for re-entry; removing federal barriers to re-entry; and using the bully pulpit to dispel myths, educating key stakeholders about federal policies, resources and effective reentry models.

Regarding employment and re-entry, the council has an active working group composed of staff from the Department of Labor (DOL), DOJ, the Office of Personnel Management, the Equal Employment Opportunity Commission (EEOC), the Federal Trade Commission and the Small Business Administration, among others. The council has developed public education materials, a website and a set of "Reentry MythBusters" to clarify federal policy on a number of issues. Five MythBusters focus on employer responsibilities and incentives as well as worker rights in this area. On the incentives side, DOL offers both tax credits and federal bonding protection for employers that hire ex-offenders. On the employer-responsibility and worker rights side, an EEOC-authored MythBuster provides guidance to employers about the appropriate use of a criminal record in making hiring decisions.[1]

The EEOC has long-standing guidance on this issue and is doing enhanced, extensive training and outreach. In July 2011, the Commission held a meeting focused exclusively on arrest and conviction records as barriers to employment. After substantial consideration and review of the information presented both at

Attorney General, with a copy to every Governor, asking them to assess their state's collateral consequences and determine if any should be eliminated "so that people who have paid their debt to society are able to live and work productively."[27] The Attorney General's letter also said the federal government would assess the federal collateral consequences — and through the auspices of the interagency Reentry Council, we are doing just that.

Regardless of the legal restrictions, the majority of employers indicate that they would "probably" or "definitely" not be willing to hire an applicant with a criminal record, according to a study by Harry Holzer and colleagues.[28] In fact, a recent report by the National Employment Law Project found frequent use of blanket "no-hire" policies among major corporations, as evidenced by their online job ads posted on Craigslist.[29] The employer motivation is understandable. Employers do not want to hire individuals who might commit future crimes and who may be a risk to their employees' and customers' safety. The assumption, of course, is that a prior record signals higher odds that the individual will commit more crimes in the future. A key question is: If a person who has been arrested stays *arrest-free* for some period of

the meeting and during the public comment period, the EEOC voted 4-1 to issue updated enforcement guidance. The revised guidance, issued April 25, 2012, calls for employers to assess applicants on an individual basis rather than excluding everyone with a criminal record through a blanket policy. It provides new detail and direction for employers in how to consider three key factors — the nature of the job; the nature and seriousness of the offense; and the length of time since it occurred — in writing a hiring policy and in making a specific hiring decision. The updated guidance also emphasizes that employers should not reject a candidate because of an arrest without a conviction, as arrests are not proof of criminal conduct. "The ability of African-Americans and Hispanics to gain employment after prison is one of the paramount civil justice issues of our time," said Commissioner Stuart J. Ishimaru in his statement at the April 25 meeting.

Additionally, in January 2012, the EEOC announced an important settlement agreement with Pepsi regarding its use of arrest and conviction records in employment.[2] The company's policy excluded applicants arrested for any crime — even if they had never been convicted of any offense — from permanent employment. The EEOC found that the criminal background check policy discriminated against African Americans in violation of Title VII of the Civil Rights Act of 1964. This was the first public conciliation concerning the use of arrest and conviction records and is already raising awareness among employers. During fiscal year 2010 and fiscal year 2011, the Commission received more than 1,200 charges alleging job discrimination involving criminal background checks.

DOL is also playing a critical role in this area. In addition to substantial investments in re-entry programs and research, DOL is making important commitments to educate its broad network of employment and training entities on these issues. In June 2010, Secretary Hilda L. Solis hosted a roundtable on workforce development and employment strategies for people with criminal records, and she has gone on record with strong statements on the topic. As she stated at the June roundtable, "When someone serves time in our penal system, they shouldn't face a lifetime sentence of unemployment when they are released. Those who want to make amends must be given the opportunity to make an honest living."[3]

Notes

1. Reentry MythBusters and additional information about the Reentry Council are available at http://www.nationalreentryresourcecenter.org/reentry-council.
2. See Equal Employment Opportunity Commission, "Pepsi to Pay $3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans," press release, January 11, 2012, http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm; and Hananel, Sam, "Pepsi Beverages Pays $3M in Racial Bias Case," *USA Today* (January 11, 2012), http://www.usatoday.com/money/industries/food/story/2012-01-11/pepsi-racial-bias-case/52498132/1.
3. Remarks of Hilda L. Solis, Secretary of Labor, "Workforce Development and Employment Strategies for the Formerly-Incarcerated," June 21, 2011, https://www.dol.gov/_sec/media/speeches/20110621_EX.htm.

activity go down? A recent study sheds light on just this issue.

Alfred Blumstein and Kiminori Nakamura conducted the NIJ-funded "Redemption Study." They were looking for a way to empirically determine when it is no longer necessary for an employer to be concerned about a criminal record in a prospective employee's past.[30] The researchers examined the criminal records of everyone who was arrested for the first time in 1980 in the state of New York. They then tracked those criminal records forward to find who was arrested again, who wasn't and how long people "stayed clean." In general, once a person had stayed clean for a certain period of time, his chances of being arrested for a new crime were substantially reduced. This is what the researchers refer to as the "point of redemption" — when a prior arrest no longer distinguishes that person from a similar person in the general population in terms of the risk of future criminal arrests.

For individuals who commit their first crime at a very young age or who are first arrested for a more serious crime, it takes longer — about eight years — to reach the point of redemption; but for those

who are older when first arrested or who commit less serious crimes, the point of redemption can come in as little as three or four years. After staying clean for this period of time, these individuals become indistinguishable from the general population in terms of their odds of another arrest.[31]

This research has important practical implications. Blumstein and Nakamura suggest that "forever rules be replaced by rules that provide for the expiration of a criminal record." They continue, in an op-ed published by *The New York Times,* that "it is unreasonable for someone to be hounded by a single arrest or conviction that happened more than 20 years earlier — and for many kinds of crimes, the records should be sealed even sooner."[32]

Some states are taking steps in exactly this direction.[33] Thirteen states enacted laws in their 2010-2011 legislative sessions to expunge and seal low-level offenses after a discrete number of years. Three states passed laws to limit the liability of employers that hire people with criminal records.[34]

This is not to say that criminal background checks serve no purpose. They give employers a tool — albeit an imperfect one — for helping assess risk to their employees, customers, assets and reputations when making hiring decisions. In fact, some of the same research cited earlier indicates that the use of criminal history records and the practice of performing background checks can, in some cases, *reduce* racial discrimination in hiring. The Holzer study, in particular, suggests that employers that perform background checks may end up hiring more African American workers (especially African American men) than those that do not perform them. This is because some employers may assume young African American men have criminal records, and a background check may actually dispel that assumption and increase their chances of being hired.

> If a person who has been arrested stays *arrest-free* for some period of time, do the odds of further criminal activity go down?

It is also important to note that criminal records are often incomplete and inaccurate. A DOJ report states that "no single source exists that provides complete and up-to-date information about a person's criminal history."[35] Even the best-maintained record systems are incomplete, often lacking final disposition information in 50 percent or more of the records.[36] If criminal records were a perfect reflection of a person's criminal history, the need for this discussion would be less critical.

Focusing on Prisoner Re-Entry

As noted earlier, incarceration rates are high, and nearly everyone in prison will eventually be released. When re-entry fails, the costs — both societal and economic — are high. More than two-thirds of state prisoners are rearrested within three years of their release, and half are reincarcerated.[37] High rates of recidivism mean more crime, more victims and more pressure on federal, state and municipal budgets. In the past 20 years, state spending on corrections has grown at a faster rate than nearly any other state budget item. The United States now spends more than $74 billion annually on federal, state and local corrections.[38]

The good news is that the response being mounted to meet these challenges is robust. Because re-entry intersects with issues such as health, housing, education, employment, family, faith and community well-being, many federal agencies are focusing on the re-entry population with initiatives that aim to improve outcomes in each of these areas (see sidebar, "The Attorney General's Reentry Council"). Congress has supported re-entry efforts as well. The Second Chance Act was passed by Congress with strong bipartisan support and then signed into law by President Bush in 2008. Senators Patrick Leahy (D-VT) and Rob Portman (R-OH) introduced S. 1231, the Second Chance Reauthorization Act of 2011. Re-entry efforts are under way all over the country, and strong bipartisan support is found in state houses and city halls, on county commissions, and in community forums.

Moving Forward

These issues are large-scale and impact an increasingly sizable share of our population. In some distressed communities, arrest and incarceration are commonplace occurrences and part of daily life. Getting a job is arguably the most important step toward successful re-entry for people who have broken the law and paid their debt to society. Yet too many people are barred from job opportunities and thus denied a critical chance to succeed.

Guidance to Employers and Job Seekers on the Use of Criminal Records in the Hiring Process

A 2010 survey by the Society for Human Resource Management reported that 92 percent of employers conduct background checks on job applicants. According to the Equal Employment Opportunity Commission (EEOC), if an employer is aware of a conviction or incarceration, that information should bar someone from employment only when the conviction is closely related to the job, after considering: (1) the nature of the job, (2) the nature and seriousness of the offense, and (3) the length of time since it occurred. Because an arrest alone does not necessarily mean that someone has committed a crime, an employer should allow the person to explain the circumstances of the arrest and again assess whether the circumstances of the arrest are closely related to the job. In the vast majority of cases, employers may not automatically bar everyone with an arrest or conviction record from employment because it could have a disparate impact on communities of color, violating Title VII of the Civil Rights Act of 1964. The EEOC's guidance in this area was revised in April 2012. It now provides greater detail and direction to employers on the appropriate use of arrest and conviction records in hiring decisions.

It is important that job applicants know their rights. The Fair Credit Reporting Act (FCRA) requires employers to receive an applicant's permission, usually in writing, before asking a background screening company for a criminal history report. If the applicant does not give permission, the application for employment may not get reviewed. If a person does give permission but does not get hired because of information in the report, the potential employer has several legal obligations. Specifically, they must tell the individual:

- The name, address and telephone number of the company that supplied the criminal history report
- That the company that supplied the criminal history information did not make the decision to take the adverse action and cannot give specific reasons for it
- About his or her right to dispute the accuracy or completeness of any information in the report, and his or her right to an additional free report from the company that supplied the criminal history report, if requested within 60 days of the adverse action

For more information:

- Reentry MythBusters on the EEOC guidance: http://www.nationalreentryresourcecenter.org/documents/0000/1082/Reentry_Council_Mythbuster_Employment.pdf
- FCRA and criminal background checks: http://www.nationalreentryresourcecenter.org/documents/0000/1176/Reentry_Council_Mythbuster_FCRA_Employment.pdf
- Revised EEOC guidance, issued April 25, 2012: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

The argument here is not about giving preference to this population when it comes to jobs. And employers certainly have a right to consider a person's criminal history in making a hiring decision. The concern is that some employers cast an overly broad net banning this population altogether. What is important is that people have an opportunity to apply and be considered for jobs when they are qualified and when their criminal record is not relevant or occurred long enough in the past to no longer be a significant factor in predicting future behavior.

In following up with Jay, I learned that he now has two part-time jobs at local broadcasting companies. He holds himself accountable for his crime, but is also encouraged that he can make positive contributions and is eager to help others. It is critical that we, as a society, provide a path for individuals who have served their time and paid their debts to compete for legitimate work opportunities. It is, in fact, our only choice if we want people with past criminal involvement to be able to support themselves and their families, pay their taxes, and contribute to our communities.

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NCJ 238488

For more information:

- Learn more about Devah Pager's research on the impact of conviction status on the employment prospects of young men at http://www.nij.gov/topics/corrections/reentry/employment.htm.
- Read "'Redemption' in an Era of Widespread Criminal Background Checks," by Alfred Blumstein and Kiminori Nakamura, at http://www.nij.gov/journals/263/redemption.htm.

Watch Alfred Blumstein and Kiminori Nakamura discuss how their research findings could have implications for hiring decisions: http://nij.ncjrs.gov/multimedia/video-nijconf2009-blumstein-nakamura.htm.

Read the Reentry MythBusters: http://www.nationalreentryresourcecenter.org/documents/0000/1090/REENTRY_MYTHBUSTERS.pdf.

Learn more at the Reentry Council's website, http://www.nationalreentryresourcecenter.org/reentry-council.

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30. Blumstein, Alfred, and Kiminori Nakamura, "'Redemption' in an Era of Widespread Criminal Background Checks," *NIJ Journal* 263 (June 2009): 10-17, http://www.nij.gov/journals/263/redemption.htm. It is worth emphasizing that this research was based on first-time arrests, and the subjects were rarely incarcerated or were incarcerated for short periods of time. First-time arrestees rarely go to prison. Blumstein and Nakamura were recently awarded a new grant to examine "redemption" times for re-entering prisoners.
31. To test the general applicability of their results, Blumstein and Nakamura have conducted additional research in two other states and with two other sampling years. Their results are consistent, especially after the first five years after initial arrest. NIJ is currently funding Blumstein and Nakamura to test the robustness of the previous findings and to look at out-of-state arrests and racial differences.
32. Blumstein, Alfred, and Kiminori Nakamura, "Paying a Price, Long After the Crime," *New York Times* (January 9, 2012), http://www.nytimes.com/2012/01/10/opinion/paying-a-price-long-after-the-crime.html?_r=2&ref=opinion.
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35. U.S. Department of Justice, Office of the Attorney General, *The Attorney General's Report on Criminal History Background Checks,* Washington, D.C.: U.S. Department of Justice, Office of the Attorney General, June 2006, http://www.justice.gov/olp/ag_bgchecks_report.pdf. The report states that approximately 50 percent of the records in the FBI's criminal history record repository are missing final disposition information. More recent arrest records, however, have a higher rate of completeness.
36. Also note that even after a criminal record has been expunged, the record can still appear in private database searches. See SEARCH Group, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information,* SEARCH Group: Sacramento, Calif., 2005, http://www.search.org/files/pdf/RNTFCSCJRI.pdf.
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