



**Meeting of July 26, 2011 – Employment Discrimination Faced by  
Individuals with Arrest and Conviction Records**

**Written Testimony of Cornell William Brooks, Esq.  
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**Introduction**

Thank you for the opportunity to present this testimony to the Equal Employment Opportunity Commission (“EEOC”) on issues relating to individuals with criminal records. I am Cornell William Brooks, Executive Director of the New Jersey Institute for Social Justice (the “Institute”), a social justice “think and do tank.” In its twelve year history, the Institute has produced research, presented policy analysis, and collaborated with government on reform projects in areas of criminal and juvenile justice to ensure public safety and fiscal responsibility. We have also run model programs aimed at expanding employment opportunities for vulnerable populations, including individuals with criminal records.

My testimony today will cover four areas: (1) the broad economic harm caused by arbitrary employment barriers to individuals with criminal records; (2) maintaining the presumption of disparate impact; (3) incorporating growing research on recidivism into EEOC guidance; and (4) the need for education on fair employment best practices.

Fundamentally, the same moral case made for Title VII in the 1960s underlies the urgent issue of employment opportunities for people with criminal records today. Title VII established the EEOC to provide Americans the fair opportunity to work and support their families. This is not only an issue of legal necessity, but also a challenge to the heart of the American ideals of community, responsibility, and opportunity. Indeed, my experience as a civil rights attorney and ordained minister is that the faith-based community believes strongly in these principles and is vigorously opposed to law breaking, but our voice also brings with it a deeply-rooted belief in redemption. Those in the churches, temples, mosques, and other houses of worship understand that we should not be judged and punished in perpetuity based solely on our worst day.

**I. Employment Barriers to Individuals with Criminal Records Limit Economic Growth and Opportunity in Local Labor Markets and the Nation as a Whole**

Individuals with criminal records face severe disadvantages in today’s tight labor market. This impacts the national unemployment rate, community economic stability, and racial inequality. The problem of finding and keeping a job is even more acute for those with a criminal history. Employment provides necessary financial support for individuals, their families, and the surrounding community, and legitimate employment has been shown to reduce recidivism. Faced with these issues, it is imperative that individuals with criminal histories who seek legitimate employment receive fair treatment.

## *Macro Statistics on Employment and Earnings*

- “[E]x-offenders 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 . . . [T]hese employment losses cost the country \$57 to \$65 billion per year.”<sup>1</sup>
- “The impact [of criminal records on employment] was biggest for African-American men, lowering employment rates between 2.3 and 5.3 percentage points.”<sup>2</sup>
- Even prior to the Great Recession, “[o]nce prison inmates are added to the jobless statistics, total joblessness among black men has remained around 40% through recessions and economic recoveries.”<sup>3</sup>
- “[R]eleased prisoners are concentrated in a few large states and, within these states, are increasingly concentrated in the core counties that contain the central cities of metropolitan areas.”<sup>4</sup>
- “[Data] show that a third or more of those incarcerated experience no earnings or income growth over a decade.”<sup>5</sup>
- “By 1990, the risk of parental imprisonment was greater than 25% for black children; for white children, the risk was 4%.”<sup>6</sup>
- “[E]ach male prisoner can expect to see his earning reduced by approximately \$100,000 throughout his prime-earning years, following his period of incarceration.”<sup>7</sup>

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<sup>1</sup> JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 14 (2010), available at <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>.

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

<sup>3</sup> Bruce Western & Katherine Beckett, *How Unregulated Is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOC. 1030, 1044 (1999).

<sup>4</sup> JAMES P. LYNCH & WILLIAM J. SABOL, URBAN INST. JUSTICE POLICY CTR., PRISONER REENTRY IN PERSPECTIVE 3 (2001), available at [http://www.urban.org/uploadedpdf/410213\\_reentry.PDF](http://www.urban.org/uploadedpdf/410213_reentry.PDF).

<sup>5</sup> BRUCE WESTERN & BECKY PETTIT, TECHNICAL REPORT ON REVISED POPULATION ESTIMATES AND NLSY79 ANALYSIS TABLES FOR THE PEW PUBLIC SAFETY AND MOBILITY PROJECT 60 (July 2, 2009) (unpublished report on file with author).

<sup>6</sup> Christopher Wildeman, *Parental Imprisonment, the Prison Boom, and the Concentration of Childhood Disadvantage*, 46 DEMOGRAPHY 165, 266 (2009).

<sup>7</sup> MEREDITH KLEYKAMP, JAKE ROSENFELD & ROSEANNE SCOTTI, WASTING MONEY, WASTING LIVES: CALCULATING THE HIDDEN COSTS OF INCARCERATION IN NEW JERSEY 9 (2008) (citing BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA tbl.5.3 (2006)).

## *Lessons at the State Level*

The Institute has seen these macroeconomic effects at an individual level:

- We represented a 60-year-old African-American man who has been a regional manager of contracts in New Jersey for a national company for several years. He is a father, grandfather, and pillar of his community. Under New Jersey law, he was barred from managing contracts with schools because of a 40-year-old criminal record for possessing five pills without a prescription. The only way we could secure his position was by obtaining a pardon. This is not a realistic solution for the numerous other people who are also barred from working.
- Another example involves an African-American Newark native whose story is emblematic of the barriers that create unnecessary obstacles to employment of people with a criminal record. She completed the Institute's New Careers transitional jobs program, equipping herself with the skills and confidence to obtain a permanent position in the food services department at a large university. However, because her employer holds a liquor license, New Jersey law required her to follow a costly seven-step administrative waiver process to work even though she does not serve alcohol. Without her dedication and the expertise of the New Careers staff, she might still be unemployed. These restrictions harm employees and employers alike.
- Another African-American client of our New Careers program returned home from prison with no work history. Without references or experience, and with a criminal history, his employment prospects appeared dim. Through long-standing connections to the local business community, we found him a transitional position at a copy center for four weeks. His extraordinary commitment to the job earned him the necessary reference and experience that resulted in a permanent position in the mail room at a large corporation, where he continues to thrive today. This experience highlights the need for transitional positions and partnerships between community-based organizations and local businesses that open doors to people with criminal records.
- Three years ago, our client, a young, single, African-American mother, pled guilty to a misdemeanor offense. Soon thereafter she secured a job as a secretary with a local faith-based nonprofit. Two years later the nonprofit won a contract with the state. As a condition of the contract, the state prohibited the nonprofit from employing anyone with a criminal record. Although the nonprofit was pleased with our client's performance, it was required to fire her. As this story highlights, overly-harsh criminal record policies can undermine the efforts of community groups to provide opportunities for individuals with criminal records.
- Another client, an African-American man, had been convicted nine years ago of a non-violent drug offense. With the help of the Newark One Stop Center, he had subsequently trained for and obtained a commercial truck drivers license, as well as several certifications. Despite his credentials, our client was repeatedly turned away by employers. Even at a job fair organized by the One Stop Center for careers in the

trucking industry, major employers refused even to give him application materials. Overly restrictive hiring practices such as these undermine the money and resources that government provides for reentry services and job development.

### *Federal Implications of State Lessons*

The Institute and its partners have worked diligently at the state level to remove these types of statutory barriers. In 2009, the Institute spearheaded the Second Chance Campaign. We successfully advocated for a series of landmark reforms, said to be “a model for the rest of the nation,” to facilitate the transition of formerly incarcerated individuals from prison to home.<sup>8</sup> Several provisions in the new laws will improve employment opportunities, including: (1) lifting the felony drug ban on welfare and food stamps; (2) requiring the Department of Corrections to provide identification documents, essential for employment, upon release; and (3) establishing, for the first time, mandatory in-prison education as well as relevant vocational and digital literacy training.<sup>9</sup>

We found our partnerships essential to the success of the Second Chance Campaign in New Jersey. A diverse group of organizations and individuals supported the legislation, including: (1) criminal justice organizations; (2) former and current governors of New Jersey; (3) community corrections; (4) Republican and Democratic legislators concerned about fiscal responsibility and public safety in equal measure; (5) fiscal conservatives and social progressives; and (6) faith-based groups. We found the faith-based community particularly influential by providing a moral voice in concert with the overwhelming economic argument for reform.

Our Second Chance Campaign mirrored the diversity of support that drove the passage of the 2007 Second Chance Act at the national level. The supporters of the Second Chance Act included a wide range of legislators and organizations: Senators Sam Brownback (R-KS), Patrick Leahy (D-VT) and Arlen Specter (R-PA); Representatives Danny Davis (D-IL), Joe Pitts (R-PA), John Conyers (D-MI) and Mike Pence (R-IN); Goodwill Industries; departments of correction; and academics.<sup>10</sup> In calling for this legislation, President George W. Bush stated in his 2004 State of the Union address that “America is the land of second chances, and when the gates of prison open, the path ahead should lead to a better life.”<sup>11</sup>

We continue to expand our partnerships in the business community and government to address the struggle of employing individuals with criminal records. This includes working with: (1) Alfred C. Koeppe, the Chair of the New Jersey Economic Development Authority and CEO of the Newark Alliance; (2) the Newark Alliance, a non-profit organization of key leaders from New Jersey’s major corporations, Newark’s higher education community, and civic and

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<sup>8</sup> Editorial, *Smart Answers to Recidivism*, N.Y. TIMES, Dec. 24, 2009, at A30, available at <http://www.nytimes.com/2009/12/25/opinion/25fri1.html>.

<sup>9</sup> See 2009 N.J. Laws ch. 329; 2009 N.J. Laws ch. 330; 2009 N.J. Laws ch. 427.

<sup>10</sup> See Recidivism Reduction and Second Chance Act of 2007, H.R. 1593, 110th Cong. (2007) (enacted), available at <http://www.gpo.gov/fdsys/pkg/BILLS-110hr1593enr/pdf/BILLS-110hr1593enr.pdf>; Second Chance Act of 2007: Hearing on H.R. 1593 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. (2007), available at <http://judiciary.house.gov/hearings/printers/110th/34176.PDF>.

<sup>11</sup> President George W. Bush, State of the Union Address (Jan. 20, 2004).

non-profit organizations that works to improve Newark's economy and public educational system; (3) William Marino, former President and Chief Executive Officer of Horizon Blue Cross Blue Shield of New Jersey; (4) Sanmar Distribution Center, a maker and distributor of athletic apparel; (5) Legacy Converting, a maker of disposable hand towels; (6) Richard Liebler, President of the Hillside Auto Mall; (7) a coalition of organizations serving veterans with criminal records, including the American Legion and the New Jersey Department of Military and Veterans Affairs; (8) the New Jersey State Parole Board; and (9) the New Jersey Department of Corrections.

We believe that the EEOC and other federal agencies and partners have a similarly vital role in encouraging economic growth by removing barriers to employment of individuals with a criminal record. This administration has already recognized the importance of providing second chances.<sup>12</sup> To fulfill these goals, we suggest the following strategies to the EEOC: (1) engage the Department of Commerce in this issue; (2) bring the United States Small Business Administration and the National Association of Attorneys General into the conversation; and (3) support research to quantify the harmful effects on economic growth caused by employment barriers for people with criminal records.

#### **A. Engage the Department of Commerce**

The U.S. Department of Commerce was needed but not present at the recent cabinet-level Reentry Council Meeting. The Department of Commerce, whose mission encompasses economic development and encouraging business innovation, should play an important part in reentry.<sup>13</sup> By partnering with the EEOC, the Department of Commerce could aid in addressing the collateral and economic consequences of criminal records as a civil rights challenge.

State departments of commerce have already undertaken reentry projects. The Illinois Department of Commerce and Economic Opportunity funds the Safer Foundation, which seeks to reduce recidivism by helping ex-offenders become productive members of the community.<sup>14</sup> The Oklahoma Department of Commerce partnered with the Oklahoma Department of Corrections and other government agencies to create a state reentry website, which provides information on reentry services for offenders and facilitates communication among partners.<sup>15</sup> In 2007, South Carolina passed legislation requiring the state's Department of Commerce and

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<sup>12</sup> Barack Obama, U.S. President, Remarks by the President and the Vice President at Town Hall Meeting in Tampa, Florida (Jan. 28, 2010), *available at*

<http://www.whitehouse.gov/the-press-office/remarks-president-and-vice-president-town-hall-meeting-tampa-florida>.

<sup>13</sup> The Commerce Department's website states that the Department "promotes job creation, economic growth, sustainable development and improved standards of living for all Americans." U.S. Dept. of Commerce, About the Commerce Department, <http://www.commerce.gov/about-department-commerce> (last visited July 20, 2011). It also states that the "department touches the daily lives of the American people in many ways, with a wide range of responsibilities in the areas of trade, economic development, technology, entrepreneurship and business development, environmental stewardship, and statistical research and analysis." *Id.* The Commerce Department's collaboration with EEOC promotes such mission of serving the American business community and resonates with President Obama's reentry initiative.

<sup>14</sup> See Illinois Department of Commerce, Statement of Grant Award to the Safer Foundation (undated), *available at* [http://www.doleta.gov/RExO/PDF/The\\_Safer\\_Foundation.pdf](http://www.doleta.gov/RExO/PDF/The_Safer_Foundation.pdf). (The Department has also engaged in projects such as helping the Foundation create an employer brochure on the benefits of hiring formerly incarcerated people.)

<sup>15</sup> See Oklahoma Reentry Division and Transition, <http://www.ok.gov/re-entry> (last visited July 20, 2011).

Department of Corrections to develop and maintain a marketing plan to attract private-sector service businesses to employ individuals who are incarcerated through the prison industries program.<sup>16</sup>

The U.S. Department of Commerce should play a similar role by: (1) promoting reentry projects at the federal level; (2) partnering with the EEOC and other federal agencies to educate businesses as to both the civil rights and economic challenges of criminal records; (3) convening a cross-section of corporations to discuss unnecessary and inefficient barriers to employment of people with a criminal record; and (4) educating the business community on government incentives for hiring individuals with criminal records, such as tax credits and bonding,<sup>17</sup> and on how removing employment restrictions on people with criminal records will encourage economic growth.

**B. Bring the U.S. Small Business Administration and the National Association of Attorneys General into the Conversation**

The U.S. Small Business Administration (“SBA”) and the National Association of Attorneys General (“NAAG”) can also be valuable partners in this conversation. Small businesses are the heart of urban labor markets, where the majority of people released from incarceration return. “Small businesses are the greatest source of net new employment in inner cities—comprising more than 99 percent of establishments and 80 percent of total employment.”<sup>18</sup> Inner city small businesses employ about 8 percent of the private workforce, just less than 9 million people.<sup>19</sup> Through its entrepreneurial development program, the SBA can help educate these small businesses on how removing employment restrictions on people with criminal records can serve their economic interests.

NAAG, through its network of state Attorneys General and chief legal officers, can develop, coordinate, and implement interstate reentry policy. The EEOC has a long history of working with NAAG on civil rights issues, including a memorandum of understanding on “enforcement of laws against employment discrimination and the eradication of unfair employment practices.”<sup>20</sup>

The EEOC is in a unique position to bring these partners to the table because of its expertise in civil rights and employment, which are the key issues to addressing unemployment of people with criminal records.

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<sup>16</sup> See S.C. CODE ANN. § 24-1-290 (2011).

<sup>17</sup> By hiring a formerly incarcerated individual, the business can qualify for the Federal Bonding Program and receive both federal and state tax credits. The bonding incentive/insurance protects employers in the case of loss of money or property due to theft, forgery, larceny, and/or embezzlement (up to \$5,000) sustained through the acts of their employees. See Federal Bonding Program, Program Background, <http://www.bonds4jobs.com/program-background.html> (last visited July 20, 2011).

<sup>18</sup> INITIATIVE FOR A COMPETITIVE INNER CITY, STATE OF THE INNER CITY ECONOMIES: SMALL BUSINESSES IN THE INNER CITY 1 (2005), available at <http://archive.sba.gov/advo/research/rs260tot.pdf>.

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

<sup>20</sup> Memorandum of Understanding Between the Nat’l Ass’n of Attorneys Gen. and the EEOC (Nov. 10, 1997), available at <http://archive.eeoc.gov/policy/docs/naagmem.html>.

### C. Support Research to Quantify How Collateral Sanctions Harm Urban Labor Markets and Limit Growth

To support cooperation between the government and the business community on a reentry agenda, further research is necessary to quantify the effects of the failure to integrate individuals with criminal histories into urban labor markets. Discrimination against people with criminal records is a civil rights and an economic development issue. Incarceration of a family member is a personal tragedy; expanded across the country and concentrated in urban areas it is an economic and social disaster. Given the scale of incarceration<sup>21</sup> and the wide-ranging collateral consequences, there are severe macro-economic and regional development effects. We need to quantify the harm from excluding a vital portion of the population from the labor market in order to make the case for reentry reform to the business community.

Studies have found that the legal barriers and stigma that follow individuals with criminal histories lead to a cycle of poverty, recidivism, and lack of economic opportunity both for the individuals and the communities as a whole. “The sheer volume of individuals moving into and out of prison can dramatically alter the conditions of supply and demand in local labor markets.”<sup>22</sup>

The Institute has begun examining these issues. Our research focuses on Newark, New Jersey, which has one of the highest concentrations of individuals with criminal records of any city in the United States. Based on current scholarship<sup>23</sup> and our programmatic experience, we hypothesize that a large group of adult males who are statutorily barred from certain areas of employment, and face discrimination in the job market generally, depress the average wage for the city, which in turn negatively impacts property values, consumer spending, tax revenues, and decisions by firms to locate in New Jersey neighborhoods.

We are currently in the planning and funding phase of this research project, which will involve partnering with researchers from Rutgers University, including Professor William Rodgers, former Chief Economist for the U.S. Department of Labor, and John Chaisson, Director at the Thought Leadership Institute and co-organizer of the recent forum on the Next Great Competitive Workforce at the Heldrich Center for Workforce Development at Rutgers University, and plan to fully engage the project in fall 2011.

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<sup>21</sup> “[M]ore than 1 in 100 adults is now locked up in America. With 1,596,127 in state or federal prison custody, and another 723,131 in local jails, the total adult inmate count at the beginning of 2008 stood at 2,319,258 . . . . [O]ne in every 15 black males aged 18 or older is in prison or jail . . . .” JENIFER WARREN, ADAM GELB, JAKE HOROWITZ, ET. AL, PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 5-7 (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>.

<sup>22</sup> Bruce Western, Jeffrey R. Kling & David F. Weiman, *The Labor Market Consequences of Incarceration* 7 (Princeton Univ., Working Paper No. 450, 2001), available at <http://www.irs.princeton.edu/pubs/pdfs/450.pdf> (“The sheer volume of individuals moving into and out of prison can dramatically alter the conditions of supply and demand in local labor markets. . . .”).

<sup>23</sup> See *id.*; Robert J. Sampson & Charles Loeffler, *Punishment’s Place: The Local Concentration of Mass Incarceration*, 139 DAEDALUS 26 (2010).

## II. Maintain the Presumption of Disparate Impact

Employers continue to urge the EEOC to revise its policy statement to eliminate the presumption of disparate impact based on national or regional conviction rate statistics. They advocate for the EEOC to require applicants with criminal histories to show a disparate impact in crime-specific or applicant pool data to carry their initial burden.<sup>24</sup> The EEOC should reject these arguments and reaffirm the presumption, because: (1) data support the continued validity of the presumption; (2) producing more particular statistical evidence would prove prohibitively burdensome; and (3) there is no consensus that local data do not reflect national trends.

First, all available data support the continued validity of the presumption of a disparate impact. Specifically, the data on charges and convictions show that conviction rates among people of color and conviction rates among whites are highly disparate.<sup>25</sup>

Second, producing more particular statistical evidence would prove prohibitively burdensome. Panelists at previous EEOC convenings have indicated that employers generally destroy employment applications and other information related to unsuccessful applicants. Since such information is in the exclusive control of the employer, the availability of applicant pool data to applicants or the EEOC is limited, and the presumption based on national data is necessary.

Third, there is no consensus that the crime-specific data or local applicant data are so poorly reflective of national and regional conviction trends, or that the presumption is therefore unwarranted. Where such data exist, the EEOC's policy statement permits the employer to rebut the presumption and show that no such disparate impact exists under the policy at issue.

To benefit all parties, with respect to both specific litigation and general policymaking, we recommend that the EEOC work closely with other state and federal agencies (like the Bureau of Justice Statistics ("BJS")) to ensure that data are both collected and readily available for such purposes. The data already collected and compiled by BJS should permit crime-specific analysis of offender race, and should break down the data by jurisdictions to permit local trends analysis.

Additionally, because the EEOC's policy statement permits employers to rebut the presumption of disparate impact by pointing to applicant pool data, the EEOC should encourage employers to retain applications and applicant data so that applicants can benefit equally from such data in bringing discrimination charges. Employers should not be permitted to retain applicant information when it would benefit them and to destroy the information otherwise.

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<sup>24</sup> See Donald R. Livingston, Statement at EEOC Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records (November 20, 2008), *available at* <http://www.eeoc.gov/eeoc/meetings/11-20-08/livingston.cfm>.

<sup>25</sup> See, e.g., Letter from Legal Defense Fund to the Equal Employment Opportunity Commission (Jan. 12, 2009); NATIONAL EMPLOYMENT LAW CENTER, 65 MILLIONS "NEED NOT APPLY" 5 & nn.14-16 (2011) (citing data from the U.S. Department of Justice and the U.S. Census Bureau).



### III. Incorporate Growing Research on Recidivism into EEOC Guidance

While the EEOC has addressed employers' use of criminal records in its Compliance Manual, it has not reexamined the issue in some time. Without updated guidance from the EEOC regarding background check practices and recidivism research, employers are uncertain of their obligations. Courts too have found the EEOC's guidance insufficient; the Third Circuit Court of Appeals has questioned whether the EEOC Compliance Manual reflects the type of thorough research that should be granted deference.<sup>26</sup>

New research on recidivism can be incorporated into the application and further development of the EEOC's guidance, aiding employers in crafting well-informed policies. The Commission's existing three-prong test for business necessity requires employers to consider:

1. The nature and gravity of the offense or offenses;
2. The time that has passed since the conviction and/or completion of the sentence; and
3. The nature of the job held or sought.<sup>27</sup>

Demonstrating business necessity through consideration of these factors requires more than broad assertions; the standard "requires some level of empirical proof that the challenged hiring criteria accurately predict job performance."<sup>28</sup> Further development of these factors through examples and explanations can aid employers in making accurate determinations when considering criminal records.<sup>29</sup>

#### A. Relationship Between Factors

Evaluating the factors in isolation will not meet the particular consideration required under Title VII. The EEOC can clarify the relevance of the factors in relation to one another. For instance, the nature of the offense should, most obviously, be considered in relation to the nature of the job. It may also be relevant to consider the time passed since the conviction; research shows that the likelihood of recidivism varies based on the nature of the crime.<sup>30</sup>

Further, examples can aid employers in making well-tailored determinations when assessing how the factors can be evaluated. Guidance can emphasize and clarify the need for a direct relationship between the specific duties required of an employee and the elements of the conviction(s) that would preclude employment. For instance, consideration of convictions for embezzlement may be relevant in hiring an accountant. However, an employer would not likely

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<sup>26</sup> *El v. SEPTA*, 479 F.3d 232, 244 (3d Cir. 2006).

<sup>27</sup> EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Feb. 4, 1987), available at <http://www.eeoc.gov/policy/docs/convict1.html>. This list of factors is derived from *Green v. Missouri Pacific Railroad Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977).

<sup>28</sup> *El v. SEPTA*, 479 F.3d at 240.

<sup>29</sup> The EEOC has already provided this type of helpful guidance with respect to arrest records. See Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (Sept. 7, 1990), available at [http://www.eeoc.gov/policy/docs/arrest\\_records.html](http://www.eeoc.gov/policy/docs/arrest_records.html).

<sup>30</sup> Alfred Blumstein & Kiminori Nakamura, "Redemption" in an Era of Widespread Criminal Background Checks, 263 NAT'L INST. JUST. J. 10 (2009).

be justified in arguing that a conviction for shoplifting is related to a position as a bus driver. At the same time, many categories of crimes (violent crimes, for instance) may appear relevant to almost any job position. Thus, in many cases, contextual factors, such as age, rehabilitation, community ties, etc., are likely to have the most importance in crafting a sound approach to an employer's treatment of criminal records. Such understanding can carry influence in the enforcement context; policies that delay the criminal background inquiry until after individual interviews will always include a threshold inquiry into contextual factors.

## **B. Time and Recidivism Risk**

The time passed since arrest and/or completion of a sentence is perhaps the most well-researched factor in predicting recidivism risk. The EEOC should highlight prevailing research in the field showing that approximately seven years after the most recent criminal conviction or sentence completion, a person's risk level is no longer affected by his or her previous conviction(s).<sup>31</sup> Based on such strong evidence, the EEOC could provide guidance that records ending more than seven years ago are in most instances irrelevant to employment determinations. At the same time, the EEOC should note that the seven-year period is an outer limit; research also shows that for many conviction types (in the context of age), the period for which a criminal record evidences risk is much shorter (for example, after 3.8 years, 18-year-olds with felony burglary convictions had the same rate of risk as same aged individuals with no convictions).<sup>32</sup>

## **C. Additional Factors**

Other factors could also be drawn from recent research to add further context to the employment decision, including:

4. The number, nature, and gravity, of previous convictions;<sup>33</sup> and
5. Individual indicators of rehabilitation, such as work history, family ties, community involvement, and successful participation in rehabilitation programs.<sup>34</sup>

Additionally, the EEOC could state in its guidance that in addition to disparate impact on racial minorities, other forms of discrimination are likely to follow from overbroad criminal records restrictions. For example, individuals with prior drug convictions may have suffered from addiction, triggering other protections under the Americans with Disabilities Act.

If a business necessity exists, employers should still look to adopt the least preclusive policy or practice to meet their needs. Further development of this aspect of the Title VII test would be beneficial in both ensuring compliance and engaging in affirmative strategies.

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<sup>31</sup> Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483 (2006).

<sup>32</sup> See Blumstein & Nakamura, *supra* note 30.

<sup>33</sup> See Peter B. Hoffman & James L. Beck, *Recidivism Among Released Federal Prisoners*, 12 CRIM. JUST. & BEHAV. 501 (1985).

<sup>34</sup> See John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 17-24 (2001).

#### **D. Pursuing Amicus Curiae Briefs in State Court Cases Involving Negligent Hiring**

The EEOC should address the relationship between its guidance regarding Title VII compliance and negligent hiring jurisprudence. Employers have voiced concerns that in attempting to comply with Title VII, they will open themselves up to the risk of negligent hiring lawsuits because they will not be able to effectively screen out employees who would pose a threat to customers and others.

Additional guidance as to how to appropriately consider criminal records in making employment decisions can aid employers in making careful decisions that both protect customers and ensure a fair playing field to job applicants. To further guarantee awareness and compliance with the Commission's guidance, the EEOC could monitor the reliance on factors such as type of conviction and time since offense in negligent hiring claims. Where an employer is accused of negligence in failing to deny employment on the basis of a criminal record, courts should rely on considerations closely similar to those used in evaluating business necessity.<sup>35</sup> If an employer has evaluated factors like the relationship between the job duties and the elements of conviction, or the time passed since conviction, these considerations should contribute to the employer's defense.

The EEOC can monitor the state appellate court dockets for important negligent hiring cases. Weighing in as amicus in select cases can be helpful in ensuring that negligent hiring doctrine does not undermine the EEOC's guidance under Title VII.

#### **IV. Sharing Fair Employment Best Practices**

Employers, and small employers in particular, face difficulties marshalling the time and resources necessary to understand and implement complex legal requirements. To meet the needs of this community, the EEOC should: (1) strengthen its relationships with national, local, and regional partners, including state departments of commerce, offices of small business, and civil rights offices, and employment advocates; (2) reduce the costs of fair employment training; and (3) increase access to fair employment training.

The EEOC should continue to leverage its local partnerships to improve its educational outreach to small businesses. The EEOC could magnify the impact of existing training efforts by establishing a network of training partners (e.g., local government agencies, nonprofits, and educational institutions—along with the regional small business liaisons) capable of providing similar education services. This might prompt a proliferation of convenient, quality training at a minimal cost to the Commission and the small business participants.

These networks of local partners would be particularly effective at the state level, especially with the support of each state department of commerce and small business association. Partners providing localized (but standardized) training will be able to easily share information on local employment practices, including state statutes and municipal ordinances, local

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<sup>35</sup> The EEOC should advocate for a tort foreseeability analysis based on concrete, research-based factors that accurately reflect risk, rather than on the more nebulous "totality of the circumstances."

enforcement mechanisms, and even local employment incentives. Periodic trainings across the state would also provide a forum for local partners to meet with and learn from local businesses, as well as reduced time and travel costs for small businesses.

The EEOC can also encourage training by minimizing associated costs and increasing availability; for example, by providing scholarships for new businesses, those with a small number of employees, first-time attendees, etc. to the Training Institute. The EEOC could also coordinate and publicize low- or no-cost local training provided by partners across each state. The EEOC website should be a clearinghouse for information about local training opportunities.

Finally, technology has made it easier than ever to reach local business owners. The EEOC could expand the Training Institute's selections to include additional topics, particularly the Title VII "basics" (which could just be recordings of sessions at the Training Institute's live seminars). The EEOC could also encourage state departments of commerce and small business associations to assist with these publicity efforts and provide access to EEOC online trainings through their own websites.

## **Conclusion**

Thank you again for inviting me to testify today. In this difficult recovery from the Great Recession, more than ever, providing fair employment opportunities is of the utmost importance to individuals and families, as well as communities. I am confident that the business community can be a partner in this effort. I urge the EEOC: (1) to engage the Department of Commerce; (2) bring the SBA and NAAG to the table; (3) support research to quantify how collateral sanctions harm urban labor markets; (4) maintain the presumption of disparate impact; (5) incorporate growing research on recidivism into EEOC guidance; and (6) increase its outreach and training efforts for small businesses.