



CENTER ON FATHERS, FAMILIES, AND PUBLIC POLICY

# Incarceration, Criminal Legal Records, and Employment Barriers

*Marguerite Roulet*



TECHNICAL ASSISTANCE SERIES

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*The Center on Fathers, Families and Public Policy is a national nonprofit policy organization that addresses the concerns of low-income families who receive federal and state assistance. Founded in 1995 as a policy arm of the Ford Foundation-supported Strengthening Fragile Families Initiative, the Center works with practitioners, researchers, and policy advocates throughout the country to promote the well-being of low-income men, their children, and their families. The Center provides technical assistance to direct service organizations, analysis of legislative and policy initiatives that affect low-income families, and advocacy for the creation of holistic laws that are supportive of all members of low-income families, whether or not they live together or are legally married.*

# **Incarceration, Criminal Legal Records, and Employment Barriers**

*By Marguerite Roulet*

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# Incarceration, Criminal Legal Records, and Employment Barriers

## Introduction

In May 2001 and in July 2002 the Center on Fathers, Families, and Public Policy held two conferences for community-based organizations to discuss fatherhood programs and fatherhood policy. The conferences were designed for programs that serve low-income noncustodial fathers and their families, and the purpose was to address day-to-day programmatic issues within the broader contexts of policy and community. Based in large part on these discussions, the Center has produced a series of publications aimed at assisting community-based organizations with various aspects of their programs, including a manual that explains the systems of paternity establishment and child support, a discussion of federal fatherhood and TANF policy initiatives and their implications for community-based programs, a discussion of fatherhood programs and their potential involvement in addressing domestic violence, and a guide to organizational and resource development for community-based organizations serving low-income families.

In addition to these issues, one of the most pressing concerns that was discussed at both meetings was the repercussions that incarceration can have on the lives of low-income noncustodial fathers, particularly in regard to their future ability to secure and maintain employment.

As recent studies have emphasized, many male prisoners and men who have been recently released from prison are noncustodial fathers. While in many respects they face the same barriers upon re-entry as other former prisoners, they also face additional challenges that derive from their position as noncustodial parents. Perhaps the most critical of these, for many fathers, is their involvement with the system of child support enforcement. This involvement is important for a number of reasons. To begin with, it is a regular financial obligation that cannot be avoided or easily modified and that is—particularly when it is owed as reimbursement to the state rather than to the custodial parent in direct support of the child—often aggressively pursued. In addition, alongside current support costs,

individuals may have accrued very high arrearages if they were not able to modify their order during the time they were incarcerated. These debts (including interest payments on the debts) cannot, by federal law, be eliminated except under limited circumstances and can reach very high figures over a period of time. Finally, the nonpayment of child support (even when it is the result of poverty and an inability to pay) has increasingly become a cause of incarceration/re-incarceration, and it is not uncommon for noncustodial parents to be immediately re-arrested upon release for failure to have paid while they were incarcerated (see forthcoming CFFPP publication by Rebecca May). Thus, quite apart from the emotional, interpersonal, and familial issues noncustodial parents may face as they leave prison, those who have formal child support obligations face additional pressures that make it all the more critical that they secure and maintain employment.

During both of the meetings, participants discussed ways in which community-based programs that serve low-income noncustodial parents and their families can attempt to address some of these issues. Participants discussed some of the barriers and challenges that exist both while individuals are incarcerated and after they are released and noted some of the strategies that have been implemented (both in prisons and in communities) to assist clients facing these challenges. The discussions were led by individuals who have developed programs to address some of these issues. These included, in particular, Earl Smith, who has developed a program that operates within the San Quentin prison in California and in communities to which former prisoners have returned, and Deborah Mukamal of the Legal Action Center in New York, a policy and law organization that works to end discrimination against people on the basis of addiction, AIDS, or criminal history.

# Barriers

During the meetings, participants identified numerous barriers that arise both during and after incarceration that make it difficult for noncustodial parents to secure employment upon release.

## Pre-release barriers

Among pre-release barriers, participants mentioned the following:

**A decrease in vocational and educational programming in prisons over the past decades:** Even as prison populations have expanded, the offering of programs has become more limited, and very few prisoners can earn credentials while they are incarcerated that will assist them in gaining employment upon release.

**A mismatch between training programs and labor market needs:** Even when training programs are offered in prisons, they are frequently not related to employment needs and requirements individuals will face upon release: As one participant noted, “[T]hat happens in two ways—both that people are getting trained for jobs that no longer exist in their communities . . . [and] that the equipment that they’re training people on—[for example], computer equipment—is outdated.” Again, such training does not assist them in securing employment upon release, and the process can lead to frustration as individuals develop expectations that cannot be met.

**A mismatch between training programs and employment licensing requirements:** In addition to not reflecting labor market trends, training programs in prisons may train individuals for jobs they will not be able to hold due to licensing barriers that preclude employment for someone with a criminal record. As one participant stated, “So, we’re training people to be barbers and they’re never gonna be able to get a barber’s license because they have a criminal record. . . . [T]here’s not that sort of sophisticated matching being done between . . . what are we training guys to do inside, based on what is gonna be available to them when they leave.”

**A lack of pre-release preparation to provide individuals with necessary credentials upon release:** Prisoners who are released frequently do not have the forms of identification and other credentials that are necessary to re-establish themselves in the community and secure employment (e.g., ID card, social security card, birth certificate, driver’s license, etc.).

**A discontinuation or lack of services, post-release:** Frequently services that were provided to individuals prior to or during their incarceration are discontinued upon release, and there is no follow-through on how they can access similar services (e.g., medical services) in the community. Relatedly, individuals may also be specifically precluded from receiving certain services because of their criminal record.

**An accumulation of child support debt:** While a small number of pilot programs have been created to ameliorate this issue, in most correctional facilities throughout the country it is extremely difficult for prisoners who have existing child support orders to modify these while they are incarcerated even if they have lost their only source of income and have no other means to pay their support obligation. Consequently, most prisoners accrue child support debt while they are in prison, and interest is charged on this debt. Depending on the period of incarceration, individuals can face insurmountable debts upon their release. Failure to meet these financial obligations along with the on-going support obligations can in many situations lead to re-arrest and incarceration for failure to pay child support (in itself a crime in many states that can add a felony charge to a person's criminal record). Facing such enormous debts and the constant risk of re-incarceration can easily overwhelm individuals in their search for employment as they recognize that even if they do have a stable income, they will never be able to overcome the debt or escape the threat of re-incarceration.

Clearly there are many other barriers that prisoners face that inhibit their ability to secure employment upon release. In addition to the issues noted above, participants also addressed other practical and policy-derived barriers that arise for individuals upon release, some of them as a direct result of having been incarcerated and having a criminal record.

## **Post-release barriers**

Participants noted that many former prisoners face a number of practical barriers to securing employment, including limited education, alcohol and/or other drug dependency, poor information on what services are available to them and what they are precluded from accessing, and, additionally, a very high rate of employer discrimination. As one participant noted, employer discrimination is quite high, with as many as two-thirds of employers asked in the context of one study stating that they would not knowingly hire someone who has a criminal record.

In addition to these issues, numerous policy and legal changes over the past years have made it increasingly difficult for individuals with criminal records to secure employment. Individuals who have certain convictions can face restrictions on, or be fully denied access to, numerous support services, including TANF, food stamps, housing, and housing assistance. To the extent that individuals are involved in state-sanctioned programs, these are frequently programs required as a condition of their release and may conflict with one another in terms of both time and financial obligation. These requirements can be overwhelming for individuals who are recently released from prison to manage, as they try to find employment that is sufficiently stable and well paying to meet these myriad obligations. In addition, individuals may be legally denied access to various kinds of occupational and other licenses and specific areas of employment. Finally, participants emphasized the increasing ease with which a person's criminal record can be accessed by employers and by the general public, both through credit reports and through state-based public listings (e.g., Internet registries of individuals with particular kinds of conviction records and/or broader listings of current and former prisoners).

## *Program Strategies and Ideas*

Participants suggested a variety of strategies that programs might adopt to more effectively serve clients who have criminal records. They discussed these in regard to three areas of intervention: developing programs within prisons, working with clients on employment matters following release, and reaching out to employers.

### **Programming in prisons**

**A**s participants talked about a particular prison-based program in California, they addressed issues of general relevance to any program aimed at serving noncustodial parents who are incarcerated.

One of the aspects that characterizes this program is its comprehensive nature: individuals are made aware of the program as soon as they enter the prison—through word of mouth and informational pamphlets provided by other prisoners who are involved in the program; when they join the program they provide familial information that program staff can use to advocate on their behalf

(e.g., on child support matters); they attend regularly held workshops during their period of incarceration; they attend a pre-release class that provides them with information they need to re-establish themselves in the community; and they participate in an extensive community-based program upon release that provides individual and group support, access to services, a community-service component, assistance with familial matters, and referrals to employers and employment assistance.

**Providing program information to new prisoners:** Participants underscored the significance of having a structure in place—even a relatively informal structure—to provide prisoners with information as they enter the correctional system. In the specific program discussed, prisoners who have been trained as peer counselors in the program inform new prisoners about the fatherhood program, discuss some ways in which the program can assist them, and alert them that they will be contacted and provided with additional information within a few weeks.

**Receiving information from program participants and advocating for them:** A critical piece of the program is its ability to assist prisoners with familial issues while they are incarcerated. As prisoners join the program, they complete a questionnaire on their family status, which forms the basis for the individual support the program provides. One primary area in which the program assists clients is in modifying their existing child support orders to reflect the income they have while they are incarcerated. This service is invaluable in reducing or eliminating one of the primary barriers to stability upon release, namely, overwhelmingly high child support arrearages. Currently, in most states the ability to provide such a service is dependent upon a program's ability to work with the relevant child support agencies; however, some states or localities have instituted laws or policies that support such efforts and make it easier for programs to assist clients. If (as in the program discussed), the information is entirely self-disclosed, it is possible that it will not be comprehensive (e.g., individuals may be unaware of a default order, etc.). However, to the extent that the program can assist with any child support orders a client has, this help will be critical to prisoners upon release and will greatly enhance their ability to secure and maintain stable and sufficiently supportive employment.

**Providing regular programming during incarceration and pre-release information:** In addition to providing assistance on legal familial matters, the program also provides regularly held peer workshops that address personal, familial, and community issues, as well as a one-day workshop that helps individuals prepare

for their release. Prisoners attend this class some time between six and two months prior to their release, and are provided assistance with such issues as verifying their credit and criminal records and securing necessary forms of identification and certification (e.g., re-establishing driver's licenses). Again, such assistance is invaluable in eliminating or reducing many of the barriers to employment clients face upon release.

**Providing post-release assistance:** Finally, participants noted the value of having post-release services that are linked to services in prison such as are provided through the program under discussion (e.g., employment and housing assistance, individual counseling, regular peer support meetings, substance abuse counseling, engaging clients in community service, and assisting clients with legal familial matters, such as providing supervision for visitation with children). While there are numerous community-based programs that work with former prisoners, participants noted that programs that provide services both within prisons and in communities can more effectively assist clients over time, particularly if they can anticipate and address some of the issues in prison before they become impossibly difficult barriers to overcome upon release.

Discussion also focused on employment matters and how community-based organizations that work with a variety of clients and do not necessarily have any connection to prison-based programs can work with ex-offenders. This discussion addressed two issues most directly: first, how program staff can assist clients as they are applying for positions, and second, how program staff can work with employers to address their concerns and practices related to hiring former prisoners.

## **Working with clients on employment matters**

In developing this discussion, participants were presented with a scenario in which they help clients who have criminal records complete job applications and must advise them on how to answer application questions regarding their criminal history:

You're a job developer working with clients who have criminal records, and a large employer just relocated to your community that needs to hire a substantial number of entry-level workers in the services field. In preparation of your client's interview, you have your client complete a sample job application that asks him, among other things, about his criminal history. When you go over the application with the client, you realize that he left the question about his criminal history

blank. In the state you live in, inquiring about arrests on employment applications is illegal, but inquiring about convictions is not prohibited. What should you do?

**Completing the application:** As participants considered the question, several suggested that one possible means to address this is to encourage clients to fill out the application fully, but to stress other activities he or she may have undertaken subsequently that might enhance employment prospects (e.g., vocational training):

[I]n our program, what we teach our clients is that we use the term “flip it.” Let’s talk about what other things you have done after you’ve been arrested. How have you improved your life? Change the conversation not to get into your criminality. So present an idea that you made a mistake but you want to do something different, and you’re making some progress forward.

Even as participants noted the value of focusing on activities the client has undertaken since the arrest or conviction, the question still remained as to what a client should put on the application itself. On the one hand, participants agreed, clients should be truthful about their criminal history; on the other hand, applications leave little room for clients to explain the context or to discuss their subsequent activities.

Several participants suggested that clients might answer the question on the form by stating that they will address this issue during an interview. However, it was noted that the client is legally better protected by appending such information to the application itself if this is possible. As one participant stated,

Problem is that a job application is a legal document, and the question said “please describe.” And let’s say that the person said “yes, will describe in interview,” . . . and then comes to the interview and has that conversation with the interviewer, talks about all the things that he did since he was convicted—I got a GED, I went through substance abuse treatment and all that—and the interviewer’s fine with it, and the guy gets a job. Well, then let’s say the employer does background checks on everyone and finds out, well, this guy had a criminal record, and they go back and he pulls the application and . . . it just says “will discuss in interview.” And then they approach the employee and they say “well, hey, you didn’t fill out the application; you didn’t complete it.” And he says, “well, I discussed it with my interviewer.” Well, the interviewer’s now gone or the interviewer doesn’t like this employee. He says, “well, I don’t remember talking about it.” That gives the employer a legal basis for firing this guy. So, it’s a real tricky situation, because I understand the practical issue of, let’s say this guy has been convicted of armed robbery. So he writes on the application “yes, armed robbery.” That may not get him an interview. . . . So I encourage clients to say yes, describe, very briefly, whatever it is . . . and I also encourage clients to maybe

even draw up, working with the job developer, a written description of what they've done since, or that explains the circumstances of the crime in a way that they are comfortable doing, and then asking that it be attached to their application.

**Specifics of questions:** Another issue that arose is the need for clients and program staff to focus on the specifics of the questions asked, with an understanding of the legal definition of the terms used. For example, if the question is limited to only certain acts (e.g., crimes rather than violations, convictions rather than arrests) or to a certain period of time (e.g., the past five years), applicants are not legally obliged to provide additional information. As one participant noted:

You have to be really careful about what the question says, right, because if it says "Have you ever been convicted in the last five years?" you don't have to talk about anything that happened six years ago, and clients shouldn't, and if the question says "Have you ever been convicted of a crime?" clients shouldn't be talking about arrests that didn't lead to convictions. That's just going to make the application look worse for them, right? So we want to make sure that clients feel comfortable talking about answering these questions directly and honestly and completely, but also in a way that makes them feel comfortable about their history.

In many instances the information is legally technical, and many clients may be unaware and thus vulnerable to termination for submitting an inaccurate application. For example, one participant noted that in his state multiple misdemeanors constitute a felony, and that, not knowing this, a client of his was fired for not indicating on his application that he had been convicted of a felony when he had several misdemeanor convictions. In another example, a client was denied employment for not being aware of criminal laws in his state:

[W]e helped a client . . . who was in the police academy and got disqualified. He had been like six or seven weeks into the police academy, and they called him in, and they wanted to disqualify him, and he was like, "What's going on? I'm like the perfect candidate . . ." And they go, "Well, we asked you have you ever been arrested and you said no." And he was like, "Well, I haven't." He had two voided arrests, where they actually ripped up the ticket . . . And he said, "But how would I have known that that was an arrest?" A reasonable person wouldn't have thought those were an arrest. They got ripped up right at the station. The onus is on the client to know that unfortunately. It's not fair, but . . ."

Thus it was repeatedly emphasized that it is important for program staff to be informed about their state laws regarding these issues and to fully understand the legal definitions of terms used by employers.

**Gaining access to records:** Participants also noted the value of having program

staff assist clients in gaining access to their records and ensuring that these are accurate. To begin with, doing so can assist clients in knowing their criminal record fully, so that they will not be denied, or terminated from, employment for mistakenly misrepresenting their criminal history. In addition, however, it was stressed that gaining access to a client's criminal record may be critical because the record itself may be inaccurate or incomplete (and a study conducted by the Legal Action Center in New York suggests that in some areas the error rate on criminal records is very high). This issue becomes all the more critical as employers increasingly have access to and review criminal records in the hiring process. As Deborah Mukamal of the Legal Action Center stated:

So, it's another really good reason why we want clients to get a copy of their rap sheet, to become familiar with it, make sure there are no mistakes on it. . . . [W]e have [a book] in New York called *How to Get and Clean Up Your New York State Rap Sheet*, and it walks a client through that process. How do you get it? How do you read it? How do you fix mistakes? How do you get something sealed or expunged? That kind of thing. And it even includes documents that they can use, to submit to court. [W]e're currently finishing these for [other states].

In addition to correcting records, it is possible in some states to have certain records sealed or expunged, thereby limiting who has access to them and possibly lifting the reporting requirement on employment applications. While the possibility to seek such protections varies by state and the specifics of the criminal record, program staff can assist clients by determining what is available to them.

Finally, participants noted that in addition to gaining access to their state records, it is useful if programs can help clients gain access to FBI records they may have to ensure that the FBI record reflects any corrections to their state record.

**Certificates of rehabilitation:** In addition to accessing criminal records, programs can assist clients by determining whether their state issues "certificates of rehabilitation" that can be submitted to employers. If available, such certificates may help eliminate legal barriers to licensing or to employment that resulted from the criminal record and may provide assurance to employers.

## Working with employers

Participants also discussed how programs might address some concerns of employers. Again, the focus was primarily on the process of securing employment. As participants noted, one of the primary problems is the fear employers have that

an ex-offender will commit a crime after they have hired them—making the employer vulnerable not only to the potential crime and potential bad publicity but also to possible liability. In the face of these concerns, many employers will avoid hiring ex-offenders, even if this practice violates state law. Consequently, participants focused on two approaches to this dilemma that programs might undertake: on the one hand, trying to safeguard the rights of potential employees, and on the other, reducing the anxiety and prejudice of potential employers.

Participants again discussed a scenario: that of a client who was denied employment, possibly because of his criminal record. State law in this instance permits denial of employment only if there is a direct relationship between the job applied for and the convictions of an applicant. Participants also considered the additional factors of the value of this employer to the program and local publicity about criminal acts committed by an ex-offender after being hired by another local employer:

You're a job developer working to place individuals with multiple barriers to employment. One of your clients has applied for a job as a customer service representative for a long-distance phone company. Your client is denied the job and comes to you frustrated that he was overlooked for the position. Though he has five drug-related convictions, he completed drug treatment after being released from prison and received his GED while he was incarcerated. The employer has indicated he doesn't have positions available, and you know that the benefit package offered by the employer is generous. You also know that your state protects ex-offenders from employment discrimination. The relevant law makes it illegal for an employer to deny an ex-offender a job unless there is a "direct relationship between the job the applicant is applying for and his or her convictions."

Recently, there was a big story in the newspaper about an employer who hired someone who turned out to have a long criminal record, and the person committed a crime on the job. You are conscious that other local employers are sensitive about this incident and have concerns about being exposed to liability if they hire ex-offenders. What should you do?

**Determining state laws and making appropriate referrals:** Participants discussed the initial need for programs to determine what laws (if any) in their state provide protections against employment discrimination for applicants with criminal records. If, for example, there is a law as in the scenario above, that requires there to be a relationship between the job applied for and the conviction, programs can educate employers about these laws and can argue on a case-by-case basis for the appropriateness of a given job for a particular client. As one participant stated,

[T]he fact that there was an article in the paper or that this happened somewhere

else, the law still remains the same. If there's no direct reason . . . a job-related crime or something like that, then they can't use that. So it's still illegal.

Another participant concurred:

Absolutely. It goes to the individual client. Does this individual client's criminal history make him an inappropriate candidate for this particular job, right? This client, with his history, and this job.

However, even in the absence of state laws that protect ex-offenders from specific forms of discrimination, participants noted that programs benefit from ensuring that the referrals they make are appropriate for each particular client and position. To that end, it was underscored that program staff should be informed both about the specific activities entailed in a given job and the specifics of a client's criminal record. Given employers' concerns about incurring liability, participants noted that programs that wish to develop solid relationships with employers and effectively serve their clients and assist them in finding long-term employment benefit from having access to both kinds of information.

**Highlighting value of programs to employers:** In addition to ensuring that job referrals are appropriate, participants emphasized that programs should highlight their on-going value to employers. Participants noted numerous ways in which programs assist employers, and stressed that it is important to educate employers about the benefits of working with programs and seeking employees through them. Among the benefits, they included:

- serving as an on-going human resource referral for an employer
- providing post-placement follow-up services for employees who are program clients
- enabling an employer to receive a tax credit when hiring program
- participants participating in the federal bonding program to provide insurance against theft to an employer for a period of time
- providing numerous on-going support services for employees who are program clients, thus enhancing their ability to perform well in their job.

**Redress in face of illegal hiring practices:** Finally, participants addressed how program staff might respond when they become aware that an employer is illegally denying employment to applicants with criminal records. The practical conundrum participants discussed in this instance was the need, on the one hand, to protect the rights of clients who have been illegally denied employment, balanced on the other hand by the need to maintain a relationship with an employer who may hire other or future clients of the program.

Participants suggested making the employer aware of the program's concerns in a non-confrontational manner—e.g., presenting it as an attempt to make them aware of their practices and to educate them about the law and protect them from future liability. It was also suggested that if they are uncomfortable with directly approaching the employer, program staff might rely on legal services organizations or advocates to contact the employer, thus avoiding direct confrontation and jeopardizing the relationship between the program and the employer.

Participants also noted that, while it may be difficult, if programs wish to pursue legal action against an employer on behalf of an employee, there are resources and remedies that may be applicable in specific cases—e.g., protections through the EEOC.

Ultimately it was acknowledged that clients with criminal records do face significant challenges in trying to secure and maintain employment. Consequently, each of the suggestions listed above was made with the recognition that in practice it can be very difficult to overcome employer prejudices against clients with criminal records or to prove instances of employer discrimination.

## *Additional Information and Resources*

Both scenarios discussed above, as well as many points of information, were provided by the National H.I.R.E. Network, a project of the Legal Action Center under the co-direction of Deborah Mukamal (J.D.) and John Jeffries (Ph.D.). The National H.I.R.E. Network is both an advocacy organization and a national clearinghouse for information on employment issues affecting individuals with criminal records and provides technical assistance to organizations working to increase the employment options of individuals with criminal records. The National H.I.R.E. Network can be accessed through its Internet address at [www.hirenetwork.org](http://www.hirenetwork.org).





ILLUSTRATIONS BY BOB GALE  
[PJBF DESIGN]



CENTER ON FATHERS,  
FAMILIES, AND PUBLIC POLICY

23 NORTH PINCKNEY STREET

[SUITE 210]

MADISON, WISCONSIN 53703

PHONE 608.257.3148 | FAX 608.257.4686

[www.cffpp.org](http://www.cffpp.org)

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