

CARR CENTER FOR HUMAN RIGHTS POLICY HARVARD KENNEDY SCHOOL

Mass Incarceration and the Future:

**An Urgent Need to Address
the Human Rights Implications
of Criminal Background
Checks and the Future of
Artificial Intelligence**

**Teresa Y. Hodge &
Laurin Leonard**

**Carr Center
Discussion Paper**

**Mass Incarceration and The Future:
An Urgent Need to Address the Human Rights Implications of
Criminal Background Checks and the Future of Artificial Intelligence**

Teresa Hodge and Laurin Leonard

July, 2020

Teresa Hodge brings the lived experience of being sentenced to 78-months in Federal Prison and returning home to become a national advocate for tech in reentry. Her subject matter expertise establishes a roadmap for informing the direction of research from a human-centered approach. Laurin Leonard, Teresa's daughter, and co-founder, is a systems-level thinker, published researcher and student of Competitive Intelligence/Information Systems. This unique mother-daughter team is aware of various federal policies that, while established, are often not enforced. These policies could hold the key to ensuring one-third of the population becomes aware of their rights surrounding their records and the application of that data to make critical decisions.

The views expressed in the Carr Center Discussion Paper Series are those of the author(s) and do not necessarily reflect those of the John F. Kennedy School of Government or of Harvard University. Faculty Research Working Papers have not undergone formal review and approval. Such papers are included in this series to elicit feedback and to encourage debate on important public policy challenges. Copyright belongs to the author(s). Papers may be downloaded for personal use only.

Table of Contents

Introduction	2
Frameworks and Beliefs	3
The Rise in Criminal Background Checks	4
The Snowball Effect	6
Background Screening in the Era of Artificial Intelligence	8
A Path Forward	9
Appendix	11

I. Introduction

Between 70 and 100 million Americans—one in three—currently live with a criminal record.¹ This number is expected to rise above 100 million by the year 2030. The criminal justice system in the U.S. has over-incarcerated its citizen base; we have 5% of the world's population but 25% of the world's prison population. America became known as the “incarceration nation” because our prison and jail population exploded from less than 200,000 in 1972 to 2.2 million today, which became a social phenomenon known as mass incarceration.² And along the way, there was a subsequent boom in querying databases for data on citizens with criminal records.

Once a person comes in contact with the U.S. criminal justice system, they begin to develop an arrest and/or conviction record. This record includes data aggregated from various databases mostly, if not exclusively, administered by affiliated government agencies. As the prison population grew, the number of background check companies rose as well. The industry has grown and continues to do so with very little motivation to wrestle with morality, data integrity standards, or the role of individual rights. Several factors contributed to our current reality, wherein nine in ten employers, four in five landlords, and three in five universities are using a criminal record report in their qualifying process.³ Many argue that this information is stored and disseminated publicly with the moral obligation to preserve public safety. The premise of this argument is that individuals and society at large must be protected from a social classification of citizens deemed indefinitely risky. This argument, however, is not challenged nearly enough. There is growing evidence to suggest the fallacy of presuming blanket, universal and inherent risk when qualifying an applicant with a criminal record.

That said, we find ourselves nationally in a vicious cycle. We are gaining momentum towards a dangerous collective fate via a snowball effect. The volume of people with records is rolling into the rise of decision-makers using background

screening tools in their qualifying process. This reality is bumping up against the fact that there are over 50,000 known collateral consequences for having a record.⁴ These collateral consequences, which are additional sanctions beyond the actual conviction, are direct or indirect discriminatory barriers, which impact a person's social and economic class standing. Collateral consequences do not just affect the person but also the country broadly. The U.S. economy loses \$78 to \$87 billion annually in gross domestic product (GDP) due to workforce/labor-related collateral consequences.⁵ Additionally, there would be 8.1 million fewer people in poverty⁶ if we finally asked and answered the question: where is the line between an individual's human rights and information that is relevant or enables the safety of the greater good?

Many criminal justice advocates continue to raise the importance of finding and drawing this line. In this paper, we specifically address the urgent need to look towards a future where background screening decisions and artificial intelligence collide. We define artificial intelligence (AI) as the development of machines making decisions that used to rely on human information. Actionable understanding is critically important to intervene in a future where the ability for 100 million Americans to become socially or economically mobile while living with a criminal record is automated. We have a core belief that to truly protect the human rights of all citizens, and not settle for partial protections, it is necessary to understand the structures that contribute to our current reality. This discussion paper is written for a broad audience. We desire to spark a dialogue to establish a network of collaborative, cross-sector thought-leaders committed to disrupting the future we are on track to meet. Our moonshot goal is to ensure that by the year 2030, Americans with criminal records have clear data rights and shared ownership so that the criminal background check no longer serves as a structural barrier to socioeconomic mobility. We view this as the first of several pieces of communication. With this in mind, this paper is in no way exhaustive. We connect a few dots between modern decision-making practices and a future where machines will decide the quality of life for a third of

¹ The Sentencing Project “Poverty and Opportunity Profile: Americans with Criminal Records” <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf>

² Equal Justice Initiative, <https://eji.org/mass-incarceration>.

³ Society for Human Resource Management, “Background Checking—The Use of Criminal Background Checks in Hiring Decisions”, 2012; David Thatcher, “The Rise of Criminal Background Screening in Rental Housing,” *Journal of the American Bar Foundation* 33 (1), 2008: 5-30, <http://onlinelibrary.wiley.com/doi/10.1111/j.1747-4469.2008.00092.x/abstract>.

⁴ National Inventory of Collateral Consequences Inventory, <https://niccc.csgjusticecenter.org/>.

⁵ Michael Mitchell and Michael Leachman, “Changing Priorities: State Criminal Justice Reforms and Investments in Education” Washington: Center on Budget and Policy Priorities, 2014, <https://www.cbpp.org/research/changing-priorities-state-criminal-justice-reforms-and-investments-in-education>.

⁶ Robert H. DeFina and Lance Hannon, “The Impact of Mass Incarceration on Poverty” Rochester: Social Science Research Network, 2009, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348049.

the population. We then close with recommendations to move this discussion forward, to pursue absolute protection to defend the inherent rights of all people, which includes people living with records.

II. Frameworks and Beliefs

In this section, we will briefly discuss recognized frameworks and our beliefs on how America arrived at our present-day crisis. As authors, we are practitioners, entrepreneurs, and advocates. This section is not designed to be robust but enables us to state early in our discussion the pillars that uphold our perspective.

In sections three and five, we briefly point to the nature of capitalism as a driver in the rise of background checks. Specifically, we agree that "an essential fact about capitalism is the endless process of replacing old with new," and the consequences to people, society, and politics that would be inevitable.⁷ In the long run, capitalism does cause social harm and from time to time it is necessary to judge the ways in which the engine of capitalism might erode certain fabrics of society.

Additionally, we subscribe to some of Max Weber's theories outlined in *The Theory of Social and Economic Organization*. Namely, the belief that laws are established to promote a labor market where workers are recruited on merit (among other hallmarks). Weber believed that the actions

Ex-con skips job interview, takes shirt
off his back to save car crash victim



bradlee

imagine rescuing someone from a car
crash, risking your own life & then being
called an "ex-con" his name is aaron
tucker

people take in a market economy are motivated by their desire to "make provisions for their own ideal or material interests to acquire (or maintain) a positive position in their social class (income), social status (prestige/honor) or political (vocational choice) class."⁸ We agree with this based on our experiences as criminal justice advocates. Together we have witnessed people living with records struggle to compete in an open labor market even though they have the drive and desire to be financially autonomous. Indeed, attempting to earn a living with a record requires creativity, strategy, and stamina on the part of the individual. When nine out of ten employers screen for criminal records as an indicator of merit for employment, it is obvious why 8.1 million more people are in poverty. Having a record locks a person into a social status that drastically limits their socioeconomic well-being even with humans in the decision-making loop.

When the experiences of individuals living with records are combined into an aggregate, we see the full picture of an entire classification of people. Weber defines a class as a "group of people who occupy the same status and experience the same positive or negative privileges."⁹ Experiencing negative privileges is typically related to being a "slave, an outcast, a debtor, or being poor."¹⁰ In this manner, groups that experience negative privileges often find themselves facing barriers to acquiring property and competing in the market-driven labor economy. The stigma and prejudice faced by this condition is then propped up in a variety of ways including language, policy, and norm enforcement. The requirements defined by Weber are fully experienced by people living with records as a class. For example, people living with records face tremendous stigma in language with terms like "con/ex-con, felon/ex-felon" and many other derogatory terms. When given the opportunity in public spaces, one of the authors, Laurin Leonard, often reminds audience members the significance of language. She can be known to say, "Anytime we use a term like 'ex-con' or 'ex-felon', we are continually locking a person into a time in their life and often a period we all want them to move forward from. It is as if I called myself, or allowed myself to be called, an ex-high school student. Yes, I was at one point a high school student, but if I was only ever identified as such, it would mean you would never get the impression that I went on to undergraduate and graduate school, which I did." It is critical that we quickly address conversational language norms so that we can finally advance the conversation to the digital implications. The internet is indexed in such a way that articles, social media posts, and hashtags require the use of stigmatizing language. It is for this reason that often even positive news headlines refer to people

⁷ Joseph A. Schumpeter and Thomas, K. McCraw, *Capitalism, Socialism and Democracy with a new introduction by Thomas K. McCraw* (New York: HarperCollins Publisher, 1942, 2008), xxiii.

⁸ Max Weber, A. M. Henderson, and Talcott Parsons, *The theory of social and economic organization* (New York: Oxford University Press, 1947), 319.

⁹ Weber, Henderson, and Parsons, 319.

¹⁰ Ibid.

using dehumanizing language. See the social media image on the previous page as an example. This is one example of why, throughout this paper, we go from the individual to the collective. Since we are reaching a broad audience, we want to ensure the reader understands both micro and macro implications.

III. The Rise in Criminal Background Checks

To fully understand how criminal background screening impacts people, we want to explain the background screening industry. A background screening business is one that provides data to other companies: landlords, corporations, other organizations, and in some cases, direct to individuals. The screening data can include personal and professional reference checks, credit checks (bill/debt payment history), housing verification, and paper criminal records. An industry analysis report shows the industry has "performed well [over the five years to 2019], rising at an annualized rate of 4.8% to \$3.2B, with growth of 3.5% expected in 2019 alone."¹¹ There are various reasons for the rise in background screening broadly and criminal background checks specifically. This paper does not intend to declare one reason more important than the other. We will present four of the scenarios that we most align with, which include fear of terrorism, shifts in the labor market, demands to digitize government records, and the nature of capitalism.

The rise of terrorism and fear

One of the best indicators of the rapid change in background checks is that in the year 2000, the National Association of Professional Background Screeners (NAPBS) did not exist, and there was no process to become an accredited screener. According to the Society for Human Resource Management (SHRM), in 2000, roughly only five out of ten employers were utilizing a criminal background screening process.¹² At that time, screening was considered an extra step that increased hiring costs and slowed down the overall process due to the amount of paperwork required to make a final decision. This all changed with the events of September 11, 2001. After the attacks on 9/11, the fear of terrorism led decision-makers to become more aware of who they were hiring. Nationwide, we went from 50% of employers conducting background checks

to 76% and 73% doing criminal background checks correctly. This demand on the part of employers alone created the need for an association (NAPBS formed in 2003), which reported that in 2018 screening was up to 95% from 50% just 19 years ago.¹³ The impact of this is felt on the individual and by the entire class of people living with records. Nearly all employers in the U.S. are screening applicants based on their criminal record, and one-third of the country has a criminal record.

Another report shows:¹⁴

- In 2018, 86% of survey respondents stated they were screening all full-time employees (which was a slight increase from 83% in 2017), and 68% were screening part-time employees (a slight increase from 67% in 2017).
- The rates of screening were becoming universal as a global economy opened up a more competitive labor market.
- The top reason cited by employers for screening in 2018 was public safety—86% of employers stated that they conducted background checks to protect employees, customers, and others.
- Other reasons for background screening included improving the quality of hires (52%); law/regulation requirements (39%); protecting company reputation (38%); and to prevent and/or reduce theft, embezzlement, and other criminal activity (36%).

Shifts in the labor market

Over the last decade, the U.S. labor market has seen drastic changes. The labor market, which was impacted by a recession, led to conditions that, for a long while, favored employers. With jobs being scarce and innovation promoted throughout society, there was a boom in platforms that enabled individuals to enter into a form of labor whereby they work independently and temporarily. This form of work is known as "gigging". When we examine the current direction of the gig

¹¹ Evan Hoffman, "Background Check Services in the US," IBIS World Industry Report OD6058, April 2019.

¹² SHRM, <https://www.shrm.org/about-shrm>.

¹³ Thomas Ahearn, "NAPBS Survey Reveals 95 Percent of Employers Conducting Employment Background Screening in 2018," ESR News, July 2, 2018, <https://www.esrcheck.com/wordpress/2018/07/02/napbs-survey-reveals-95-percent-employers-conducting-employment-background-screening-2018/>.

¹⁴ HR.com, "How Human Resource Professionals View the Use and Effectiveness of Background Screening Methods," 2018, <https://pubs.thebpsa.org/pub.cfm?id=9E5ED85F-C257-C289-9E8E-A7C7A8C58D00>.

economy, we see that it will continue to grow so that over 50% of the labor market will be working as freelancers by 2027.¹⁵ The normalization of non-permanent work has driven major corporations (and even smaller firms) to look for more efficient ways to vet a higher volume of candidates for contingent or on-demand work. This means that the already high demand for accessible, cheap, and business-friendly background checks will surge as millions more seek to earn an income through the gig economy and employers contend with rapid turnover.

Demands to digitize government records

A third contributing factor to the rise in background checks is connected to the public sector. As government, policing, and court institutions move to a more modern digital format of record keeping, the dialogue around open government continues to heat up. The advent of digitized court records means that criminal justice data, which is housed in a government database, can now be more easily searched through a simple online engine or via a paid subscription service. In some instances, this may not be a bad thing to society at large, but it is mostly detrimental to the individual with the record. People living with criminal records have no transparent way of knowing what will appear in an online search or how and where to dispute privacy-infringing information spreading online, and zero control over what is seen and shared widely. And this sadly isn't the end of the snowball.

The nature of capitalism

When mass incarceration collided with terrorism, labor market changes, and digital record keeping, it created friction. Capitalism establishes a pathway to improve one's mode of living by joining the entrepreneur class and developing a business. In America, this is a core value and pillar to the American Dream—an ideal that anyone can achieve upward class mobility through equality of opportunity and hard work (more directly, through education, business ownership and acquiring property).¹⁶ So, while the country was experiencing a rise in background checks it was only natural that astute entrepreneurs seized the moment. Forming a background check company is surprisingly—or not surprisingly—a low-barrier business. Given what we know about personal motivation to better one's socioeconomic standing and the

harsh realities of unchecked capitalism, this dangerous cycle was unavoidable. While ascending to the entrepreneur class benefits the individual who starts a background check business, the surge in this type of business severely harms the individual, the class of people living with records, and society at large.

The harm in the surge of background check businesses come from limited dialogue around data integrity standards. The need for data integrity standards would enable a healthy dialogue around what some consider to be low-level data. Low-level data includes data on a person that is as irrelevant as a speeding ticket as well as criminal justice records that do not speak to a person's riskiness or character. This is the easiest data to find and distribute to fulfill a request for a criminal record report. Still, with no filter, we see use cases where any person in society with \$10 can access another person's criminal justice data, sometimes even without them knowing. And while we need to address access to low-level data, we must also acknowledge that what should be the gold-standard of criminal justice data is also scarily bad. A 2013 report by the National Employment Law Project, "Wanted: Accurate Federal Bureau of Investigation (FBI) Background Checks for Employment", showed that "nearly half of all FBI (background checks) failed to include information on the outcome of a case after an arrest—for example, whether a charge was dismissed or otherwise disposed of without a conviction, or if a record was expunged. These routine omissions seriously prejudice the employment prospects of an estimated 600,000 workers every year."¹⁷ Both of these instances demonstrate that while we need to protect the rights of individuals, we also must set a standard of quality for the source of data to be shared.

Between 70 and 100 million Americans—one in three—currently live with a criminal record.

¹⁵ Elaine Pofeldt, "Are We Ready for a Workforce that is 50% Freelance," *Forbes*, October 2017, <https://www.forbes.com/sites/elainepofeldt/2017/10/17/are-we-ready-for-a-workforce-that-is-50-freelance/#f56189b3f82b>.

¹⁶ "The American dream," Merriam-Webster, <https://www.merriam-webster.com/dictionary/the%20American%20dream>.

¹⁷ National Employment Law Project, "Policy Brief: Faulty FBI Background Checks for Employment: Correcting FBI Records is Key to Criminal Justice Reform," December 2015, <https://www.nelp.org/publication/faulty-fbi-background-checks-for-employment/>.

Having an arrest record locks
one-third of the U.S. population
into a subclass based on the
harmful privileges associated with
a criminal record.

We realize that we have presented quite a few social and economic conditions at this point. Allow us to offer our logic more linearly to show how all of these things feed off of each other and led us to our current reckoning with mass incarceration.

- 70 million people have data on them about their involvement with the criminal justice system, and this number is expected to reach 100 million by 2030.
- The data compiled on each individual is stored in a government-associated database, as public agencies are the generator and administrator of this data.
- Over the last couple of decades, hiring practices have shifted to using a criminal background check in the standard qualifying process. Today 95% of employers use this report in decision-making.
- The public moral narrative surrounding the common good is that criminal justice system data should be shared for the benefit of society at large, and therefore it is rational that background check data is used in this manner.
- The reality of how this data is used enforces the social class and social status that creates poverty loops for people living with records, and limits the growth of the U.S. economy because of a strained workforce.
- This data is also used to prohibit individuals from building a safe and secure lifestyle beyond work.
- Market drivers are motivating more decision-makers to qualify/disqualify workers based on their criminal justice system data.
- Modernization of government databases to online records makes criminal justice system data more available even though parameters of access to low-level data and the integrity of source data do not exist widely.
- Entrepreneurs seeking to improve their social class and status via a low-barrier business are drawn to establishing criminal background screening companies to meet the market demand. This positively benefits the entrepreneurs, but negatively impacts individuals living with records and society at large.
- Poor quality data (a fundamentally flawed product) is used to reinforce harmful privileges for a bloated class of people.
- Poor quality data is moving through society and the economy at a faster rate than ever before, with no human rights protections for people living with a record.

IV. The Snowball Effect of it All

Leaning into Weber's theories on class structures, we see that policymakers have written laws that cause people with a record to gain a permanent social status designation as "formerly incarcerated, a returning citizen" or the term *du jour*. As more people became entangled in the criminal justice system, we also saw the rise of collateral consequences. There are over 50,000 known restrictions/sanctions for people living with a record. They are catalogued in the National Inventory of Collateral Consequences of Conviction, which was established after the federal Court Security Improvement Act of 2007 directed the National Institute of Justice to collect and analyze the collateral consequences in place in each U.S. jurisdiction.¹⁸ We no longer have to rely on the stories of people. We can see with our own eyes the ways that Americans across this country can be denied access to safe housing, education, work, and healthcare as well as protections for their environmental rights as a consequence of conviction.

The moral argument that it is essential for the safety of all or the greater good that information on people living with criminal records is readily available is mostly cited when the topic of human rights and background checks is approached. We contend that while safety is essential, we must find and draw the line between the rights of society at large, the rights of businesses and decision-makers, and individual rights. As authors, we, too, want to live in a society where we are safe, and we believe there is a point where information can and should be shared to enable safety. This discussion paper is focused not on that argument but on the need to address where this ethical line is and where it should be with the rise in tech-enabled decision-making.

For example, when we look at innovations in technology, we know that thousands, if not millions, of job seekers across this country are denied the ability to even apply for a job in processes that still involve humans. Online job seekers share stories of their computer screens prohibiting them from submitting a job application once they check a box that asks if they have ever been convicted of a crime. We fully understand that businesses are attempting to manage their risks; however, an algorithm should not be built to deny a candidate even before assessing their actual merits for filling a job. Having a criminal record has now become an indicator that a computer is trained to assess as "risky" or "unqualified." Again, we point to the fact that when this would happen to a small population size, it was ignored. However, the foundational structuring of society into classes based on social status now dictates that having an arrest and/or conviction record locks one-third of the U.S. population into a subclass based on the harmful privileges associated with a criminal record.

¹⁸ "About," National Inventory of Collateral Consequences of Conviction, accessed May 2020, <https://niccc.csgjusticecenter.org/about/>.

We know that this type of social classification is associated with how the human brain is hardwired for pattern matching. Humans assess risk (and safety) based on previous data or experiences. It is natural to believe that if someone made a risky or unsafe decision that hindered the greater good of society in their past they are more likely to do so again. Following this logic, it indeed might have been in the best interest of society at large to freeze any person, and the entire group, with a record into a class to better assess their ability to rejoin society and regain positive social standing. However, this idealistic view that at some point a person is no longer impacted by negative privileges doesn't hold up in reality. When asked, many people living with a record declare their experiences as having "a permanent life sentence" based on the collateral consequences they experience. We contend that this experience can sadly only become inflamed when we look to the future of artificial intelligence. We must wrestle with how advances in technology impact human life and account for the impact on vulnerable communities already disenfranchised by mass incarceration. History has shown that structures of oppression impacting minorities of all types and people in poverty are baked into the DNA of this country. We now know that some of the big drivers of mass incarceration were racism, the criminalization of poverty, and the mislabeling of mental health and addiction, among others. Many vulnerable communities face significant hardships in overcoming human bias. Algorithmic bias must be addressed in background checks so as not to further racism, elitism, ableism, and patriarchy.

V. Background Screening in the Era of Artificial Intelligence

Together we fundamentally believe that a threshold for what is in the best interest of society, versus the interest of businesses and decision-makers, versus the rights of individuals has not been established because criminal justice has not been a household social topic—until now. For a variety of reasons that we cannot explore in this paper, criminal justice has historically been an out-of-sight-out-of-mind institution. The structure of America's system of justice left most citizens believing that things were working okay without their engagement. Of course, this wasn't true. For decades, the average American was asleep to the drivers of mass incarceration. Collectively we allowed the country to slip into a state of unchecked control and presumed that the greater good was being handled by someone else, most likely the political class (those who have made politics a career).

The U.S. found itself center on stage globally as the number one incarcerator of its citizens with a system of punishment that has received rebuke and shame around the world. The human rights violations that have been allowed to occur in our policing systems, courts systems, as well as in our prisons

and jails are just now surfacing to the consciousness of more people. Still, the United States has been an embarrassment for decades. Generations of people have lived through the invisible life sentence of having a criminal record. They have been subjected to a lifetime locked into poverty loops; they have been denied access to healthcare, housing, banking opportunities, education, and just about every pathway to economic security. The Universal Declaration of Human Rights, established over 70 years ago, enthusiastically demonstrates where the rights of individuals who belong to the class of people living with records have been outright trampled.

The core tenet of the justice system is that incarceration and/or any other direct sanction should be the beginning and end of punishment. The phrase "if you do the crime, you do the time" speaks to the core value that your time removed from society is the punishment, and upon release, you are to be restored into good standing with the brotherhood mentioned in Article One of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."¹⁹

The ongoing stigmatization and collateral consequences associated with the social class and social status of a person with a criminal record is in direct violation of Article One and subsequent articles, including:

- Protection of life, liberty and security of person - Article Three
- Freedom from degrading treatment or punishment - Article Five
- Recognition under law - Articles Six and Seven
- The right to privacy and freedom from attacks on honor and reputation - Article Twelve
- The right to acquire property - Article Seventeen
- Democratic participation - Article Twenty-One
- Social security - Article Twenty-Two
- The right to work as well as equal and fair pay - Article Twenty-Three
- A standard of living adequate for health and well-being - Article Twenty-Five
- The right to accessible education - Article Twenty-Six²⁰

¹⁹ UN General Assembly, "Universal Declaration of Human Rights," 217 (III) A (Paris, 1948) https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf.

²⁰ Ibid.

Dignity and human rights are not afforded to millions of Americans. And while there are so many leaders nationwide who continue to openly fight for these rights, we want to turn this paper to discuss the urgent need for these protections, especially in the face of a world where fewer humans will make decisions that impact citizens with records. Urgency on our part could not be more evident as we already see algorithms built to support e-carceration and harsher sentencing. Technology for all its good is still a very uncharted world.

In the appendix, we share key data points that paint an expanded picture of the negative consequences already happening with background check screening that still involves humans in decision-making. A world powered by AI and robust machine procedures is already predicting how "individuals (or groups of individuals) will act based on how the data suggest they might behave or should behave based on patterns in the past, rather than based on the actual behavior of the individuals." In the case of individuals living with records, this will most likely mean the fundamentals of a dignified life will be even further out of reach.²¹

VII. A Path Forward

As practitioners, advocates, and entrepreneurs, we are committed to broadening the conversation around mass incarceration to include the urgent need to prepare for a future of AI. We already see headlines about algorithms that discriminate and limit a person's ability (regardless of their criminal record) to gain access to employment, housing, healthcare, and mainstream banking, among other things. We are already familiar with the over 50,000 barriers faced by people living with records, and this is with humans still deeply involved in decision-making. The future of automation dictates that without awareness and action, human bias will be hardcoded into machine decision-making. The impact will be millions more Americans—even more than the current 8.1 million—in poverty due to criminal background check discrimination. In our opening, we shared our goal of disrupting current trends so that by the year 2030, Americans with records have clear data rights surrounding their criminal justice data. To achieve this, we are looking at a path forward via a human rights, business, and public policy lens.

If we look to other successful movements for human rights, we anticipate finding best practices in establishing general public awareness and stakeholder buy-in to the point of positive change. We specifically, as Carr Center Fellows, are excited about expanding our knowledge of the rigor that is necessary for data

standards that impact other vulnerable populations. As a class of citizens, people living with records deserve explicit protections around how their data is collected, stored, and shared. This is vital so that there is a direct pathway for advocacy as a person or group. The big questions of the future around data rights, data ownership, and human rights extend into criminal justice. And while the general public is still awakening to the effects of mass incarceration, we can't wait for the future of AI. As a path forward, the criminal justice community has a substantial opportunity to engage with peers in the human rights and data community. The outgrowth of this knowledge exchange could yield various useful outputs, such as a toolkit around the human rights implications of background checks, as well as primary research that advances this field, given that so little research exists today.

The core tenet of the justice system is that incarceration or any other direct sanction should be the beginning and end of punishment.

A significant portion of this paper focused on the business factors involved in the background screening industry. Given the foundation of America's economy, it feels nearly impossible to suggest that entrepreneurs should ignore the social and moral friction created by capitalism. Still, we can demand that they find a balance between meeting a market demand and preserving the "common good."²² The common good is defined as an "obvious beacon [of] light [in] policy, which is always simple to define and which every normal person can be made to see using rational argument."²³ For us this means that it is in our collective best interest to protect the human rights of all people, which includes the right to work as well as equal and fair pay. The drivers of capitalism in the background screening industry are eroding the common good, so it is imperative that we find a better path forward in meeting market demand while addressing a social phenomenon. When a third of the country has a criminal record and nine out of ten employers, four out of five landlords and three out of five universities are screening for criminal records to qualify applicants, we must intervene for the collective fate of us all. Yes, the screening industry is projected to see an eight percent increase (2017-2023) with an estimated global employment screening market

²¹ Edith Ramirez, Keynote Address at the Tech. Policy Inst. Aspen Forum, "The Privacy Challenges of Big Data: A View from the Lifeguard's Chair," accessed July 28, 2016, http://www.ftc.gov/sites/default/files/documents/public_statements/privacy-challenges-big-data-view-lifeguard%E2%80%99s-chair/130819bigdataaspen.pdf; Danielle Keats Citron and Frank A. Pasquale III, "The Scored Society: Due Process for Automated Predictions," *Washington Law Review* 89 (2014):1-33; Tal Zarsky, "Understanding Discrimination in the Scored Society," *Washington Law Review* 89, 4 (3014): 1375-1412.

²² Schumpeter and McCraw, 250.

²³ *Ibid.*

valuation of \$5.46 billion by 2025;²⁴ however, the consequences of companies, and governments, blindly distributing inaccurate, incomplete, or irrelevant data can no longer be ignored.

Realizing that markets often do not regulate themselves, public policy has a role in our collective path forward. Policy can and should establish guidelines for ensuring that a desire to preserve public safety doesn't infringe upon the rights of an entire class estimated to be 100 million in size within the next decade. A policy gap analysis of the 1970 Fair Credit Reporting Act (FCRA) would allow us to determine the effectiveness of protections extended to background checks, which are covered by both the Federal Trade Commission and the Equal Employment Opportunity Commission (EEOC). FCRA was initially designed to regulate the collection and dissemination of consumer credit information to uphold fairness, accuracy, and personal protections. Criminal records were included under this statute and in April 2012 the EEOC wrote Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. This catalyzed nationwide efforts to "Ban the Box," but it didn't go nearly far enough. Ban the Box is a movement driven by civil rights and criminal justice organizations that points directly to the 2012 enforcement and requires that employers remove any boxes that must be checked on an employment application whereby an applicant must disclose they have a criminal record. By delaying this data point it is believed that the applicant will have an opportunity to persist in the qualification process and be seen on the basis of their merits. The historical data from this campaign is now pointing to some gains but also to the fact that the background check remains a structural barrier regardless of when the data point of a criminal record appears. So the gap analysis would enable actionable understanding around which policies are required to yield fairness, accuracy, and personal protections around criminal record data in all sectors (not just employment) at the same level of consumer data. Through our stellar peer network here at the Carr Center, we recently learned of The General Data Protection Regulation (GDPR - EU) 2016/679. This is a model that we are eager to explore as it appears to have some best practices worth bringing into this dialogue. The GDPR - EU has clear protections and privacy guidelines around how one's data is used and transferred outside of the European Union (EU) and European Economic Area (EEA). The notion that individuals have shared ownership of their data with the government that acts as a steward is one that can enable us to lay the path towards guidelines by 2030.

As we conclude this discussion paper, we feel like we are standing at the very beginning of a long journey. Data rights and human rights are a dialogue that often feels out of reach for the average American, and many people are unaware of what AI is but harbor grave concerns about a technological future they can't comprehend. When this is coupled with the unraveling of mass incarceration in the public consciousness, it almost feels like this an intractable conversation that could be over long before it begins. It is for this reason that we promote directly impacted people building the solutions we need to address the future of AI and criminal background checks. Those who have lived through the stigma, structural barriers, and persistent discrimination will be most primed to deconstruct the problem. They are also most likely to uphold algorithmic justice standards because there is great danger in a select few coding our collective future, especially if their bias regarding one-third of the country is unknown. We are grateful for our colleagues and advisors at the Carr Center. Without their guidance, we too would be unclear of where to start and where to go from here. Through our Fellowship, we have benefited from the year to communicate what we view as one of the most pressing issues within the criminal justice reform movement. We are eager to extend this paper and this conversation so that we can build the collective capacity of all stakeholders required to meet a future where 100 million Americans have the rights and protections they deserve surrounding their criminal justice data.

²⁴ "Employment Screening Services (ESS) Market 2019 Size, Share, Recent Trends, Leading Key Players, Key Findings, Opportunities and Regional Forecast to 2023," March 2019, <https://www.reuters.com/brandfeatures/venture-capital/article?id=87784>; "Global Employment Screening Service Market Analysis & Forecasts 2018-2025: Demand for time efficient selection systems owing to rising number of job applicants," Globe Newswire, Feb 2, 2018, <https://www.globenewswire.com/news-release/2018/02/02/1332258/0/en/Global-Employment-Screening-Service-Market-Analysis-Forecasts-2018-2025-Demand-for-time-efficient-selection-systems-owing-to-rising-number-of-job-applicants.html>.

Appendix

The Impact of Mass Incarceration on Families

- About 2.8 million minor children in the U.S.—1 in 28 kids—have a parent behind bars, up from 1 in 125 just a quarter-century ago. More than 1 in 9 African American children has an incarcerated parent, a rate that has quadrupled in the last 25 years.²⁵
- Children with incarcerated parents are more likely to experience school dropout, speech problems or learning disabilities, developmental delays or ADHD, physical health problems, and mental health problems such as anxiety and depression—even after controlling for environmental factors, race, and other characteristics.²⁶
- Nearly half of U.S. minor children—between 33 million and 36.5 million kids—have at least one parent with a criminal record. The barriers associated with a parent's record can severely undermine a child's life chances, hampering cognitive development, school performance, educational attainment, and even employment outcomes in adulthood.²⁷

The Impact of Mass Incarceration on the Economy

- The economy is based on a person's ability to work, acquire, and become mobile to escape poverty.
- Formerly incarcerated men are employed for nine fewer weeks and earn 40 percent less per year than if they had never been incarcerated, resulting in nearly \$179,000 in lost earnings by age 48.²⁸
- An applicant with a criminal record is 50 to 63 percent less likely to get a callback or job offer than an identical applicant without a record—and this hiring "penalty" is twice the size for black applicants as for whites.²⁹
- Employees with criminal records in the private sector have longer average tenures, are less likely to leave voluntarily, and are no more likely than people without records to be terminated involuntarily.³⁰ A study of the U.S. military found that individuals with felony records were promoted more rapidly and to higher ranks than others, and were no more likely to be discharged for negative reasons than individuals without records.³¹

²⁵ Bruce Wester and Becky Pettit, "Collateral Costs: Incarceration's Effect On Economic Mobility" (Washington: The Pew Charitable Trusts, 2010) http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.

²⁶ Leila Morsy and Richard Rothstein, "Mass Incarceration and Children's Outcomes" (Washington: Economic Policy Institute, 2016), <http://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/>.

²⁷ Rebecca Vallas, Melissa Boteach, Rachel West, and Jackie Odum, "Removing Barriers to Opportunity for Parents with Criminal Records and their Children" (Washington: Center for American Progress, 2015), <https://www.americanprogress.org/issues/poverty/reports/2015/12/10/126902/removing-barriers-toopportunity-for-parents-with-criminal-records-and-their-children/>.

²⁸ Wester and Pettit, 2010.

²⁹ Devah Pager and Bruce Western, "Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men" (Washington: National Criminal Justice Reference Service, 2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf>; Amanda Agan and Sonja Starr, "Ban the Box, Criminal Records, And Statistical Discrimination: A Field Experiment" (New Haven: Yale Law School, 2016), available at https://lawyale.edu/system/files/area/workshop/leo/leo16_starr.pdf.

³⁰ Dylan Minor, Nicola Persico, and Deborah M. Weiss, "Criminal Background and Job Performance" (Chicago: The Society of Labor Economists, 2017), <http://www.sole-jole.org/17537.pdf>.

³¹ Jennifer Lundquist, Devah Pager, and Eiko Strader, "Does a Criminal Past Predict Worker Performance? Evidence from America's Largest Employer" (2016), Working Paper, <http://www.esrcheck.com/wordpress/2016/05/19/study-finds-ex-offenders-can-be-good-workers/>.

The Impact of Mass Incarceration on the Labor Market

- An individual's net worth decreases by an average of more than \$47,500 in the years after incarceration, after adjusting for inflation, and imprisonment of a family member is associated with a 64.3 percent decrease in a family's assets.³²
- The probability of homeownership for formerly incarcerated individuals, while only slightly lower than their never-incarcerated peers' to begin with, drops more than 45 percent after incarceration.³³
- The total estimated cost burden of incarceration in the U.S. is more than \$1 trillion per year—nearly 6 percent of GDP and 11 times the amount spent on corrections—taking into account 23 different social and economic costs such as foregone wages, adverse health effects, and increased infant mortality.³⁴
- The U.S. workforce was missing between 1.7 million to 1.9 million workers in 2014 due to the adverse employment effects of felony conviction and incarceration—roughly equivalent to a 0.9 to 1.0 percentage point reduction in the overall employment rate.³⁵

³² Michelle L. Maroto, “The Absorbing Status of Incarceration and its Relationship with Wealth Accumulation,” *Journal of Quantitative Criminology* 31 (2015): 207-236, https://www.researchgate.net/publication/272018453_The_Absorbing_Status_of_Incarceration_and_its_Relation_ship_with_Wealth_Accumulation; Bryan L. Sykes and Michelle L. Maroto, “A Wealth of Inequalities: Mass Incarceration, Employment, and Racial Disparities in U.S. Household Wealth, 1996 to 2011,” *The Russell Sage Foundation Journal of the Social Sciences* 2, 6 (2016): 129-152, <https://muse.jhu.edu/article/639847/pdf>.

³³ Michelle L. Maroto, “The Absorbing Status of Incarceration and its Relationship with Wealth Accumulation,” *Journal of Quantitative Criminology* 31 (2015): 207-236, https://www.researchgate.net/publication/272018453_The_Absorbing_Status_of_Incarceration_and_its_Relation_ship_with_Wealth_Accumulation.

³⁴ Michael McLaughlin and others, “The Economic Burden of Incarceration in the U.S,” Working Paper AJIO72016 (Institute for Advancing Justice Research and Innovation, 2016), <https://advancingjustice.wustl.edu/SiteCollectionDocuments/The%20Economic%20Burden%20of%20Incarceration%20in%20the%20US.pdf>.

³⁵ Bruce Western, Meredith Kleykamp, and Jake Rosenfeld, “Economic Inequality and the Rise in U.S. Imprisonment” (Princeton: Department of Sociology, Princeton University, 2004), <https://www.russellsage.org/sites/all/files/u4/Western,%20Kley>.

Carr Center Discussion Paper Series

**Carr Center for Human Rights Policy
Harvard Kennedy School
79 JFK Street
Cambridge, MA 02138**

Statements and views expressed in this report are solely those of the author and do not imply endorsement by Harvard University, the Harvard Kennedy School, or the Carr Center for Human Rights Policy.

Copyright 2020, President and Fellows of Harvard College
Printed in the United States of America

**This publication was published by the Carr Center for
Human Rights Policy at the John F. Kennedy School of
Government at Harvard University**

Copyright 2020, President and Fellows of Harvard College
Printed in the United States of America

79 JFK Street
Cambridge, MA 02138

617.495.5819
<https://carrcenter.hks.harvard.edu>

