COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: BARRIERS TO REENTRY FOR THE FORMERLY INCARCERATED

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: BARRIERS TO REENTRY FOR THE FORMERLY INCARCERATED

WEDNESDAY, JUNE 9, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:20 a.m., in room 2141, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Conyers, Pierluisi, Jackson Lee, Cohen, Quigley, and Gohmert.

Staff Present: (Majority) Bobby Vassar, Subcommittee Chief Counsel; Jesselyn McCurdy, Counsel; Veronica Eligan, Professional Staff Member; (Minority) Kimani Little, Counsel; Art Baker, FBI Detailee; and Kelsey Whitlock, Staff Assistant.

Mr. SCOTT. Good morning. The Subcommittee will now come to order. Welcome to today's Subcommittee hearing on Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated.

As the historic Second Chance Act 2-year authorization will expire on September 30, the law authorizes Federal grants to government agencies and swe non-profit organizations in order to better address the needs of the growing population of ex-offenders returning to their communities. As Congress continues to evaluate the implementation of the Second Chance Act, today's hearing will examine some of the continuing barriers that former offenders in this country face as they reenter society.

This is the second hearing we have had on this issue, the first on voting rights. But in 2008 more than 735,000 individuals were released from Federal and State prisons. In addition, over 9 million were released from local jails. According to the Bureau of Justice statistics, in that same year more than 7.3 million people were on probation or parole or in prison, which equals 1 out of every 31 adults, the highest rate in the world.

A recent Pew Center report noted that any benefits from incarceration begin to have diminishing returns after about 300 per 100,000 population and any rate above 500 per 100,000 are counterproductive. The United States' rate is over 700 per 100,000 already.

In addition to those serving or those who have served prison time, even a larger number have been convicted of a criminal offense without going to prison. Millions are being released from prisons, jails, probation and parole supervision every year. They must either successfully reintegrate into society or be at risk of reoffending.

People who are convicted of a crime are subject to a number of additional civil penalties that remain with them long after they have served their sentence. Often referred to as collateral consequences, these penalties take different forms at the Federal and State level.

These collateral sanctions create roadblocks for individuals who are trying to rebuild their lives during the critical period following incarceration. For example, many States deny people with certain felonies the right to vote, which in turn discourages that person from participating in the political process.

One of the most important aspects of reintegrating in society is the ability to obtain and maintain employment. Limited employment opportunities are perhaps the most serious of the secondary legal consequences of a conviction since an inability to keep a job often leads to recidivism.

Federal law requires background checks and mandates disqualification of job applicants based on convictions in a number of occupations, including education, health care services, child and elder care, financial institutions, and transportation. Also, unskilled and semiskilled occupations are regulated by occupational licensing and employment laws.

Employers in a growing number of professions are barred from State licensing agencies from hiring people with a wide range of criminal convictions, even convictions that are unrelated to the job or occupational license. In some States, occupations such as cosmetologists or barbers are prohibited from receiving licenses if they have criminal records.

These collateral consequences contribute to the historically high rate of recidivism. Nationally two-thirds of returning prisoners are rearrested for new crimes within 3 years.

Moreover, the public availability of criminal records through the Internet had made it more difficult for offenders to return to society. According to the Department of Justice, in 2006 nearly 81 million individuals were in the criminal history files of the State criminal history repositories.

When information is inaccurate, as in the case with over 50 percent of FBI criminal records, according to a DOJ report, it makes it even more difficult to find a job. I have introduced a bill, The Fairness and Accuracy in Employment Background Checks, that will require the FBI to clean up its records and provide employers with accurate criminal histories.

Even the Supreme Court in a recent decision of *Padilla v. Kentucky* has recognized the serious implications of collateral consequences. The petitioner, Mr. Padilla, was a lawful permanent resident of the United States for over 40 years. He pleaded guilty to a felony and relied on his defense counsel's advice that his guilty plea would not result in his deportation. But shortly after his conviction Padilla's guilty plea did in fact lead to the start of deporta-

tion proceedings. The Court overturned the sentence and held that defense counsel must inform a client whether his plea carries a potential of deportation or risk not providing the client with effective legal assistance.

I look forward to hearing from our witnesses about these barriers and how we can provide ex-offenders an opportunity to rehabilitate themselves, successfully reenter their communities, reduce the future incarceration costs, and reduce the chance that people will be victims of crimes.

At this point, I yield to the Ranking Member of Subcommittee, Judge Gohmert.

Mr. GOHMERT. Thanks, Chairman Scott.

Research estimates indicate that over 95 percent of currently incarcerated individuals will eventually be released back into communities across America. Studies show also that, unfortunately, about two-thirds of them will recidivate within 3 years. High recidivism rates not only decrease the safety of the neighborhoods affected by crime but also increase government expenditures on prisons and criminal justice systems.

As Members of Congress, we have the responsibility to enact robust criminal laws to protect Americans from harm. We have simultaneously the duty to ensure that taxpayer money is wisely and efficiently spent. Recidivism among former criminals is increasingly a budget strain. Congress should, as we are, seek out new approaches that facilitate reintegration of criminals in the community, rather than continuing to appropriate Federal funds to expensive failing programs.

Faith-based prisoner rehabilitation and post-release programs have proven successful in reducing the likelihood that a prisoner will reoffend. In 2009, Mr. Lewis testified that the faith-based Interchange Freedom Initiative reduced recidivism among its participants by over 50 percent. Congress should not discredit religion's role in facilitating reintegration in curbing criminal propensities. Faith-based programs are also frequently less expensive than other reintegration initiatives.

When we debated the Second Chance Act of 2007 last Congress, I supported including a provision to fund faith-based initiatives because of the proven success in cost efficiency. As Federal deficits continue to skyrocket, Congress cannot afford to ignore innovative initiatives while funding traditional programs that have only mediocre results.

In fiscal year 2009, $25 million was processed by the Federal Government and then returned to fund State and local initiatives. This included $15 million for State and local reentry demonstration projects and $10 million for grants to non-profit organizations for mentoring and other transitional services.

In fiscal year 2010, Congress appropriated $100 million for Second Chance Act grants. President Obama has requested yet another $100 million for fiscal year 2011, though the Act has not been reauthorized.

Currently, 6.7 million people make up the Federal and State correctional population. Approximately 800,000 of these men and women return home to their communities each year. These statistics highlight the important responsibility State and local govern-

ments have in implementing programs to ease the transition for offenders. The Second Chance Act shifts the State and local burden to the Federal Government. It addresses the problem of prisoner reentry through inefficient channeling of Federal funds to State and local organizations.

I question whether taxing to bring dollars to Washington so we can take a cut for the Federal Government and then only return the remainder to State and local governments is as efficient, when actually we might be better off having that tax money stay at the State and local level without funneling it through Washington to get our cut.

As a former State judge, I strongly support efforts to develop new approaches to reduce recidivism by assisting ex-convicts in their reentry into communities. However, we can no longer afford to spend Federal money on inefficient State and or local reintegration programs.

I look forward to hearing from our witnesses today, getting their perspectives, and I appreciate you for this opportunity. Thank you.

Mr. SCOTT. Thank you.

We have been joined by the Chairman of full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

This is a very important subject matter; and, of course, we wouldn't about talking about this unless Marc Mauer was in the room as a witness.

But I wanted to thank Judge Gohmert, who was with us yesterday in Los Angeles as we examined the NBC-Comcast merger; and it was a very good hearing. I don't know what you are going to do with the 5-minute rule today, but if you knew how much time Judge Gohmert used up at that hearing—and it was very well-spent, too, the time and the questioning. As a matter of fact, after he had asked his questions, you couldn't stop—the witnesses all wanted—they almost demanded an opportunity to respond to these questions.

But this Committee does so much important work. You and Danny Davis started off with the Second Chance Act, and our staff man on the Committee was reminding me that the Second Chance Act—and I always look for a chance to praise a former Republican President—came out of George Bush's State of the Union address, and it was picked up by you and Danny.

We ended up with 24 Republican cosponsors of the bill, including Chris Cannon of Utah; Lamar Smith of Texas, our Ranking Member; Steve Chaffetz of Cincinnati, Ohio; Jim Sensenbrenner, the former Chairman of the Committee; Adam Schiff; Sheila Jackson Lee; and many others.

What I am indicating is the bipartisan nature of this activity and the importance of what we are doing here today, and this is why I count this as an exceedingly important hearing.

Now, here is the challenge, and I am looking for some responses. I haven't found it in any of the statements of the six witnesses. How can we look into the Second Chance consideration and all of these—we have got a system now—I will never forget the former inmate, as he was going out and was saying goodbye to one of the

keepers, and he said, don't worry. You will be back. I will be waiting for you when you come back.

This is the nature of the atmosphere that we are in. As Judge Gohmert said, most of them recidivate, some much sooner than others.

Now what can somebody do that has been incarcerated for years. He may have a bus ticket. He certainly has no clothing. He has no prospects of a job. He doesn't even know who still lives in the city he came from. Of course he is going to recidivate.

But the additional problem we are faced with is that we are in—our Administration calls it a heightened recession. In some areas, we are in a depression. Now, come on, folks, who is going to hire a former felon and people who, through no fault of their own, are running out of unemployment benefits?

Housing foreclosures are predicted to be higher this year than they were last year, and my city and State was at the top almost all the time in unemployment and foreclosure.

So for us to be talking about how we strengthen this bill—and the fact of the matter is we are in a recession everywhere and a depression in many other places—does not conform with reality, and that is why my remarks are on creating a full employment system which some of you are already aware of. I don't know what the witnesses think of this, but it seems clear to me that we are not going to strengthen it; and, even if we do, what are we going to do with all the people that haven't been in the judicial system, the criminal justice system?

So we have got to start thinking about the responsibilities of the government to create a full employment society when the private sector can't do it, and that is why I have rewritten the Humphrey-Hawkins Full Employment and Balanced Growth Act to accommodate that. That goes back to 1978. We had this huge battle. I will never forget it. Coretta Scott King had to fly up. They almost—we passed it in the House with Gus Hawkins, but they were going to scuttle it. And, fortunately, she was there and said that she wanted it to stay alive.

Unfortunately, it was never enforced; and so I just want to make sure that all of our witnesses and everybody on the Committee is thinking about the connection.

And I will put the rest of my——

[The prepared statement of Mr. Conyers follows:]

Statement of Chairman John Conyers, Jr.
for the Hearing on

Collateral Consequences of Criminal Convictions:
Barriers to Reentry for the Formerly Incarcerated

Before the Subcommittee on Crime, Terrorism, and Homeland Security

Wednesday, June 9, 2010, at 10:00 a.m.
2141 Rayburn House Office Building

Today's hearing focuses on the continuing barriers that men and women who are released from jail and prison confront as they attempt to re-enter society.

I'd like to begin by discussing several ways in which civil penalties that are the result of a criminal conviction create a "prison after imprisonment," and have a particularly adverse effect on African Americans and Latinos.

First, people convicted of crimes are subject to various additional civil penalties that remain with them long after they have served their criminal sentence.

Two years ago, the landmark Second Chance Act was signed into law, and it authorized federal grants to provide employment assistance, substance abuse treatment, housing, family programming, mentoring, victims support and other services for former offenders.

These services play an absolutely critical role in facilitating the transition from prison into our neighborhoods and communities of those who have paid their debt to society, so that they do not fall into a cycle of recidivism.

While the Second Chance Act has created important resources to assist with reintegration after incarceration, there are still many collateral sanctions that ex-offenders are subjected to after completing their criminal sentences.

These penalties are referred to as "collateral consequences," and they exist at the federal and State levels.

Rather than helping the formerly incarcerated successfully transition from prison to the community, many of these laws have just the opposite effect. They essentially limit an individual's ability to obtain a job, housing, or public assistance.

Second, the stigma of a criminal conviction results in subtle and wide-ranging forms of discrimination.

A criminal conviction negatively affects an person's legal status as a productive member of society. For example, an individual convicted of certain felonies may lose his or her right to vote, or be ineligible to hold public office.

In addition, federal laws bar individuals with convictions from serving in the military, and on civil and criminal juries. Collateral sanctions can also result in non-citizens who are convicted of crimes being deported.

Like their federal counterpart, State legislatures have embraced civil sanctions for convicted individuals. Studies of disabilities imposed by State law or regulation found hundreds of collateral sanctions and disqualifications on the books.

This study also found that employers in 37 States can deny jobs to people who were arrested, but never convicted of any crime.

Finally, the collateral consequences of convictions also have an adverse racial impact.

African-Americans and Latinos are arrested and convicted at significantly higher rates than Whites. As a result, they are particularly harmed by these legal

barriers, resulting in large segments of these communities being economically disadvantaged.

Minorities are far more likely than whites to have a criminal record. Almost 17% of adult black males have been incarcerated, compared to 2.6% of white males.

A recent study shows that "a criminal record has a significant negative impact on hiring outcomes, even for applicants with otherwise appealing characteristics," and that "the negative effect of a criminal conviction is substantially larger for blacks than for whites."

One of the most important aspects of reintegrating into society is the ability to obtain and maintain employment.

Thus, limited employment opportunities are among the most serious of the secondary legal consequences of conviction, as the inability to get or keep a job can lead to recidivism.

Unskilled and semi-skilled occupations are often regulated by occupational licensing and employment laws. Employers in a growing number of professions, however, are barred by State licensing agencies from hiring people with a wide range of criminal convictions, even convictions that are unrelated to the job or occupational license.

I am looking forward to hearing from today's witnesses, and hope that this discussion will provide meaningful guidance about ways we can tear down the walls of the "prison after imprisonment" that prevents men and women – who have paid their debt to society – from living productive lives.

Mr. GOHMERT. Mr. Chairman, will you yield?

Mr. CONYERS. Sure, judge.

Mr. GOHMERT. I think we all agree on the end—one of the things that I saw as a judge, statistics, 70 percent or more were either addicted to drugs or alcohol. And one of the problems that I saw in

Texas was while people were incarcerated we didn't deal with that problem adequately; and something was created called Substance Abuse Felony Punishment facilities, where, basically, you went through AA while you were there. There was high school or college courses.

And so, just to plant this seed, to get full employment after people are released, it seems like we needed to do a better job of helping them deal with their addiction while they are incarcerated and getting them the education that they didn't have when they came there so that they are better prepared. But just from personal experience that seemed to be a shortcoming in the Texas system, and I was pleased when the SAFP system was developed.

But I have heard from colleagues—I hope it isn't true—that is where major cuts are being made in the very areas that seem to be doing the best job toward preparing people for the future.

Appreciate the Chairman's indulgence.

Mr. SCOTT. Thank you.

We will ask the other Members, if they would, to place statements in the record, unless you have a very brief statement.

[The prepared statement of Mr. Cohen follows:]

Statement of Representative Steve Cohen
Crime Subcommittee Hearing on
The Collateral Consequences of Criminal Convictions
June 9, 2010

- Thank you, Mr. Chairman, for holding this very important hearing.
- For too many people, a conviction for even a minor offense actually dooms them to a life sentence.
- That's because long after they've served their time, the conviction stays on their record.
- Employment, education and housing opportunities can all be denied, in some circumstances, to people with convictions in their past.
- Even certain federal benefits like TANF can be denied to people with felony drug convictions.
- Many of these restrictions are unfairly punitive and simply counter-productive.
- How does one re-enter society and start a new, clean life without access to education and a job?
- Wherever possible, we should offer people a chance to start over again.
- That's why today I'm introducing the Fresh Start Act, which would allow non-violent federal offenders who have served their time and lived a clean life ever since to have their convictions expunged from their record.
- To be eligible for expungement, a person may not have committed any other state or federal offense, whether violent or non-violent, and must have met all the terms of their sentence.
- An eligible offender would have to apply to the court that sentenced them and the US Attorney for that district could weigh in with recommendations.

- Once seven years have elapsed since an offender has completed their sentence, expungement would be automatically granted.
- However, the bill makes an exception for sex offenders and people who commit property or financial crimes worth over $10,000.
- Finally, the bill would encourage states to pass their own expungement laws through incentive grants and financial penalties.
- The Fresh Start Act would allow people who made a mistake earlier in life, and have paid their debt to society, to wipe the slate clean and start their lives over.
- Of course, this bill would only apply to a subset of the people we're talking about today and we need to remove the barriers to re-entry for all ex-offenders.
- The Second Chance Act has been critical to this effort and we need to make sure it gets reauthorized and fully funded.
- We also need to restore voting rights to ex-felons and end that fundamental denial of civil rights.
- There are a host of other barriers to re-entry in our laws and I look forward to hearing from our witnesses to learn how we can knock these hurdles down.
- Thank you Mr. Chairman.

Mr. PIERLUISI. I will just wait for the witnesses to start, and then I will ask some questions.

Mr. SCOTT. I thank the gentleman from Puerto Rico.

We have a distinguished panel of witnesses who will help us consider the important issue today.

Our first witness is Marc Mauer, the Executive Director of The Sentencing Project. He is one of the Nation's leading experts on sentencing policy, race in the criminal justice system, and the author of several books.

The second witness will be Maurice Emsellem, Policy Co-Director of the National Employment Law Project. He has worked on collaborations with organizers and advocates that have successfully modernized State unemployment insurance programs, created employment protections for workfare workers, and reduced unfair barriers to employment of people with criminal records.

Our third witness is Calvin Moore, a native of Washington, D.C. He struggled with the criminal justice system as a young adult, was incarcerated over 20 years ago but has since been trying to rebuild his life. He found several jobs at private companies and with the D.C. Government as a professional driver until 2007 when he was laid off. Since that time, he has been trying to find work and has applied for about 42 different positions. He has been turned down by all of them, primarily because of his criminal records.

Our next witness is Richard Alan Lewis, who is the senior manager of ICF International, a global professional services firm. He manages the National Responsible Fatherhood Clearinghouse and Web site and provides consulting services to help clients develop and manage effective human services programs.

The fifth witness is Pamela K. Lattimore, Ph.D., principal scientist at RTI International. She is an expert in prisoner reentry and multimodal correctional program evaluation, as well as approaches to improving criminal justice systems operations.

Our final witness will be Richard Cassidy, founding member of the law firm of Hoff Curtis and chair of the Uniform Law Commission's Drafting Committee on Uniform Collateral Consequences of Conviction Act. That law was adopted in July 2009, and endorsed by the—was adopted in July 2009, and endorsed by the American Bar Association in February 2010.

Each of our witnesses' written statements will be made part of the record in their entirety.

I ask each witness to summarize your testimony in 5 minutes or less. To help you stay within that time, there is a lighting device on the table which will start green, go to yellow when you have 1 minute to conclude your testimony. It will turn red when your 5 minutes have expired.

We will begin with Mr. Mauer.

TESTIMONY OF MARC MAUER, EXECUTIVE DIRECTOR, THE SENTENCING PROJECT, WASHINGTON, DC

Mr. MAUER. Thank you, Chairman Scott. I appreciate the opportunity to be here and the important nature of this issue.

The issue of collateral consequences is not a new issue. We have had these policies and practices in many ways since the time of the founding of the Nation. In those early days, not only might you lose

your job, you could have your marriage dissolved as well and other consequences.

But one thing that has been consistent over the last 200 years is that there has rarely been any kind of analysis or assessment about the impact and effectiveness of collateral consequences, and I think that is what makes this hearing particularly important.

The other element that makes it so important today is that we now have an impact of collateral consequences that is far more broad ranging than we have ever seen before. This has come about from two factors: First, the enormous increase in the criminal justice population over the last four decades. We have eight times as many people in prison as we did in 1970. Some 13 million people have had a felony conviction. Millions more have been arrested or had a misdemeanor conviction. So the scope of who is affected is really unprecedented now.

Secondly, a series of policy initiatives over the last 20 years or so, many of them coming out of the war on drugs, have further restricted the ability of people with felony convictions, and particularly drug felony convictions, to have access to public benefits and services. And so we have this very broad range.

There are a variety of questions that come up in this area. Some of them are philosophical, in a sense. For example, what should be a punishment for a crime and should it include forfeiture of your rights?

There are a number of very practical problems, though, that I just want to dwell on to lay out some of the issues that we need to examine today.

The first one, of course, is the impact of collateral consequences on reentry; and it seems to me that many of the policies currently in place are very counterproductive to successful reentry. We look at restrictions on employment, for example. There are some restrictions that few people would argue with. Most people don't want to have a convicted pedophile working in a day care center, but that is generally the exception to the rule.

Other kinds of restrictions, such as restrictions on getting a license to be a barber, to work in asbestos removal, or to work in physical therapy, are rarely connected at all to a person's past behavior, rarely connected to any kind of public safety objectives. So it is hard to see what the rationale is for restricting people from these occupations.

Another set of restrictions are the drug felony bans, some of these coming out of the 1996 Federal welfare reform legislation, which prohibit people with a drug felony from receiving welfare benefits or food stamps for life unless the State in which they live opts out of that. This policy applies to drug felonies and only drug felonies, so someone with an armed robbery conviction or a stolen car conviction or anything else is perfectly eligible to qualify but only people with a drug felony have lost their social safety net, essentially.

Another one that is very counterproductive is the elimination of Pell Grants that Congress approved in 1994. At the time, prisoners received less than 1 percent of all Pell Grant funds, but this permitted them to get a college education in prison. I think it is fair to say the number of college education programs declined dramati-

cally following the imposition of that policy. All the research we have tells us that more education contributes to reduced recidivism rates. So I think this is very counterproductive.

We also have implementation problems. There is no State at the moment that can tell us exactly what all the collateral sanctions are for a given offender in the State. This is not a very helpful way to go about this. We know they are frequently implemented in error.

I do a good deal of work on the issue of felon disfranchisement. One study of 10 States looked at election officials and found that 30 percent of the local election officials misinterpreted the applicable law in their State, which means we have errors on both sides of the equation, that sometimes people who are eligible to vote are denied the opportunity to do so, but, conversely, people who are ineligible to vote in a given State are permitted to vote. This is no way to run an election system but I think just an indication of how these laws expand over a broad range of areas.

There is momentum for reform. Many States are beginning to address this. I know there is interest in Congress as well. But it seems to me if we care about reentry and care about doing it productively we need to reassess whether these policies have a legitimate role or whether it is time to repeal or scale back their impact.

Thank you.

[The prepared statement of Mr. Mauer follows:]

PREPARED STATEMENT OF MARC MAUER

THE SENTENCING PROJECT
RESEARCH AND ADVOCACY FOR REFORM

Testimony of Marc Mauer
Executive Director
The Sentencing Project

Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated

Prepared for House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security

June 9, 2010

Thank you for the opportunity to present this testimony on the impact of the collateral consequences of a criminal conviction. I am Marc Mauer, Executive Director of The Sentencing Project. I have been engaged in research and public policy advocacy on criminal justice issues for thirty years, and am the author of books and journal articles on issues of sentencing, incarceration, and collateral consequences. I am also the co-editor of the book, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, one of the first volumes to examine the broad effects of the current generation of collateral consequences.

In my testimony today I will present an overview of the range of consequences that affect people with criminal convictions as well as an assessment of their impact on reentry, recidivism, and civic participation. I will also offer recommendations for reform that I believe would address some of the problems in this area and would lead to more successful outcomes.

THE GROWING PROBLEM OF COLLATERAL CONSEQUENCES

One of the few bright spots in the economy this year was the substantial number of people who were able to obtain employment to help carry out the national census. While the Census Bureau is expected to hire 700,000 temporary workers, these will generally not be people with previous criminal convictions. The Census agency's practice involves screening out applicants if their names show up in an FBI database, either for an arrest or conviction. Applicants then have 30 days in which to produce official records showing the disposition of their cases.

Eugene Johnson and Evelyn Houser were two African American applicants denied employment through this process. Johnson, who has done field survey work for market researchers, had been arrested on misdemeanor assault charges in 1995 stemming from a dispute with his landlord. He was sentenced to perform community service and pay restitution. Houser, a 69-year old retired home health care aide, had been arrested in 1981 and charged with theft and forgery involving a check she had found near a dumpster and cashed. She was placed in a diversion program and was not even formally convicted. In 1990, she had been hired as a census taker, and had no subsequent arrests. But neither Johnson nor Houser could produce court records to document that their cases had been settled, and so both were denied employment.

There have been restrictions placed on persons with criminal convictions since the founding of the nation. Growing out of the medieval concept of "civil death," which restricted offenders from entering into contracts, inheriting property, or voting, the early American nation incorporated many aspects of this tradition. Thus, offenders were frequently denied the right to enter into contracts, had their marriages dissolved, and had broad restrictions placed on their access to employment and

benefits. The prevailing sentiment of two hundred years ago was a starkly punitive one that was probably not useful then and is certainly not useful today.

I am pleased that this committee is choosing to reexamine this unfortunate legacy today. While collateral consequences such as employment barriers have been a feature of the criminal justice system for many years, their existence today is more far-reaching than ever before. This is a function of two overlapping trends.

First, the sheer increase in the number of people with felony convictions and those sentenced to prison over the past three decades is unprecedented. The U.S. currently imprisons eight times as many people as were held in state and federal prisons in 1970, a record 1.6 million people. Inclusion of those awaiting trial or serving a sentence in local jails brings the total to 2.3 million today. It is important to note that these dramatic increases are largely a result of changes in policy, not crime rates. Through such policy initiatives as the "war on drugs," mandatory sentencing, and cutbacks in parole release, policymakers have enacted a series of harsh sentencing laws that have sent more people to prison and for longer periods of time than in any previous era.

Current estimates suggest that about 13 million Americans are either serving a felony sentence or have had a felony conviction in the past. In addition, 47 million people have a criminal record on file. Since even an arrest that does not lead to conviction can have consequences for an individual, these figures clearly indicate that the problem affects a substantial proportion of the adult population. Moreover, given the racial dynamics of the criminal justice system, communities of color are experiencing these impacts at substantially higher levels than the national average. This can be seen most dramatically for African American males, with one of every six having served time in prison, and even greater numbers having a felony conviction.

Second, in addition to the growth of the criminal justice population, there has been a parallel development of a new generation of collateral consequences enacted by policymakers. Many of these have grown out of the "war on drugs," and have been directly targeted toward persons with a drug conviction. In many cases, the same retributive impulses that have led to excessive sentencing provisions have also resulted in this new range of punishments and restrictions that accompany a criminal conviction. The conglomeration of collateral consequences can now touch every aspect of an individual's life, affecting employment, housing, education, military service, public benefits, driver's licenses, child custody, voting, and jury service, among others.

Three additional points regarding the spread of collateral consequences are notable as well. First, it is ironic that the reach of these sanctions is now so broad, given the growing support for sentencing reform and reentry over the past decade. Second, many of these restrictions extend well beyond the term of the criminal conviction, and frequently result in lifetime prohibitions on access to public benefits and services. And third, many collateral sanctions have been in existence for decades without ever being reviewed for effectiveness or utility.

COLLATERAL CONSEQUENCES ARE PROBLEMATIC FOR SUCCESSFUL REENTRY

Some collateral consequences of a criminal conviction are based on a premise of public safety, and may be considered as necessary and appropriate for that objective. For example, few people would object to restrictions on convicted pedophiles being able to work in a day care center. In this instance, public safety is clearly the objective of the restriction, and the person's past criminal behavior is directly linked to that objective. In assessing the full range of collateral sanctions, though, there are few instances such as this where we can discern a public safety objective that is defined by targeted restrictions on the offender. Instead what we see all too often are restrictions that fail to promote public safety, that frequently run counter to integrating formerly incarcerated people into the community, and that are based on political posturing rather than behaviorally based analysis.

The problems posed by a broad range of collateral sanctions for successful reentry are many, including the following:

Many restrictions on employment are irrational and counterproductive – As noted above, some of the restrictions based in law or licensing provisions are related to legitimate public safety objectives. But in far too many cases, it is difficult to detect any such consideration. In Florida, for example, there are at least 71 occupational groups which subject potential employees to background checks, covering as many as one-third of the 7.9 million jobs in the Florida economy.[1] These include such diverse positions as working at a dog racetrack, physical therapist, funeral embalmer, and asbestos abatement. Some of these restrictions are lifetime bans, others require

[1] Collins Center for Public Policy, "Florida's Restrictions on Employment Opportunities for People with Criminal Records," February 2006.

restoration of civil rights by the governor, while still others are discretionary by the relevant agency.

Drug-related collateral consequences are particularly unfair and counterproductive – A little-noticed provision at the time of enactment of the 1996 federal welfare reform legislation was a permanent prohibition on receipt of welfare benefits and food stamps for anyone with a felony drug conviction. Presumably, members of Congress believed that this measure represented one more means of "sending a message" about the harms of drug use and drug selling, although curiously the ban does not apply to far more serious crimes such as murder or armed robbery. This ban disproportionately affects women and children, by far the overwhelming proportion of recipients of such benefits. The impact of the ban means that a woman returning home from prison who may gain temporary employment but is then laid off during a recession is left with no "safety net." And further, children are essentially punished for the acts of their parents.

Under the 1996 law, the ban applies nationally, but states may opt out of its provisions. To date, 9 states have fully opted out, while 33 others have partially opted out. These latter include states in which convictions for drug selling result in the ban, but not those for drug possession, or where the ban is suspended for someone participating in drug treatment.

The ban on receipt of Pell grants in prison was based on politics, not research – As an element of the 1994 federal crime bill, prisoners who seek to enroll in higher education are now denied access to Pell grant funds. Previously, these funds generally covered the tuition costs of the community college programs that frequently provided higher education in prison. At the time, prison programs represented less than 1% of all Pell grant spending nationally. As a result of the ban,

the number of such programs has declined precipitously. A wealth of research over time demonstrates that education helps to reduce recidivism, and so this ban runs counter to promoting public safety.

IMPLEMENTATION OF COLLATERAL CONSEQUENCES IS PROBLEMATIC FOR BOTH INDIVIDUALS AND DECISION MAKERS

The broad range of collateral consequences of conviction encompasses a patchwork of federal, state, and local initiatives, and have been enacted over a period of many years. As such, they pose a series of problems for consideration by policymakers. These include:

Collateral consequences are not catalogued in any systematic manner – Arguably, one rationale for imposing collateral consequences might be that policymakers hope they will have a deterrent effect on potential offenders, who might consider the consequences of their actions. Yet under current practice, there is no means by which this can occur, since there is no systematic catalogue of such sanctions in any state. This situation is a function of the fact that these policies have been enacted over many years, that they are written into varying sections of state law, that some are imposed by the federal government, and that some are functions of licensing agencies. Therefore, an offender reentering the community generally will have no means of knowing which benefits and services he or she is restricted from accessing.

Fortunately, the National Institute of Justice is supporting a project aimed at producing a comprehensive catalogue of collateral sanctions by state. However, it is likely that this resource will not be available for at least two to three years, and so until then both policymakers and people with felony convictions will have little guidance in understanding the breadth of these sanctions.

Collateral consequences are rarely acknowledged in the courtroom – If one believes that collateral sanctions have some utility, then they should be transparent and considered carefully as part of the court process. But this is rarely the case. The first significant point at which this poses an issue regards the defense attorney advising a client on plea negotiations. If the plea is to truly be an informed one, then we would normally expect that the attorney would advise the client of all the potential consequences of conviction. This is particularly critical for non-citizens who may face deportation as a result of a plea. In many jurisdictions defense attorneys now regularly inform their clients of this, but as seen in the recent Supreme Court decision in the *Padilla* case, all too often this is not done effectively. The *Padilla* case involved a man who had lived in the U.S. for 40 years and was a legal resident, but was incorrectly told by his attorney that pleading guilty to a drug charge would not affect his immigration status. In fact, the plea brought with it a mandatory deportation.

Even more rare in a courtroom is any statement by a sentencing judge regarding the collateral sanctions that are imposed upon conviction. In many cases this is in part due to the judge being unaware of the range of restrictions that are triggered by the conviction, since there is little discussion of this in judicial training or practice.

COLLATERAL SANCTIONS ARE OFTEN IMPLEMENTED IN ERROR

Because collateral consequences are frequently misunderstood even by the officials charged with enforcing them, they are subject to both arbitrariness and error in their implementation. There is a good deal of evidence of this in the area of felony disenfranchisement in particular.

Felony disenfranchisement policies are state-based, and 48 states and the District of Columbia variously call for restrictions on voting while in prison, or on probation or

parole. The implementation problems result from several factors. First, there is little training of election officials regarding relevant state law. One survey of officials in ten states found that one-third misinterpreted the relevant law in their state.[2] A second problem is access to information. In most states, election officials do not have ready access to criminal justice records, and so have to go through a cumbersome process (or rely solely on the word of the applicant) to certify that a person is eligible to vote. This process can be very costly to the jurisdiction as well, involving significant amounts of personnel time.

Anecdotal evidence suggests that misinformation results in two types of error. In some cases, persons who are legally disenfranchised are permitted to vote, while in others people who are legally eligible to vote are mistakenly prevented from doing so. Clearly, an electoral system can only be respected if it enforces the law fairly and uniformly.

A GROWING MOVEMENT FOR REFORM

As a result of increased attention to the challenges posed by collateral consequences policymakers in a number of jurisdictions have enacted reforms designed to either eliminate or scale back the scope of many such policies. In addition, organizations such as the American Bar Association and others have developed policy recommendations designed to implement a more rational system. We can see the direction of these changes in many areas.

In regard to felony disenfranchisement, 21 states have enacted reforms in policy and practice since 1997. These have included eliminating the ban on post-sentence

[2] Alec Ewald, "A 'Crazy Quilt' of Tiny Pieces: State and Local Administration of American Disenfranchisement Law" The Sentencing Project, 2005.

voting in Iowa, Maryland, New Mexico, and Texas, extending voting rights to persons on probation and/or parole in Connecticut and Rhode Island, and easing the rights restoration process in Florida, Virginia, and other states.

As noted above, 42 states have chosen to opt out, either in whole or in part, of the TANF/food stamp bans required by Congress. These actions by the states should be considered as an indication that such sweeping federal policies may not be viewed as desirable at a state and local level.

In the area of employment, a number of jurisdictions have taken measures to reduce the barriers posed by a criminal conviction. Under these "ban the box" measures, applicants for public employment are no longer asked if they have a criminal conviction on an initial application. If the applicant is called for an interview and is being considered for the position, the employer can then request the criminal history information. The objective of such measures is to not automatically screen out persons with a criminal history, and instead to only consider such information in the overall context of the employee's qualifications. In recent years, such measures have been adopted statewide in Minnesota and New Mexico, as well as in the cities of Boston, Minneapolis, and San Francisco.

CONCLUSION AND RECOMMENDATIONS

Congress's demonstrated commitment to the issues confronting people reentering communities after incarceration, as demonstrated through its overwhelming support and funding of the Second Chance Act passed in 2008, is commendable. The programs funded through this law will undoubtedly provide critical assistance to those facing significant obstacles, aid their rehabilitation and ultimately reduce levels of recidivism. But, unfortunately, much more remains to be done.

Each year 700,000 people leave prison and millions more leave local jails. The consequences of their criminal conviction remain present even after incarceration and hinder their reintegration. Without access to housing or financial assistance, or even food during this critical period of transition, every day can be an overwhelming challenge. People leaving incarceration need a reasonable opportunity at a successful life but collateral consequences can make this impossible, resulting in an almost inevitable rearrest or reincarceration.

Congress's commitment to successful reentry should not ignore the numerous collateral consequences confronting those with criminal convictions. In order to provide more comprehensive support for reentry, there are several areas in which areas in which Congress should take action. These include:

- Eliminate the lifetime ban on Temporary Assistance for Needy Families (TANF) and the Supplemental Nutrition Assistance Program (formerly Food Stamps) eligibility for people with drug felony convictions.
- Amend the Higher Education Act to restore Pell Grant eligibility to incarcerated people.

- Reconsider the broad discretionary power of Public Housing Authorities to deny public, Section 8, and other federally assisted housing to anyone who has had any involvement in a drug-related or violent crime, regardless of time passed since the offense.
- Create a federal standard on the use of criminal background checks for employment purposes when screening for arrest and conviction. A standard should consider the relationship between the offense and the job position, how long ago the offense occurred, the severity of the offense, and any evidence of rehabilitation.
- Restore federal voting rights to those who are no longer incarcerated and ensure accurate notification of voting rights.

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Mr. SCOTT. Thank you, Mr. Mauer.
Mr. Emsellem.

TESTIMONY OF MAURICE EMSELLEM, POLICY CO-DIRECTOR, NATIONAL EMPLOYMENT LAW PROJECT, OAKLAND, CA

Mr. EMSELLEM. Chairman Scott, Ranking Member Gohmert, Members of the Committee, thank you for this opportunity to testify in support of Federal reform of criminal background checks for employment.

Today, nearly one in three adults, almost 70 million workers, have a criminal record that can show up on a routine background check for employment. It is a devastating reality that most of us can choose to ignore, but it is a fact of life for those workers and their families who are living in constant fear of being laid off or missing out on the perfect job because of background checks, especially in today's tight labor market.

One of our clients, Mr. William Truxton, an esteemed ship clerk who has worked in the Philadelphia ports for over 10 years, was one of these Americans whose lives was turned upside down by the FBI criminal background check required of all the Nation's port workers after September 11th. When the Federal deadline hit, closing off the Philadelphia port to anyone who didn't yet clear the TSA background check, Mr. Truxton was out of work due to his FBI rap sheet.

During the 5 months that it took TSA to process his appeal where he documented that his FBI rap sheet failed to show that an old arrest never actually led to a disqualifying conviction, Mr. Truxton and his family of four children lost everything. They received an eviction notice, their car was repossessed, and they sold their furniture to help pay their bills.

Unfortunately, Mr. Truxton's case was anything but an isolated event. Every year, the FBI conducts six million criminal background checks for employment for all sorts of jobs, from cafeteria workers employed by Federal contractors probably in this building, to nursing home workers, to Federal civil service employees, to port workers and truck drivers.

However, according to the Department of Justice, almost 50 percent of the criminal records in the FBI systems are not up to date, just like Mr. Truxton's old arrest record, because the States are very good at getting the arrest record into the system, but they routinely fail to send along the final disposition of the case to the FBI. That is exactly what happened to nearly 40,000 port workers, like our client, Mr. Truxton, who successfully appealed their TSA background check determinations based on the faulty FBI records. Their appeals, which took TSA several months to resolve, resulted in a remarkable 96 percent success rate, which is proof positive that the FBI's records are in very rough shape. Unfortunately, thousands more workers fell through the cracks of the TSA background check system, unable to get the help they needed to navigate the special appeals process.

So to avoid all this needless hardship the challenge is to get the FBI rap sheet right before it is released to the employer and ends up wasting the valuable resources of government agencies that have to deal with all the fallout from the problem of the FBI

records. In fact, that is exactly what is done in the case of the Brady gun checks where an FBI unit tracks down the missing dispositions before the information is released to the gun dealers. As a result of this follow up, the FBI locates 65 percent of the missing records in just 3 days. If it works for FBI gun checks, it can also work for employment background checks.

Thanks to your leadership, Chairman Scott, that is the basic premise of H.R. 5300, The Fairness and Accuracy in Employment Background Checks Act, which you introduced last month with strong bipartisan support. H.R. 5300 takes the tested Brady gun check process and applies it to criminal background checks for employment. It is a simple measure, but it is a huge reform of the system which is paid for with the supplement to the fee that is now charged for each FBI employment background check.

In addition, the bill adopts several basic consumer protections that apply to private background check screening firms, including the right to get a copy of the record to challenge its accuracy.

Finally, I would like to highlight a key protection in the port workers screening law which we urge Congress to extend to all Federal statutes requiring criminal background checks for employment. It is a policy that allows most port workers who have a disqualifying felony offense on their record to make the case to TSA that they have been rehabilitated under the law's special waiver provision. The waiver protection has proved its weight in gold. It saved the jobs of 5,000 hardworking workers who TSA determined do not pose a terrorism security threat based on evidence of rehabilitation. In fact, at least 60 percent of those who applied for the waiver were approved by TSA. What is more, people of color were significant beneficiaries of the waiver process, given the huge impact of criminal records, especially drug offenses, on low-income communities.

Thank you again for your hard work on this critical issue.

[The prepared statement of Mr. Emsellem follows:]

PREPARED STATEMENT OF MAURICE EMSELLEM

Testimony of
Maurice Emsellem
National Employment Law Project

Before the U.S. Congress,
House of Representatives,
Judiciary Committee, Subcommittee on
Crime, Terrorism & Homeland Security

Hearing on
Collateral Consequences of Criminal Convictions:
Barriers to Reentry for Formerly Incarcerated

June 9, 2010

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Testimony of Maurice Emsellem Before the U.S. Congress,
House of Representatives, Judiciary Committee,
Subcommittee on Crime, Terrorism and Homeland Security
June 9, 2010

Chairman Scott and members of the Committee, thank you for this opportunity to testify in support of H.R. 5300, the Fairness and Accuracy in Employment Background Checks Act, and the need for federal reform to ensure more fair and accurate criminal background checks for employment.

My name is Maurice Emsellem, and I am the Policy Co-Director for the National Employment Law Project (NELP), a non-profit research and advocacy organization that specializes in the employment rights of people with criminal records. NELP's Second Chance Labor Project seeks to protect public safety and security while supporting the rehabilitative value of work and the basic employment rights of all workers, including those with a criminal record.

At this crucial juncture in the evolution of criminal background checks for employment, it is especially important that Congress properly evaluate the impact and effectiveness of current federal policy and reform outdated laws and practices.

- The critical first step toward federal reform is to improve the integrity and reliability of the FBI's criminal background checks for employment, as required by H.R. 5300.
- Congress should also promote and reward rehabilitation by adopting "waiver" protections modeled on the federal port worker program in new laws requiring criminal background checks for employment.
- The federal government should embrace the role of a model employer, setting the example for private industry and state and local governments by reducing artificial barriers to employment of people with criminal records.
- The federal government should aggressively enforce existing civil rights and consumer protection laws that regulate criminal background checks for employment.

The good news is that there are model reentry policies already in place in federal, state and local laws that can significantly reduce unnecessary barriers to employment of people with criminal records. If incorporated more broadly into federal law and policy, as described below, these innovative reforms can go a long way to create a fairer and more effective process of criminal background checks that serves the safety and security interests of employers, workers, and the community.

I. The Scope & Impact of Criminal Background Checks for Employment

Before addressing the opportunities for reform of federal criminal background check laws and policies, it helps to appreciate the vast expansion of criminal background checks of today's workers and the extent to which this new reality impacts workers and their families.

Criminal background checks for employment have increased exponentially, especially since the September 11th attacks. In 2009, the FBI performed 5.8 million fingerprint-based background checks for employment and licensing purposes, an increase of nearly one million in the past five years.[1] While the FBI criminal background checks are largely limited to public safety and security functions, 73% of private employers now also report conducting criminal background checks based on information provided by the growing industry of private background check screening firms.[2]

The vast expansion of background checks for employment has cast a wide net that is catching millions of workers, limiting their employment opportunities.

- Nearly one in three adults (31.7%) in the United States are estimated to have a criminal record on file with the states that will show up on a routine criminal background check.[3]

- A large number of people who have a criminal record that shows up on a background check have never been convicted of a crime--their record is of an arrest only. In fact, about one-third of felony arrests never lead to conviction.[4]

- Over 700,000 people are released from prison each year, looking to find work in their communities and a new way of life.[5] Three out of four individuals being released from prison have served time for non-violent offenses, including property crimes (40%) and drug offenses (37%).[6]

- African Americans account for 28.3% of all arrests in the United States, although they represent just 13% of the U.S. population.[7] According to a Minneapolis study, African Americans are 15 times more likely than whites to be arrested for low-level offenses, but less than 20% of arrests of African Americans for these offenses result in convictions.[8]

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[1] Steve Fisher, FBI, Criminal Justice Information Services Division, Office of Multimedia, Response to Information Request from Maurice Emsellem, National Employment Law Project (dated May 10, 2010).
[2] Society for Human Resources Management, "Background Checking: Conducting Criminal Background Checks" (January 22, 2010).
[3] This estimate is based on the following methodology. According to a 2008 state survey, there were 102.8 million people with criminal records on file with the states, including serious misdemeanors and felony arrests. Bureau of Justice Statistics, *Survey of State Criminal History Systems*, 2008 (October 2009), at Table 2. To account for over counting due to individuals who may have records in multiple states and other factors, and to arrive at a conservative national estimate, we reduced this figure by 30% (72 million). Thus, as a percentage of the U.S. population over the age of 18 (209 million according to the 2000 Census, which we increased by 8.3% to reflect the average population growth over the past 10 years, totaling 227 million adults), an estimated 31.7% of the U.S. adult population has a criminal record on file with the states.
[4] Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties*, 2004 (April 2008).
[5] Bureau of Justice Statistics, *Prison Inmates at Midyear, 2007* (June 2008), Appendix, Table 7.
[6] Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S., 1974-2001* (August 2005), at page 1.
[7] U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States, 2008*, at Table 43.
[8] Council on Crime and Justice, *Low Level Offenses in Minneapolis: An Analysis of Arrests and Their Outcomes* (November 2004), at page 4.

- Drug "trafficking" is the single largest category of all state felony convictions, representing 18.8% of all cases, followed by drug possession, which accounts for another 14.6% of all state felonies.[9]

- Large numbers of arrests and convictions are for especially minor crimes, primarily including drunkenness and disorderly conduct (which account for almost 10% of all arrests in the United States, or 1.32 million cases annually).[10]

Given the substantial impact of the criminal justice system on millions of Americans, it is important to understand how employers evaluate and use criminal records information. According to a major survey, over 60% of employers would "probably not" or "definitely not" consider a job applicant for employment once they become aware that the individual has a criminal record.[11] According to "employment testing" studies, workers of color with a criminal record are even less likely to even be interviewed for a job when compared with similarly situated whites.[12]

However, a growing body of research demonstrates that a prior criminal record alone is not a reliable indicator of an individual's propensity to violate the law. Recent studies show that individuals with a prior record who have no subsequent involvement with the criminal justice system over time are no more likely than anyone else to commit another crime. Specifically, those with a prior record who have not been arrested or convicted of a crime over a period of four to seven years are statistically no more likely than someone with no prior record to commit a crime.[13] This research should inform criminal background checks for employment, including the need for strict age limits on the use of prior criminal records.

Not surprisingly, an individual's track record of employment is another compelling indicator of rehabilitation, which contributes to public safety.[14] Those who have been employed even for a year or less are also far less likely to commit another crime. According to a study in Illinois that followed 1,600 individuals recently released from state prison, only 8% of those who were employed for a year committed another crime, compared to the state's 54% average recidivism rate.[15]

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[9] Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006* (December 2009), Table 1.
[10] U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States, 2008*, at Table 29.
[11] Harry Holzer, Steven Raphael, Michael Stoll, "Perceived Criminality, Criminal Background Checks and the Racial Hiring Practices of Employers," (April 2005), at page 3.
[12] Devah Pager, "The Mark of a Criminal Record" 108 *Am.J.Soc.* 937 (2003).
[13] Alfred Blumstein, Kiminori Nakamura, "'Redemption' in an Era of Widespread Criminal Background Checks," *NIJ Journal*, Issue 263 (June 2009), at page 10; (the findings depend on the nature of the prior offense and the age of the individual); Kurlychek, et al. "Scarlet Letters & Recidivism: Does An Old Criminal Record Predict Future Criminal Behavior?" (2006).
[14] Aliya Mascelall, Amanda Petteruti, Nastassia Walsh, Jason Ziedenberg, "Employment, Wages and Public Safety" (Justice Policy Institute: November 2007).
[15] American Correctional Association, 135th Congress of Correction, Presentation by Dr. Art Lurigio (Loyola University) Safer Foundation Recidivism Study (August 8, 2005).

II. The Landscape of Federal Laws Authorizing FBI Criminal Background Checks

Over twenty federal laws require or authorize FBI criminal background checks for employment purposes covering millions of workers, both in the public and private sectors. These laws cover a wide range of occupations, from nursing home workers,[16] workers who have "responsibility for the safety and security of children, the elderly or individuals with disabilities,"[17] to school employees,[18] and employees of financial institutions.[19] In addition to screening for criminal records, these federal laws often prohibit individuals with certain criminal records from being employed in various occupations.

Thousands of additional federal workers and federal contract employees are also subjected to FBI background checks (called the National Agency Check with Inquiries) based on federal personnel and homeland security mandates. The positions subject to these background checks run the gamut, from food service and janitorial workers employed in federal buildings, to Census enumerators, and professional civil service employees.[20]

Federal law also authorizes the states to obtain FBI background checks based on their state occupational and licensing laws. States often mandate screening standards for particular occupations, like school employees or nursing home workers, requiring FBI background checks to be reviewed by the state licensing agency or the employer.

After the September 11th attacks, Congress enacted criminal record prohibitions that apply to workers employed in nearly the entire transportation industry (including aviation workers, port workers and truck drivers who haul hazardous material).[21] These laws, which are specifically intended to identify terrorism security risks, incorporated strong standards regulating the severity of disqualifying offenses (limited to selected felonies in most cases) and the age of the offense (limiting most offenses to 7 years in the case of the laws regulating port workers and hazmat drivers).

Also significant, these federal protections, which are implemented by the Transportation Security Administration (TSA), have made an effort to remove disqualifying felonies that are especially broad to prevent unfair treatment and to more effectively screen for true security risks. Thus, TSA's regulations no longer disqualify workers who have certain felony convictions, include drug possession, welfare fraud and bad check writing.[22]

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[16] P.L. 105-277, Div. A., Title I, Section 101(b).
[17] 42 U.S.C. Section 5119(a)(1).
[18] H.R. 4472, Adam Walsh Child Protection & Safety Act (signed July 27, 2006).
[19] 12 U.S.C. Section 1829(a)(1).
[20] Executive Order 13488; Executive Order 10450; 5 C.F.R. Part 731; Homeland Security Presidential Directive (HSPD) 12.- Policy for a Common Identification Standard for Federal Employees and Contractors (2004).
[21] USA Patriot Act of 2001, 49 U.S.C. Section 5103a (hazmat drivers); Aviation and Transportation Security Act of 2001, 40 U.S.C. Section 44936 (unescorted access to airport security areas); Maritime Transportation Security Act of 2002, 46 U.S.C. Section 70105 (secured areas of ports).
[22] 72 Fed. Reg. 3600 (January 25, 2007).

Especially important, the laws regulating port workers and hazmat drivers also include a "waiver" procedure allowing those workers who do have a disqualifying offense to petition to remove the disqualification based on evidence of rehabilitation and their employment record. In addition, the federal law includes an "appeal" procedure that applies when workers have identified an error or critical missing information in criminal records generated by the FBI.

Nothing in the federal laws that authorize criminal background checks requires that the employer only consider offenses that are "job related," which is the standard established by Equal Employment Opportunity Commission (EEOC) guidances interpreting Title VII of the Civil Rights Act of 1964, as applied to criminal background checks for employment.[23] This omission is significant since the federal laws requiring checks often apply to occupations that employ especially large numbers of minority workers who are protected by Title VII because of the demonstrated "disparate impact" of criminal background checks.

III. The Critical Significance of the Model Port Worker Protections

The recent experience with the waiver and appeal procedures in the federal port worker criminal background check program provide a powerful illustration of the effectiveness of these critical worker protections.

From late 2007 to April 2010, TSA screened the FBI records of about 1.6 million port workers pursuant to the Maritime Transportation Security Act of 2002. During that time, at least 60% of the employee petitions to "waive" their disqualifying felony offense based on evidence of rehabilitation were granted by TSA.[24] Were it not for this TSA waiver procedure authorized by the federal maritime law, nearly 5,000 workers would have lost their jobs and been out on the streets, unable to support their families in the midst of the worst jobs downturn since the Great Depression.

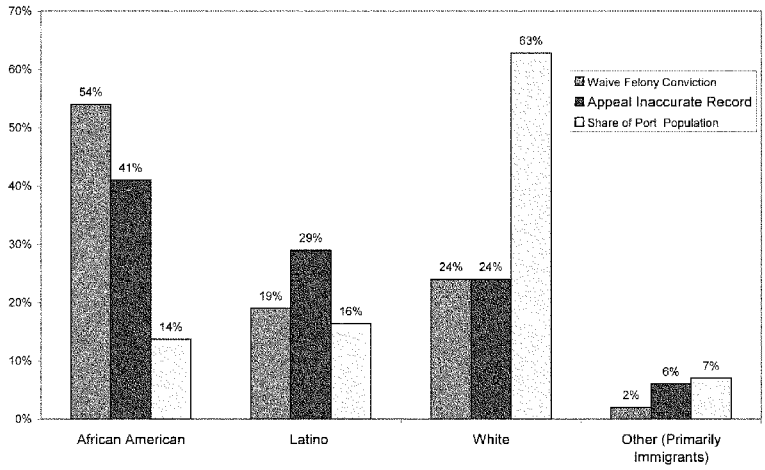
Moreover, a remarkable 96% of "appeals" filed by workers successfully challenged the accuracy of their FBI criminal records, thus overturning the initial TSA determinations denying their security clearance to work at the ports. In other words, nearly every case (about 40,000 in all) where the workers alleged that there was a problem with the criminal record produced by the FBI – mostly reflecting the failure of the FBI record to indicate that an arrest never actually led to a disqualifying conviction - TSA agreed with the worker that the FBI records were inaccurate. Unfortunately, due to the challenge of tracking down court records and other required documentation, large numbers of workers failed to appeal their cases to TSA.

Significantly, workers of color were major beneficiaries of the federal port worker protections, according to data collected by NELP on 500 workers we represented through

[23] U.S. Equal Employment Opportunity Commission, *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964* (February 4, 1987).
[24] Department of Homeland Security, TWIC Dashboard (May 20, 2010).

the waiver and appeal process.[25] As the graphic below illustrates, African Americans appealed the accuracy of the FBI criminal records three times more than their share of the port worker population (41% compared to 14%). In addition, over half of the petitions to waive a disqualifying record were filed by African Americans, which is nearly four times their share of the port worker population.

TWIC's Criminal Record Waiver and Appeals Protections Significantly Benefit Workers of Color



Thus, the federal worker protections proved to be the lifeline to employment for tens of thousands of the nation's port workers, especially workers of color. Those federal policies are also paramount to the goals of the reentry movement to reduce recidivism by removing unnecessary barriers to employment of people with criminal records.

IV. The Major Limitations of FBI Rap Sheets Produced for Employment Screening Purposes

While never originally designed to screen workers for employment, the FBI's rap sheets are now the major gateway to employment for millions of workers employed in a range of industries and occupations. Despite the growing role that FBI rap sheets play in criminal background checks for employment, there has been very limited scrutiny of this critical function performed by the FBI.

[25] National Employment Law Project, *A Scorecard on the Post-9/11 Port Worker Background Checks* (July 2009).

A. Incomplete FBI Rap Sheets Undermine the Integrity of the Background Check Process

By far, the most prejudicial flaw of the FBI rap sheets produced for employment purposes is the extent to which the state information reported is out-of-date or incomplete, thus undermining the integrity of the criminal background check process.

According to the 2006 report by the U.S. Attorney General, the FBI's rap sheets are "still missing final disposition information for approximately 50% of its records."[26] As of last year, the rate remained at 48%. This more recent figure does not take into account some reduction in incomplete records based on a small number of states that participate in a program that allows the FBI to send the state's rap sheet directly to the requesting entity in response to a criminal record inquiry.

The omissions on FBI rap sheets primarily reflect arrest information that is reported after an individual has been fingerprinted, but is never updated electronically by the state to reflect final disposition. In about half the states, at least 30% of the arrests in the past five years have no final disposition recorded, which means that the FBI's records are similarly incomplete.[27]

This serious reporting gap exists despite federal regulations intended to ensure that the records produced by the FBI are accurate and up-to-date. Specifically, the regulations state that "[d]ispositions should be submitted by criminal justice agencies within 120 days after the disposition has occurred."[28] More generally, the FBI's regulations also require that the "information on individuals is kept complete, accurate and current so that all such records shall contain to the maximum extent feasible disposition of all arrests data included therein."

Unfortunately, given the gaps in reporting, workers who have never been convicted of a crime or have charges that have been dismissed are seriously prejudiced by arrest information that continues to be reported on the FBI rap sheet. When this information is reported to employers, it undermines the laws of a number of states that prohibit employers from taking into consideration an individual's arrest record absent a conviction.

It also conflicts with the EEOC's policy regulating criminal background checks for employment, potentially leading to violations of Title VII. Citing the discriminatory impact of arrest information on African Americans and Latinos, the EEOC stated "[s]ince using arrests as a disqualifying criteria can only be justified where it appears that the applicant actually engaged in the conduct for which he/she was arrested and that conduct is job

[26] U.S. Attorney General, *The Attorney General's Report on Criminal Background Checks* (June 2006), at page 3.
[27] Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2008* (October 2009), at Table 1.
[28] 28 C.F.R. Section 20.37.

related, the Commission further concludes that an employer will seldom be able to justify making broad general inquiries about an employee's or applicant's arrest."[29]

In significant contrast to the FBI rap sheets produced for employment purposes, the FBI rap sheets produced for federal gun checks are far less incomplete. In the case of Brady gun checks, 65% of the missing dispositions from the state are tracked down by the FBI within three days.[30] If more targeted federal resources are devoted to rap sheets produced for employment purposes, there is no apparent reason why similar results could not be produced.

B. FBI's Proposed Regulation to Report "Nonserious" Offenses

Seriously compounding the problem of old arrests reported on FBI rap sheets, the FBI has proposed regulations overturning more than 30 years of policy that would allow "nonserious" offenses to also be reported on the FBI's rap sheets for employment purposes.[31] According to the FBI, these proposed regulations are scheduled to be finalized in three months, by August 2010.[32]

Nonserious offenses include juvenile arrests and convictions and many adult arrests and convictions, including anything from vagrancy, to drunkenness to many traffic violations. Under the proposed regulations, every time an individual is fingerprinted, an event that is happening far more often even in the case of juvenile arrests, the record would likely be reported on the FBI rap sheet. The current regulation (28 C.F.R. Section 20.32(b)) was the product of a 1976 lawsuit that found the FBI failed to adequately remove nonserious offenses from the rap sheets produced for non-criminal justice purposes.[33]

The only justification provided for the FBI's decision to reverse 30 years of policy was the following statement: "the FBI believes that this rule provides substantial, but difficult to quantify, benefits by enhancing the reliability of background checks for non-criminal justice employment purposes. . . . "[34] While the current regulations limit FBI rap sheets for non-criminal justice purposes to "serious and/or significant adult juvenile offenses," the state records now submitted to the FBI routinely include non-serious offenses.

We believe the FBI's proposed regulation is seriously misguided. Of special concern, large numbers of workers will, for the first time, have a record appear on their FBI rap sheet based solely on a non-serious offense, which is unwarranted given the limited safety and security threat posed by these offenses. Although estimates of the proposal's impact were conspicuously not included in the proposed regulation, when the FBI implemented its policy

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[29] U.S. Equal Employment Opportunity Commission, *Policy Statement on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, EEOC Compliance Manual (Sept. 7, 1990).
[30] *The Attorney General's Report on Criminal Background Checks*, at page 108.
[31] 71 Fed. Reg. 52302 (dated September 5, 2006).
[32] Department of Justice, Unified Regulatory Agenda (RIN 1110-AA25) (April 26, 2010).
[33] *Tarlton v. Saxbe*, 407 F.Supp. 1083 (D.D.C. 1976).
[34] 71 Fed.Reg. at 52304.

excluding nonserious offenses in the 1970s, it resulted in a 33% decrease in the total number of fingerprint cards retained by the FBI.

In addition, the FBI's proposal represents a radical departure from the state policies protecting the privacy of juvenile records for non-criminal justice purposes and promoting rehabilitation. In 2006, there were more 1.6 million arrests of people younger than 18 years old, mostly for property and other less serious offenses.[35] Meanwhile, most studies indicate that only one-third of youthful offenders ever commit a second offense.[36]

To keep these sensitive juvenile records confidential and promote rehabilitation, almost all states authorize certain juvenile records to be expunged and sealed. However, the records can still be listed in the state record systems (and then reported to the FBI) unless and until the young person successfully petitions the courts to have them removed by the state.[37] Most states never seriously contemplate that an individual's minor juvenile offense, including mere arrests, will make its way onto the FBI's rap sheets and create a devastating stigma that will follow the individual for life, from job to job and from state to state.

The FBI's policy will also seriously undermine the civil rights of people of color, who are more likely to be arrested for many nonserious crimes. For example, while African Americans represent about 13% of the population and 28% of all those arrested in the U.S., they account for about one-third of all those arrested for disorderly conduct, vagrancy and juvenile offenses.[38]

In a letter dated March 23, 2007, Chairman Scott and Congresswoman Maxine Waters wrote the Attorney General to express serious reservations about the proposed policy reversal. "Because of the extremely prejudicial impact that this proposed policy would have on the employment prospects of people with especially minor criminal histories, many of whom were never convicted of a crime," Mr. Scott and Ms. Waters requested the Attorney General to "delay issuance of this proposed regulation in order to allow Congressional oversight on this issue."

Given the absence of compelling evidence supporting the reliability or probative value of nonserious offenses, we urge the Committee to pursue the issue with the FBI, while also evaluating whether the FBI is actively enforcing the current regulations.

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[35] Christopher Hartney, Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the U.S. Criminal System* (National Council on Crime and Delinquency: March 2009), at page 30.
[36] Bureau of Justice Statistics, *Privacy and Juvenile Justice Records: A Mid-Decade Status Report* (May 1997), at page 4.
[37] Indeed, even in federal court proceedings involving juveniles, where the juvenile is required to be fingerprinted, the federal law the proceedings cannot be share for any employment purpose "except for a position immediately and directly affecting the national security." (18 U.S.C. Section 5038(a)(5)).
[38] U.S. Department of Justice, *Federal Bureau of Investigation, Crime in the United States, 2008*, at Table 43.

V. Federal Reform Agenda to Reduce Criminal Records Barriers to Employment

A. Enact the Fairness & Accuracy in Employment Background Checks Act

Thanks to the leadership of Chairman Scott, critical legislation to address the major limitations of the FBI's criminal records was re-introduced last month with bi-partisan support. We urge Congress to promptly enact the Fairness and Accuracy in Employment Background Checks Act (H.R. 5300), a measure that will greatly assist job applicants, employers, and government agencies that conduct background checks.

Just as the FBI tracks down incomplete arrest information when conducting Brady background checks required for the purchase of firearms, H.R. 5300 will require the FBI to update old and incomplete arrest information before it is released for employment screening purposes. The bill authorizes the FBI to collect a reasonable fee to fund this activity. And similar to the consumer protections that apply to private screening firms by the Fair Credit Reporting Act (FCRA),[39] the bill requires that workers subjected to the FBI's criminal background checks be provided with basic rights, including access to their criminal history records.

- Incomplete FBI records unfairly and unreasonably impede workers' access to jobs. Workers subjected to FBI background checks are routinely denied employment or the security clearance they need for their jobs due to incomplete information on their FBI rap sheets. Even for those workers who have the skills to navigate the process, correcting these errors can take weeks if not months, causing serious financial hardship to working families who must go to great lengths to track down missing information and then wait for that information to be processed.

- Incomplete FBI records disadvantage businesses that rely on ready access to qualified workers. In order to maintain an efficient and safe workforce, employers need to be given prompt, accurate and reliable information to evaluate prospective employees. When employers are forced to rely on outdated criminal history information that does not provide an accurate picture of a worker, they lose out on otherwise qualified workers of their choice or get bogged down in protracted delays that undermine the hiring process.

- Incomplete FBI records undermine security and cost the government valuable time and money. Especially since 9/11, government background checks have grown in many large industries, including most of the transportation sector as well as government jobs and large contractors doing work for the public sector. When government agencies conducting background checks rely solely on the FBI rap sheet to perform security threat assessments, it results in a grossly inefficient process where applicants are routinely denied jobs because of arrests that never resulted in conviction and that would not disqualify the worker from employment.

[39] 15 U.S.C. Section 1861 et seq.

Government employees then spend countless hours reviewing appeals and approving applicants who never should have been denied in the first place, if the records were kept up-to-date. For example, the TSA has granted 96% of the nearly 40,000 appeals submitted by port workers that are based on inaccurate FBI background checks required to work at any of the nation's ports. However, it took TSA several months to generate initial denial letters based on the FBI rap sheet, and then to process appeals from eligible workers.

The Fairness and Accuracy in Employment Background Checks Act takes simple, important steps to significantly improve the reliability of FBI rap sheets produced for employment or occupational licensing purposes, while creating basic consumer protections that ensure workers are guarded against potential abuses associated with the FBI's criminal background checks:

- Similar to the practice of the FBI in reviewing an individual's criminal record to purchase firearms, the FBI would be required to locate missing disposition information, to the maximum extent possible within ten days, before releasing the rap sheet for employment screening purposes. The FBI has been able to track down 65% of the missing information within three days for federal gun checks under the Brady Act.

- As required by the federal law regulating private security background checks, arrests older than one year that do not include a disposition will not be reported on an FBI rap sheet for employment purposes unless the FBI can verify that the case is still being actively prosecuted.

- The bill codifies the FBI regulations that have been in place since the 1970s providing that "nonserious" juvenile and adult offenses should not be reported on FBI rap sheets, to the extent that the rap sheets are prepared for employment screening purposes.

- Individuals subject to an employment criminal background check will have the right to receive a copy of their rap sheet, thus providing the individual with an opportunity to verify and challenge the accuracy of the information.

- The bill provides fair and timely procedures for workers to challenge inaccurate FBI records, requiring an investigation of federal, state and local criminal records.

- For those criminal records found to be incomplete by the FBI or a worker challenge, the FBI will update its records and notify the local authorities of the corrected information.

- The bill directs the Attorney General to inventory the employment restrictions based on criminal records required by federal law and policy.

- The bill authorizes the FBI to charge a reasonable fee to pay for the activities necessary to investigate and update incomplete criminal records produced for employment screening purposes.

As the *New York Times* stated in its editorial endorsing H.R. 5300, "no one should be denied a job because the government's information is wrong."[40] Now, with many more workers struggling to get back to work given the record rates of unemployment, it's especially important to reform the FBI's system of criminal background checks to give all qualified workers the chance they deserve to work and contribute to their communities.

B. Promote and Reward Rehabilitation by Adopting Federal Waiver Protections

Most federal laws that require FBI criminal background checks for employment fail to provide for any basic worker protections, thus preventing deserving workers from showing that they have been rehabilitated and moved on with their lives despite their prior record. In contrast, the latest research shows that work reduces recidivism and once a worker has stayed clear of the criminal justice system -- even for just a few years -- he is no more likely to commit a crime than those who have never been in trouble with the law.

To successfully promote and reward rehabilitation, federal occupational screening laws should adopt the basic protections that have applied to over 1.6 million port workers screened for a criminal record by TSA. The Maritime Transportation Security Act's waiver procedure was a lifeline in preserving the jobs of thousands of port workers with a criminal record, especially workers of color. Indeed, TSA granted at least 60% of all waiver applications, which is proof that the system gives workers with a criminal record the real chance they need to establish they are indeed qualified for the job.

C. The Federal Government Should Embrace the Role of a Model Employer

The federal government's hiring policies regulating criminal background checks and the requirements that apply to federal contracts for services should be fundamentally reformed. As Mayor Richard Daley explained when announcing Chicago's model hiring policies in 2004, "We cannot ask private employers to consider hiring former prisoners unless the City practices what it preaches."

By appropriate regulatory means, all federal employee and contractor hiring should expressly incorporate the EEOC's Title VII standards regulating criminal background checks and other basic worker protections. This would prohibit blanket policies that preclude all employment of people with criminal records. Instead, the EEOC requires a clear and reasonable connection between the specific job at issue and the specific criminal record.

In addition, the federal government should follow the lead of several states that have recently removed the criminal history question from their applications for public employment, and delayed the inquiry into an individual's criminal record until the end of the

[40] Editorial, *New York Times* "Check It Again" (May 27, 2010).

hiring process. This hiring innovation, which has also been adopted by 21 cities and counties around the nation, helps level the playing field for workers with a criminal record without in any way compromising safety and security on the job.[41]

Finally, all federal agencies not subject to other hiring restrictions (such as law enforcement or defense department security requirements) should document and post their policies and procedures regulating criminal background checks on the web to ensure far more accountability and transparency when workers who have overcome past mistakes now seek productive government employment.

D. The Federal Government Should Aggressively Enforce Civil Rights & Consumer Protections

If aggressively enforced, current federal laws (including Title VII of the Civil Rights Act and the Fair Credit Reporting Act) would significantly improve the fairness and accuracy of criminal background checks for employment, both in the private and public sector.

In recent years, the EEOC has more actively promoted its guidelines regulating employment of people with criminal records to avoid the racially discriminatory effect of blanket bans on employment. The time has come to update and revise the EEOC's standards, which now date back 20 years, and aggressively enforce them through employer education and litigation.

The Federal Trade Commission's Consumer Protection Division also recently settled litigation against private screening firms that violated key features of the federal consumer protection laws. Under new leadership, the FTC is also well positioned to challenge the routine abuses of federal law requiring fair and accurate criminal background checks by private screening firms.

* * *

Thank you again for the opportunity to testify on this critical issue of concern to millions of hard-working families and their communities. We look forward to working with the Subcommittee to help develop more fair and effective federal criminal background check policies that promote and protect public safety.

[41] National Employment Law Project, "New State Initiatives Adopt Model Hiring Policies Reducing Barriers to Employment of People with Criminal Records" (May 2010); National Employment Law Project, "Major U.S. Cities and Counties Adopt Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records (Updated February 16, 2010).

Mr. SCOTT. Thank you.
Mr. Moore.

TESTIMONY OF CALVIN MOORE, D.C. EMPLOYMENT JUSTICE CENTER, WASHINGTON, DC

Mr. MOORE. Good morning, everyone. I would like to thank you for this golden opportunity to testify today about the collateral consequences of my criminal convictions.

My name is Calvin Moore, and I would like to share my story about how my criminal record has been a barrier to rebuilding my life and finding meaningful employment. I am 59 years old. I grew up in the District of Columbia in the 1950's and 1960's. The district was a very different place than it is today. I lived in a primarily segregated neighborhood near the Navy Yard, where racism and racial profiling were rampant and there weren't a lot of opportunities for young people.

I was part of a tough neighborhood crowd; and, unfortunately, I got into some trouble with the law. I had made some bad decisions because of my immaturity, but I paid for them. I was eventually convicted to serve a 10-year sentence, 3-and-a-half years in prison and the remaining 6-and-a-half years on parole.

During my incarceration, I prepared myself for release. I took college courses. I got my high school diploma. I got married. I am still married. I was released; and, when I was, it was still very difficult. I didn't have a strong support system and not a lot of opportunities.

Unfortunately, I got into some more trouble, trying to medicate the problem with drugs. In the 1980's, I also found myself face to face again with the criminal system. So since that time, though, however, I have been working to rebuild my life and start all over. I have been totally clean. I also obtained my commercial driver's license, and I have not had any problems with the law. I found various jobs, some with private companies, laying asphalt and also a position as a professional driver with D.C. government.

These jobs, however, took its toll on my health and didn't pay well and didn't provide much benefits. So over the years I also started developing serious health problems and injuries from my previous two jobs which prevented me from working full time. I am currently receiving SSDI; and since October, 2007, I have been out of work, diligently looking for jobs, any job to help my pay my bills and make ends meet.

When the recession hit, finding long-term employment became that much harder. I also applied for probably over 42 jobs but was turned down by all of them, and the reason was that my criminal record prevented me from being hired. In short, the decisions that I made 30 plus years ago and that I have already paid for are still preventing me from moving forward and getting a second chance.

However, I went to the D.C. Employment Justice Center last year about the possibility of sealing my criminal record in the District's 2006 expungement and sealing law so that I could have a better chance of finding a job with decent wages. But, unfortunately, again, because the law is so narrowly drafted, I was not able to seal any part of my record. So my criminal record will, I

would imagine, be a continued impediment for me, even though I am a different person than I was back then.

I want to be able to help others who are also in similar situations. I recently joined the Workers Advocacy Group as part of the Employment Justice Center so that I can advocate for changes in the law and help improve the barriers for people who have criminal records.

There is some good news. I recently was put in contact with Catholic Charities, and I am in the process of returning to school to become a certified addiction counselor. I am also hoping that after I become certified it won't be as difficult to find a job where I can help others with addiction problems.

So I am taking this time again to thank you all for this golden opportunity to share my story about the barriers that many individuals such as myself face with criminal records when they try to rebuild their lives after their convictions. I am happy to answer any questions. I am open for that. And I thank you very much.

[The prepared statement of Mr. Moore follows:]

PREPARED STATEMENT OF CALVIN MOORE

Testimony of Calvin Moore
Wednesday, June 9, 2010

Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
Hearing on Collateral Consequences of Criminal Convictions
Barriers to Reentry for the Formerly Incarcerated

Good morning. Thank you for the opportunity to testify today about the collateral consequences of criminal convictions. My name is Calvin Moore, and I would like to share my story about how my criminal record has been a barrier to rebuilding my life and finding meaningful employment.

I am 59 years old, and grew up in the District of Columbia in the 1950's and 1960s. The District was a very different place than it is today. I lived in a primarily segregated neighborhood near the Navy Yard where racism and racial profiling were rampant and there weren't a lot of opportunities for young people. I was part of a pretty tough neighborhood crowd and, unfortunately, got into some trouble with the law. I was young and made some bad decisions. But I paid for them. I was convicted and served a 10 year sentence: 3 ½ years in prison, and the remaining 6 ½ years on parole. While incarcerated, I tried to start over. I took college courses, and I got married. When I was released, it was very difficult. I didn't have a strong support system and I didn't have a lot of opportunities. Unfortunately, I got into some problems with drugs. In the late 1980s, I again found myself face-to-face with the criminal system.

Since this time, however, I have been working to rebuild my life and start over. I have been totally clean, and have not had any problems with the law. I found various jobs, some with private companies laying asphalt and performing other manual labor, and even a position with the DC government as a professional driver. These jobs, however, did not pay well and did not provide any benefits, such as health care or sick leave. Over the years, I also started developing some serious health problems from my previous jobs which prevented me from working full-time. I am currently receiving SSDI.

Since October 2007, I have been out of work, diligently looking for any job to help me pay the bills and make ends meet. When the recession hit, finding long-term employment became that much harder. I applied for over 42 jobs, but was turned down by all of them. The reason was that my criminal record prevented me from being hired. In short, the decisions that I made 30 plus years ago – and that I have already paid for – are still preventing me from moving forward and getting a second chance.

I went to the D.C. Employment Justice Center last year about the possibility of sealing my criminal record under the District's 2006 Expungement and Sealing law so that I could have a better chance at finding a job with decent wages. Unfortunately, because the law is so narrowly drafted, I was not able to seal any part of my record. My criminal record will forever be an impediment for me, even though I am a different person today than I was back then. I want to be able to help others who are also in similar situations as myself. I recently joined a workers' advocacy group as part of the Employment Justice Center so I can advocate for changes in the law and help remove barriers for people who have criminal records.

There is some good news. I recently met with Catholic Charities and am in the process of returning to school to become a Certified Addiction Counselor. I am hoping that after I become certified, I will be able to find another job and help others with addiction problems.

Thank you again for the opportunity to share my story about the barriers that many individuals with criminal records face when they try to rebuild their lives after their convictions. I am happy to answer any questions that you may have.

Mr. SCOTT. Thank you, Mr. Moore.
Mr. Lewis.

TESTIMONY OF RICHARD A. LEWIS,
FELLOW ICF INTERNATIONAL, FAIRFAX, VA

Mr. LEWIS. Good morning, Mr. Chairman, Judge Gohmert, and Members of the Subcommittee.

On behalf ICF International, I thank you for this opportunity to appear before you today to discuss this very important issue of reducing barriers to reentry and to discuss collateral consequences of criminal convictions and how it is we can overcome those multiple barriers to reintegration. We appreciate your passion and your compassion about this very important issue.

I want to speak briefly about the problem of prisoner reentry, how we overcome some of those barriers to successful reintegration, and make some recommendations to reduce some of these collateral consequences that my colleagues have talked about. And thank you, Mr. Moore, for your personal testimony of how this has impacted you and your life and your family.

As the millennium advances, American corrections is in crisis. Many of our communities are in crisis. And perhaps one of the most pervasive issues that folks are facing right now and that corrections is facing is record numbers of folks returning home without adequate supervision. We are very concerned about that, and that is what is really feeding the cycle of reentry that we see.

Currently, there is about 1.6 million folks in prison and about 5.1 million adults that are returning home to communities each year. The real question becomes how do we overcome some of these barriers? Because we know that the research indicates that increasing numbers of folks are returning home without any supervision whatsoever. Prisoners are returning having spent longer periods behind bars with inadequate supervision upon returning home and inadequate assistance in their reintegration as a whole.

While formidable, the prisoner reentry challenges provide an opportunity to really think about how is it that we balance this need to increase public safety and at the same time reduce barriers to successful reintegration. We know that prisoners returning home have a lot of difficulty reconnecting, first and foremost, with their families, reconnecting with their housing, and reconnecting with their jobs. Those are the three pillars that we focus on in our work at ICF and my prior work with prison fellowship.

Unfortunately, this problem disproportionately affects African American males who predominantly live in poor, urban environments which are already plagued by profound social and economic consequences.

Moreover, as you all know, criminal conviction carries profound social and economic consequences in the areas including getting access to housing, and particularly public housing; and getting access to gainful employment, as Mr. Conyers mentioned earlier today; getting access to higher education, as Mr. Mauer mentioned earlier; and getting access to welfare benefits; and, of course, voting.

Our major concern is that these collateral consequences really are having a profound affect upon folks' ability to reconnect with their children and families. Over the past couple of decades, the number of children impacted by incarceration has increased exponentially. Parental incarceration has increased, and there is now some 809,000 prisoners out there out of the 1.5 million that we

know have children, and about 1.7 million minor children who are impacted by incarceration. And, unfortunately, the plight of children affected by parental incarceration, they are viewed as collateral damage; and we need to think very carefully about how it is that we can help fathers in particular who are returning from prison to reconnect with their families and overcome some of the multiple barriers so that the children are not essentially victimized by incarceration.

Focusing on housing and homelessness, one of the issues that we have observed in the work that we have done is that we need to think strategically about how to get ex-prisoners access to affordable housing, how it is that we can reduce the problem of homelessness among ex-offenders. We recommend that policymakers support promising prisoner reentry programming, some of the faith-based programming that we have seen that can provide access to affordable housing and public housing and reduce the problem of homelessness among ex-offenders and among prisoner's children.

In the era of education and employment, we recommend that policymakers think strategically about how to refrain from policies that prevent folks from getting access to student loans to pursue higher education and welfare benefits and other income supports that we know returning prisoners need to support their families.

In addition, we recommend that policymakers consider very carefully some of the promising programs we are seeing in the area of substance abuse. As mentioned earlier, folks have to have access to substance abuse treatment if they are going to be successful upon reentry; and we believe that that is one of the major issues that is impacting the reentry problem.

Finally, there is a real issue of physical health and mental illness. A lot of folks who are returning from prison have a disproportionate number of physical ailments and also mental illness. We need to think strategically about how to get these folks access to health care and mental health treatment if we are going to have an impact on incarceration.

In conclusion, we know that there is a growing body of evidence that confirms that a felony conviction potentially leads to a lifetime of consequences, including barriers to housing, education and employment, income supports, health care, and even voting; and we recommend that we provide regional relief from the collateral consequences of criminal convictions.

Thank you for your time. This completes my formal statement, and I will be glad to answer any questions you may have.

[The prepared statement of Mr. Lewis follows:]

PREPARED STATEMENT OF RICHARD A. LEWIS

Statement of Richard A. Lewis
Fellow, ICF International
Before the Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
Congress of the United States
House of Representatives

Date TBD

Introduction

Good Morning Mr. Chairman and the Members of the Committee. On behalf of ICF International, thank you for the opportunity to appear before you today to discuss *Reducing Collateral Consequences of Criminal Convictions: Overcoming Barriers to Reentry for the Formerly Incarcerated.* For more than 20 years, I have managed programs and conducted research in criminal justice. Currently, I serve as a fellow for ICF International. ICF, a global professional services firm, partners with government and commercial clients to deliver consulting services and technology solutions in energy and climate change; environment and infrastructure; health, human services, and social programs; and homeland security and defense markets. Prior to joining ICF, I served as the director of research for Prison Fellowship, as a senior researcher for the National Council on Crime and Delinquency, and as a social science analyst for the U.S. Department of Justice, National Institute of Justice. The following statement briefly discusses the prisoner reentry problem, overcoming barriers to successful reintegration, and recommendations to reduce collateral consequences of criminal convictions.

The Prisoner Reentry Problem

As the new millennium advances, American corrections and many communities are in crisis. Perhaps the most pervasive problem challenging modern corrections is the ominous nexus of overburdened prison systems and record numbers of ex-prisoners returning to communities each year. Today, the correctional population includes more than 1.6 million prisoners held in federal and state corrections facilities at the end of 2008—one in every 198 U.S. residents.[1] Recent research results from the National Reentry Resource Center show that at least 95 percent of state prisoners will be released back to their communities at some point.[2] Other results show that more than 735,000 individuals were released from state and federal prisons in 2008, an increase of 20 percent from 2000.[3] Still other results show that approximately 9 million individuals are released from jail each year.[4] In addition, research results show that more than 5 million individuals were on probation or parole at the end of 2008.[5] Moreover, an estimated two-thirds of released state prisoners are re-arrested and more than half returned to prison within three years of their release.[6] In 2008, parole violators accounted for 34.2 percent of all prison admissions, 36.2 percent of state admissions, and 8.2 percent of federal admissions.[7] Finally, a quarter of adults exiting parole in 2008 returned to prison as a result of violating their terms of supervision, and 9 percent of adults exiting parole returned to prison as a result of a new conviction.[8]

America's incarceration binge—partly attributed to unprecedented crime rates during the 1980s—is the driving force behind the prisoner reentry, rearrest, and reincarceration conundrum and collateral consequences of criminal convictions. More than two decades of "get tough" sentencing reforms including mandatory minimums, truth-in-sentencing, and the abolition of parole have resulted in over 1.6 million prisoners at yearend 2008.[9] The correctional population also includes nearly 5.1 million adults under community supervision at yearend 2008—the equivalent of about 1 in every 45 adults in the United States.[10] Today, the total Federal and State adult correctional population, including those incarcerated and those supervised in the community is an estimated 6.7 million.

While the U.S. prison population, imprisonment rate, and new court commitments has declined in recent years, research findings reveal a trend toward more than 800,000 parolees returning from prison to home annually.[11] Other research findings indicate an increased number of offenders released to the community without supervision.[12] Still other findings suggest that record numbers of prisoners are returning home having spent longer terms behind bars with inadequate assistance in their reintegration.[13] [14] [15]

Overcoming Barriers to Successful Reintegration

While formidable, the prisoner reentry problem provides an opportunity to think more broadly about balancing the need to increase public safety and reduce barriers to successful reintegration. Research results show that most returning prisoners have difficulties reconnecting with families, housing, and jobs.[16] Other results show that many ex-prisoners remain plagued by substance abuse, health, and mental health problems.[17] Still other research findings show that the aforementioned cycle of imprisonment among large numbers of individuals, mostly minority men, is increasingly concentrated in poor, urban communities that already encounter enormous social and economic disadvantages.[18] [19]Moreover, criminal conviction carries profound social and economic consequences that oftentimes impede the ability of the formerly incarcerated to overcome multiple barriers to successful reintegration. In general, collateral consequences of criminal conviction include laws and policies to restrict persons with a felony conviction from access to public housing, employment, eligibility for student loans for higher education, receipt of welfare benefits, and voting. Specifically, these unintended consequences increasingly contribute to the prisoner reentry conundrum via weakened ties among children and families, limited access to affordable housing and homelessness, lack of education and high rates of unemployment, substance abuse, and physical health or mental illness challenges.[20]

Children and Families

Over the past two decades, the number of children and families impacted by parental incarceration has increased exponentially. An estimated 809,800 prisoners of the 1,518,535 held in the nation's prisons at midyear 2007 were parents of children under age 18.[21] Parents held in the nation's prisons (52 percent of state inmates and 63 percent of federal inmates) reported having an estimated 1,706,600 minor children, accounting for 2.3 percent of the U.S. resident population under age 18—and many more children have experienced a father or mother in jail. Since 1991, the number of children with a mother in prison has more than doubled, up 131 percent and the number of children with a father in prison has grown by 77 percent.[22] Twenty-two percent of the children of state inmates and 16 percent of the children of federal inmates were age 4 or younger. For both state (53 percent) and federal (50 percent) inmates, about half their children were age 9 or younger.[23]

The plight of children impacted by parental incarceration is oftentimes viewed as collateral damage—harm that is unintended or incidental to the intended outcome. Research results show that when a parent is incarcerated, the lives of their children are disrupted by separation from parents, severance from siblings, and displacement to different caregivers. Other results show that children with a parent behind bars are more likely to endure poverty, parental substance abuse, and poor academic performance. Still other results show that these children are more likely to suffer aggression, anxiety, and depression. Moreover, the children of prisoners are at greater risk for alcohol and drug abuse, a variety of problem behaviors including delinquency and crime, and subsequent incarceration at some point in their lives.[24] These stark factors represent enormous, and more often than not, insurmountable barriers for the children and families of ex-prisoners to overcome. Furthermore, the economic and social costs of parental incarceration continue to escalate in an economic climate of increasing demand for services and declining resources. Thus, criminal justice policymakers must support promising prisoner reentry programs and refrain from practices likely to weaken ties among children and families—and to produce collateral civilian damage that is excessive relative to the public safety advantages.

Housing and Homelessness

While access to affordable housing has long been a barrier to prisoner reentry, jurisdictions across the country are increasingly enacting laws and policies to restrict persons with a felony conviction (particularly convictions for drug offenses) from access to public housing. An unintended consequence of these practices is an exacerbated housing and homelessness crisis among formerly incarcerated persons. Recent research shows that more than 10 percent of those entering prisons and jails are homeless in the months prior to their incarceration. Other results show that for those with mental illness, the rates of homelessness are significantly higher (about 20 percent). Still other results show that released prisoners with a history of shelter use were almost five times more likely to have a post-release shelter stay.[25] Finally, results of a Vera Institute of Justice study show that people released from prison and jail to parole that entered homeless shelters in New York City were seven times more likely to abscond during the first month after release than those who had some form of housing.[26] Thus, housing policymakers must support promising prisoner reentry programs and refrain from practices likely to limit access to public housing and increase homelessness—and to produce collateral damage that is excessive relative to the affordable housing advantages.

Education and Employment

Among the most pervasive problems facing formerly incarcerated individuals is the ominous nexus of a lack of education, limited job skills, low levels of viable work experience, and high rates of unemployment. Research results show that two in five prison and jail inmates lack a high school diploma or its equivalent.[27] Other results show that employment rates and earnings histories of people in prisons and jails are often low before incarceration as a result of limited education experiences, low skill levels, and the prevalence of physical and mental health problems. Still other results show that incarceration exacerbates barriers to self-sufficiency and less than half of released prisoners secure a job upon their return to the community.[28]
[29]Jurisdictions across the country, however, are increasingly enacting laws and policies to restrict persons with a felony conviction from access to higher education and gainful employment. Policymakers must support promising prisoner reentry programs and refrain from practices likely to limit eligibility for student loans, participation in employment and training programs, and

receipt of income supports including welfare benefits—and to produce collateral civilian damage that is excessive relative to the self-sufficiency advantages.

Substance Abuse

The formerly incarcerated face multiple barriers to successful reentry and self-sufficiency. Substance abuse, however, is perhaps the most prevalent obstacle for ex-prisoners to overcome. Research results show that three quarters of those returning from prison to home have a history of substance abuse.[30] Over 70 percent of prisoners with serious mental illnesses also have a substance use disorder. In 2004, 53 percent of state and 45 percent of federal prisoners met Diagnostic and Statistical Manual for Mental Disorders (DSM) criteria for drug abuse or dependence. Nearly a third of state and a quarter of federal prisoners committed their offense under the influence of drugs. Among state prisoners who were dependent on or abusing drugs, 53 percent had at least three prior sentences to probation or incarceration, compared to 32 percent of other inmates. At the time of their arrest, drug dependent or abusing state prisoners (48 percent) were also more likely than other inmates (37 percent) to have been on probation or parole supervision.[31] Other results show that in 2002, 68 percent of jail inmates met DSM criteria for drug abuse or dependence. Half of all convicted jail inmates were under the influence of drugs or alcohol at the time of offense. Jail inmates who met substance dependence/abuse criteria were twice as likely as other inmates to have three or more prior probation or incarceration sentences.[32] Still other results show that only 7 percent to 17 percent of prisoners who meet DSM criteria for alcohol/drug dependence or abuse receive treatment in jail or prison.[33] While substance abuse continues to be the most persistent problem facing the formerly incarcerated, laws and policies to prohibit persons with a felony drug conviction are increasingly common Thus, substance abuse policymakers must support promising prisoner reentry programs and refrain from practices likely to limit access to housing, employment, education, and income supports—and to produce collateral damage that is excessive relative to the substance abuse prevention advantages.

Physical Health and Mental Illness

Relative the general population, the prevalence of health problems and mental illnesses is far greater among people in prisons and jails.[34] For example, in 1997 individuals released from prison or jail accounted for nearly one-quarter of all people living with HIV or AIDS, almost one-third of those diagnosed with hepatitis C, and more than one-third of those diagnosed with tuberculosis.[35] At yearend 2008, 1.5% (20,231) of male inmates and 1.9% (1,913) of female inmates held in state or federal prisons were HIV positive or had confirmed AIDS. Confirmed AIDS cases accounted for nearly a quarter (23%) of all HIV/AIDS cases in state and federal prison. In 2007, the most recent year for which general population data are available, the overall rate of estimated confirmed AIDS among the state and federal prison population was 2.5 times the rate in the general population.[36] Similarly, the incidence of serious mental illnesses is two to four times higher among prisoners than it is in the general population.[37] In a study of more than 20,000 adults entering five local jails, researchers documented serious mental illnesses in 14.5 percent of the men and 31 percent of the women, which taken together, comprises 16.9 percent of those studied — rates in excess of three to six times those found in the general population.[38] While the formerly incarcerated disproportionately suffer health problems and mental illness, policymakers must support promising prisoner reentry programs and refrain from practices likely to limit access to health/mental health care—and to produce collateral damage that is excessive relative to the public health advantages.

Recommendations to Reduce Collateral Consequences of Criminal Convictions

Consistent with the findings of The Sentencing Project, there appears to be a growing body of evidence in support of the claim that a person with a felony conviction potentially faces a lifetime of consequences including of barriers to housing, education, employment, income support, health care, and voting. These collateral consequences exert severe and longstanding punitive effects beyond the terms of the sentence. In general, a variety of complex state and federal laws impose a continuing burden on convicted persons long after the court-imposed sentence has been fully discharged. Specifically, jurisdictions across the country are increasingly enacting laws and policies to restrict persons with a felony conviction (particularly convictions for drug offenses) from access to public housing, employment and receipt of welfare benefits, and eligibility for student loans for higher education. The collateral disabilities and penalties that accompany a criminal conviction place substantial barriers to a formerly incarcerated individual's social and economic advancement—and their restoration of rights and privileges.[39] Moreover, the collateral consequences of criminal convictions impede the ability of ex-prisoners to overcome multiple barriers to successful reentry. The following recommendations are intended to reduce the post-incarceration effects of collateral sanctions on individuals, families, and communities.

1. Pass the National Criminal Justice Commission Act of 2010 (H.R. 5143) — This legislation will create a blue-ribbon bi-partisan commission charged with undertaking an 18-month comprehensive review of the nation's criminal justice system. The commission will study all areas of the criminal justice system, including federal, state, local, and tribal governments' criminal justice costs, practices, and policies. After conducting the review, the commission will make recommendations for changes in, or continuation of oversight, policies, practices and laws designed to prevent, deter, and reduce crime and violence, improve cost-effectiveness, and ensure the interests of justice. The bill has been endorsed by approximately 100 organizations, including: The Sentencing Project; Drug Policy Alliance; The Brennan Center for Justice; Open Society Policy Center; United Methodist Church; ACLU, Families Against Mandatory Minimums, and the NAACP.

2. Continue to support the Second Chance Act (P.L. 110-199) — Designed to improve outcomes for people returning to communities from prisons and jails, this first-of-its-kind legislation authorizes federal grants to government agencies and nonprofit organizations to provide employment assistance, substance abuse treatment, housing, family programming, mentoring, victims support, and other services that can help reduce recidivism. Today, Second Chance Act funding continues to invest in innovative prisoner reentry initiatives including adult/juvenile mentoring, adult/juvenile reentry demonstration projects, family-based prisoner substance abuse treatment programs, improving educational methods, reentry courts, targeting offenders with co-occurring substance abuse and mental health disorders, technology careers training, and the National Reentry Resource Center.

3. Continue to advance the field through knowledge transfer, information dissemination, and the promotion of evidence-based best practices to overcome barriers to successful reentry and reintegration for the formerly incarcerated.

4. Continue dialogue to ensure that criminal offenders have access to reliable relief mechanisms to avoid or mitigate the collateral penalties and disabilities associated with a conviction.

5. Provide reasonable relief from the collateral consequences of a criminal conviction including reducing laws and that restrict persons with a felony conviction (particularly convictions for drug offenses) from employment, receipt of welfare benefits, access to public housing, and eligibility for student loans for higher education.

Conclusion

Mr. Chairman, this concludes my formal statement. I am pleased to answer any questions you or other Members of the Subcommittee may have.

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Mr. SCOTT. Thank you.
Dr. Lattimore.

TESTIMONY OF PAMELA K. LATTIMORE, Ph.D., PRINCIPAL SCIENTIST, RTI INTERNATIONAL, RESEARCH TRIANGLE PARK, NC

Ms. LATTIMORE. Thank you, Mr. Chairman, Ranking Member and Members of the Subcommittee. I am pleased to appear before you today to provide information about prisoner reentry.

I am Dr. Pamela Lattimore, a principal scientist at RTI International. As you may know, RTI International is an independent nonprofit research organization based in North Carolina that provides evidence-based research and technical expertise to governments and businesses in more than 40 countries.

Since Congress addressed the prisoner reentry issue more than 10 years ago, we have made considerable progress in understanding the challenges faced by those reentering the community and the prospects for successful intervention. The Second Chance Act is providing an opportunity to continue to build on this progress.

I was asked to talk some about the findings from the evaluation of the Serious and Violent Offender Reentry Initiative. It goes by the acronym of SVORI. The SVORI multisite evaluation was funded by the National Institute of Justice and was completed at the end of last year. The 6-year study was conducted by researchers at RTI International and the Urban Institute.

As detailed in my written testimony, SVORI, which was the predecessor to the Second Chance Act of 2007, was funded by Congress to provide one-time grants in 2003 to 69 State agencies across the country to implement prisoner reentry programs. The findings from the SVORI evaluation are summarized in my written testimony and detailed in the evaluation final reports which are available online; and we have an evaluation Web site: *www.svorievaluation.org*.

What we learned included the following:

Individuals returning to their communities from prison or juvenile detention have problems that span multiple domains and that are interwoven: little education, few job skills, drugs and alcohol abuse, and often mental illness. Things that we take for granted, such as drivers' licenses, how to fill out a job application, having a place to live, may be out of reach for these individuals. Licensing requirements, criminal background checks and restrictions on housing access are among the collateral consequences of a criminal record that provide additional obstacles to success on the outside.

We found that SVORI program participants fortunately received more services and programs than comparable individuals who did not participate, although at level far below their reported needs. Additionally, we also found service receipt, service provision dropped substantially following release from prison. There were many more services provided during incarceration than after.

Our outcome results were mixed. SVORI program participation was associated with improvements in both housing and employment and substance use domains, but recidivism findings were more equivocal. Men participating in SVORI programs had smaller, somewhat lower arrest rates, but we observed no difference in the reincarceration rates after 24 months.

In conclusion, although we have made a lot of progress since SVORI was conceived more than a decade ago, it is important that we build on that progress. In particular, identifying and coordinating multiple services and programs delivered in most cases in multiple institutions and multiple communities is a complicated undertaking for Departments of Corrections and Departments of Juvenile Justice.

Implementation science suggests that implementing new programs can take 2 or 3 years. Thus, grantees may need more than 3 years to develop and successfully implement reentry programs that address the employment, housing, and treatment needs of serious criminal justice populations. Further, we need to develop a better understanding of issues that are associated with assuring that programs are implemented and delivered with fidelity.

Secondly, although those participating in SVORI programs had better outcomes across employment, housing, and health domains and were somewhat less likely to be rearrested, these improvements did not translate into reduction in reincarceration. Further study is needed on carefully implemented, evidence-based programs to determine the effects on both intermediate outcomes such as employment and drug use and the recidivism outcomes of such concern to the public and policymakers.

Finally, I would like to point out that the comprehensive, detailed SVORI multisite evaluation is highly unusual for justice research. Although government expenditures for law enforcement, courts, and corrections now approach $215 billion a year, research and evaluation funds remain relatively meager. NIJ, the primary funder of criminal justice research, has had a base budget of only about $40 million per year for as long as we can remember. That has to cover law enforcement courts as well as corrections, criminal behavior, victimization, sentencing, and so forth.

Although there are many priorities competing for Federal dollars, comprehensive evaluations can lead to policy development, improve program implementation and administration, better use of taxpayer dollars, and improved outcomes, returns on investments that will also make us safer.

Thank you for your time, and I am happy to answer any questions.

[The prepared statement of Ms. Lattimore follows:]

PREPARED STATEMENT OF PAMELA K. LATTIMORE

Prepared Remarks of

Pamela K. Lattimore, Ph.D.
Principal Scientist
Crime, Violence and Justice Research Program
RTI International

Before the

United States House of Representatives Judiciary Subcommittee on Crime, Terrorism and Homeland Security

Regarding

Prisoner Reentry

June 9, 2010

Mr. Chairman, Ranking Member and Members of the Subcommittee, I am pleased to appear before you today to provide information about prisoner reentry. In particular, I will address some implications of our findings from the evaluation of the *Serious and Violent Offender Reentry Initiative—SVORI.* This study was funded through the National Institute of Justice and was conducted by researchers at RTI International and the Urban Institute[1].

I am Dr. Pamela Lattimore, a Principal Scientist at RTI International. Dr. Christy Visher, Principal Research Associate at the Urban Institute and Professor at the University of Delaware, was the Co-Principal Investigator for the evaluation.

As you may know, RTI International is an independent, nonprofit research organization based in Research Triangle Park, North Carolina, that provides research and technical expertise to governments and businesses in more than 40 countries. The Urban Institute, located in Washington, D.C., is an independent, nonprofit, nonpartisan research organization that examines the social, economic, and governance challenges facing the nation.

I have been studying criminal behavior and the effectiveness of correctional programs for more than twenty years. These issues have taken on more importance as the number of people in the criminal justice system doubled from 3.7 million in 1988 when I began a visiting research fellowship at the National Institute of Justice to 7.3 million in 2008 (the latest data available)[2]. During this time, the number of people in state and federal prisons grew from about 600,000 to more than 1.5 million. Our local jails now hold over 780,000—more than double the 340,000 who were jailed in 1988.

These increases have been accompanied by a growing price tag. In 2006, federal, state and local governments spent nearly $69 billion on corrections—more than three times the $20 billion spent in 1988. If we add in other criminal justice costs

such as law enforcement and courts, we see total criminal justice costs grew from $65 billion in 1988 to nearly $215 billion in 2006.

These numbers represent significant costs at the federal, state and local levels and many lives. The question that confronts us is "Is there a better way?" Since we know that there is considerable state-level variation in incarceration rates—the total incarceration rate of the state with the highest rate in 2008 is more than 5.5 times higher than the state with the lowest rate—perhaps we can identify the appropriate policies that will allow us to reduce incarceration rates, costs to the taxpayer, and impacts to families and communities. This is one objective of the Second Chance Act of 2007.

For the past six years, I directed the evaluation of the Serious and Violent Offender Reentry Initiative (SVORI)—a predecessor to the Second Chance Act—that provided grants to 69 state agencies across the country in 2003 and 2004. SVORI was the first of recent federal efforts to provide corrections and juvenile justice agencies with grants to develop and implement prisoner reentry programs. A total of $110 million was distributed that supported 89 programs for adult prisoners and juvenile detainees. Findings from the evaluation can be found at http://www.svori-evaluation.org.

SVORI Programs

SVORI grants supported the creation of a continuum of services that started in prison and continued following release. SVORI had four specific objectives:

1) Improve the self-sufficiency of released prisoners by improving options in employment, housing, and family and community involvement;

2) Improve the health of returning offenders by addressing substance use, and physical and mental health problems;

3) Reduce criminality among returning offenders through programming and services, as well as supervision and monitoring; and

4) Promote systems change through multi-agency collaboration and case management strategies.

Each SVORI-supported program was developed to reflect local needs and resources. Grantees were encouraged to include five components in their programs: diagnostic and risk assessments, individual reentry plans, transition teams, community resources, and graduated levels of supervision. Further, all grantees were required to support a partnership between institutional agencies, such as the departments of corrections and juvenile justice, and at least one community agency. Within this basic framework, each grantee used the SVORI funding to tailor reentry programming to the needs of their jurisdictions.

Importantly, the SVORI grants focused on "serious and violent" offenders—i.e., those who potentially posed the greatest costs and highest risks following release. This differed from earlier programs that, generally, were reserved for non-violent and, often, for first-time offenders[3].

The impact of this unprecedented reentry program investment is the focus of the SVORI multi-site evaluation. After a one-year planning grant, we conducted three surveys of the directors of the 89 SVORI programs. These surveys collected information on the nature of each of the locally designed SVORI programs, including the components of the program and the targeted participant population(s), as well as information on the barriers that were encountered and overcome as programs were developed and implemented.

We also conducted interviews with SVORI program participants and comparison subjects from 12 adult programs and 4 juvenile programs located in 14 states. In total, we interviewed nearly 2,500 men, women and boys between July 2004 and April 2007 at four specific points in time: about 30 days prior to their release from prison, and at 3, 9 and 15 months following their release. (We were unable to recruit sufficient numbers of girls to include them in the study.)

The interviews asked for detailed information on criminal and employment history and past substance use; treatment and service needs; services and program receipt; and numerous outcomes in criminal justice, employment, health (including current substance use and mental health), and housing. For those in the community at 3 and 15 months following release, we also conducted oral swab drug tests.

Finally, we received administrative recidivism data from these fourteen states and the FBI that were used to determine official reincarceration and rearrest rates.

All of this information was and is being analyzed to examine the impact of these 12 adult and 4 juvenile SVORI programs. We are able to share with you some of the important conclusions of our work.

Findings from the SVORI Multi-site Evaluation

(1) The successful reintegration of individuals exiting prison is a complex issue that requires a comprehensive approach.

The SVORI legislation specified a joint effort of the Departments of Justice, Labor, Education, Health and Human Services, and Housing and Urban Development. This collaboration acknowledges that individuals leaving prison have needs that span multiple domains and that these needs are interwoven. For example, individuals exiting prison generally have little education and few job skills. They are likely to have problems with drugs and alcohol and many suffer from mental illness. Additionally, things that we take for granted—such as a driver's license, how to fill out a job application, having a place to live—may be out of reach.

For example, among our respondents, only about 60% of the adults (less than 20% of the boys) had finished twelfth grade or had a GED. Less than two-thirds of the men and only about half of the women had worked during the six months prior to their current incarceration (only slightly more than a third of the boys had worked). Further, 95% of the men and women and nearly 90% of the boys admitted to having used illegal drugs. Nearly 80% of the women, about 55% of the men and 50% of the boys had been treated for either a mental health or substance abuse problem prior to their most recent incarceration.

The SVORI program participants also had serious criminal histories. Fully 80% of the adults had been in prison before. Half of the men and 30% of the women also had had at least one juvenile detention. The men reported an average of 13 prior arrests—the women about 11 and the boys about 7. The boys also had prior records—most had been in juvenile correctional facilities before.

(2) SVORI funding was a significant step forward in the development and continuation of reentry programming in most states.

SVORI funding boosted the development of reentry programming in most states, according to SVORI program directors. We conducted an email survey of SVORI program directors in 2008—after the programs had expended all of their SVORI grant funds—to determine whether activities initiated with SVORI grant funds were continuing. We received responses from 56 of the 89 programs. More than three-quarters of the program directors said that their agencies were continuing at least some programs or activities that began as a result of SVORI grant funds. A similar proportion said that their states had developed and were implementing other reentry components. Many suggested that the SVORI funds had been instrumental in starting or improving their states' efforts to develop reentry programming.

(3) SVORI funds increased collaboration among state and local agencies and organizations.

An important goal of the SVORI grants was to foster increased collaboration between departments of correction or juvenile justice and other state and local agencies as well as community and faith-based organizations. In interviews with directors of the 16 programs in our impact evaluation, nearly all of the directors reported that the relationship between their agency and the community supervision agency had improved as a direct result of the SVORI grant. One program director said, "SVORI played a part in all the change [that was] going on. It was the catalyst by virtue of providing funds and guidance to put a model in place and demonstrate to the system how this could be done."

Further, 13 of the 16 program directors reported increased collaborations with community-based organizations (or CBOs), and 9 of the 16 reported increased collaborations with faith-based organizations (or FBOs)—again, as a direct result of the SVORI grant. One director said, "SVORI enhanced awareness both on the part of the Department of Corrections as well as on the part of the CBOs as to how it's important to work together. We have developed a set of FBOs with

whom the DOC can work. FBOs are also contacting DOC directly to ask if there are things that they can do."

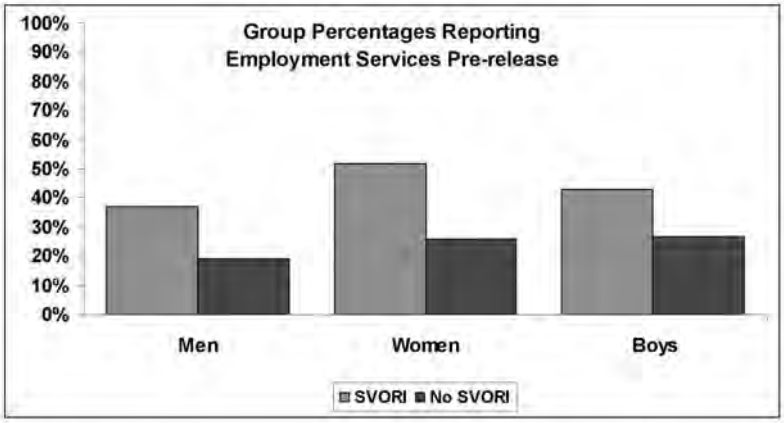
Of note, most of the program directors reported that these new and improved collaborations had continued or expanded after the conclusion of the SVORI grant.

(4) SVORI funds resulted in the development of local programs that provided an increase in services for participants.

Overall, participation in SVORI programs greatly increased the likelihood of receiving a wide variety of services, such as reentry planning, assistance obtaining documents (such as driver's licenses), mentoring, substance abuse and mental health treatment, and educational and employment services. This was true for the men, the women and the boys.

For example, 98% of women and 87% of the men participating in SVORI programs reported receiving at least one of twelve transition services. The most common was services to prepare for release: 90% of the women and 75% of the men reported that they had received services to prepare for release. These percentages were about 50% higher than those reported by the comparison groups (59% of women and 51% of men).

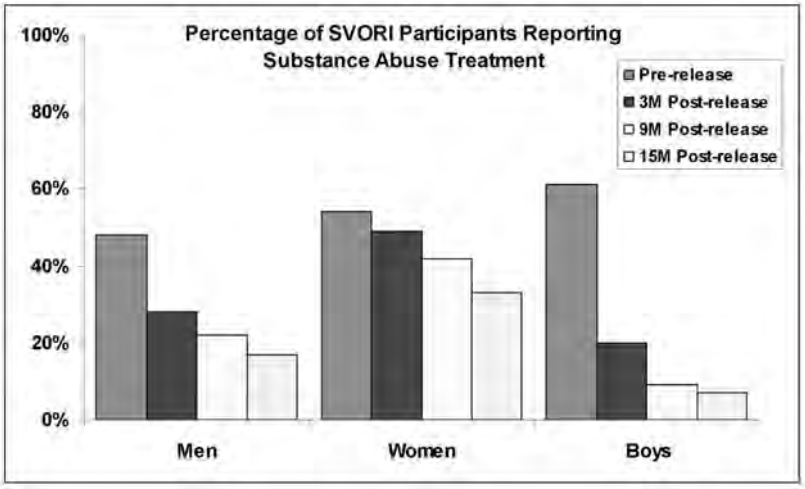
Most of the adult programs identified employment as a primary focus. Most SVORI participants (93% of the women and 79% of the men) reported that they had received at least one of six educational or employment services. However, educational services were more commonly reported with only 37% of the men and 52% of the women reporting that they had received employment services prior to release. These percentages were about twice those of the comparison subjects. So, again, SVORI program participation greatly increased the likelihood of services or programs—but at levels far less than 100%.



(5) More services were delivered prior to release than after release.

The level of services and programs provided dropped substantially following release. For example, as the chart on the following page shows, on average, about half of the men in SVORI programs received substance abuse treatment in prison—a percentage that dropped substantially following release. Similar findings were observed for the boys who were in SVORI programs. The women were somewhat more likely than the males to continue receiving services following release.

The drop following release is likely due to the difficulty of providing services or coordinating service provision in the community as opposed to within detention facilities. Particularly in sites where SVORI participants were released statewide, identifying appropriate services across the state would have been particularly daunting.



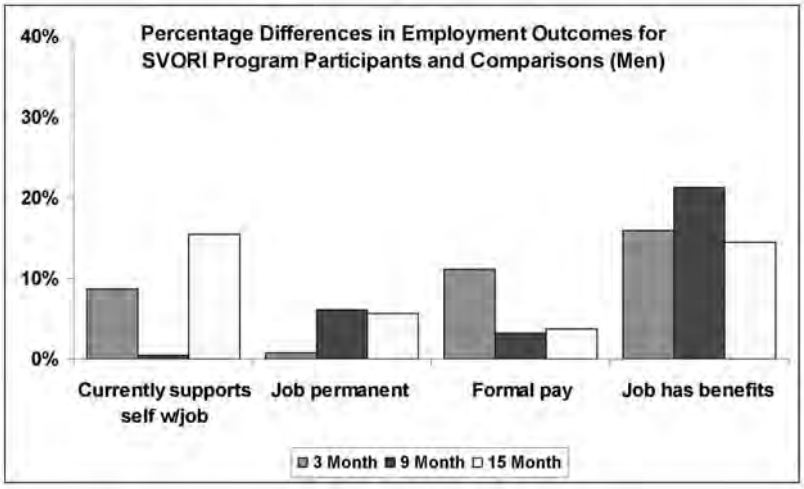
(6) The $69 billion question: What was the impact of SVORI on outcomes?

Serious and Violent Offender Reentry Initiative program participants were much more likely to receive a broad array of services and programming than similar individuals who were not in SVORI programs. However, this was much truer during the pre-release phase than following release. Also, although levels were higher, they were not 100%. These services were expected to lead to reduced societal costs through improved outcomes across a variety of dimensions, including housing, employment, mental health, family relationships, education, substance use, and criminal behavior.

We examined over 100 possible outcomes across the domain areas targeted by SVORI. In most cases, the difference in outcomes between those participating in SVORI programs and the comparison subjects indicates that SVORI program participation resulted in an improvement in outcomes. In many cases, these differences were small, but we know from the literature that effective

correctional programs generally result in improvements of 5% to 15%, so our findings are in line with what we would have expected.

The positive findings span the various outcome areas and the three post-release interview periods. For example, the preliminary results for the adult men in our study on some of our employment measures show that SVORI program participants were about 10% more likely than comparison subjects to report supporting themselves with a job 3 months following release. They were also more likely to report having a job that was permanent, that offered formal pay, and that had benefits such as health insurance and vacation pay..



Other findings showed:

- Housing independence increased over time following release for adult SVORI program participants.
- SVORI programs reduced substance use among program participants, although overall drug use increased over time for all groups.

- SVORI program participation appeared to have little effect on compliance with conditions of supervision.

The ultimate goal of SVORI—and other reentry programming—is to reduce criminal recidivism. We had both self-reported and official record indicators of criminal activity.

- Although men who participated in SVORI programs were more likely than their comparison counterparts to report not committing criminal acts in the period since the most recent interview, there were few differences between program participants and comparison subjects among the adult females and the juvenile males.
- During the first 24 months post release, adult SVORI program participants were less likely to be rearrested based on official records although rearrest rates were high[4]: 24 months following release, among SVORI program participants, 68% of men and 49% of women had at least one rearrest. These percentages compared favorably with percentages for nonparticipants—71% of men and 60% of women.
- There was little difference in the reincarceration rates of the SVORI men, non-SVORI men, and the SVORI women in terms of their chances of being reincarcerated within 24 months of release—42%, 39% and 41%, respectively. For reasons that we continue to explore, women who did not participate in SVORI programs were much less likely to be reincarcerated in state prison than their program participant counterparts (22% compared with 41%)[5].

Conclusions and Recommendations

The SVORI programs provided increases in services to a population with tremendous needs in education, employment, health and basic living skills—albeit at levels much less than 100%. Overall, service provision declined following release for everyone. In context, the programs had only a three-year grant period to develop and implement their SVORI programs—which entailed multiple services and programs delivered in most cases in multiple institutions and

communities. *The findings suggest that SVORI grants provided a beginning upon which states and communities began to develop a response to prisoner reentry issues, but that a more sustained period may be necessary to fully develop and implement a comprehensive reentry program. Congress and other funders should expect that an effort extending beyond three years may be necessary to develop, implement and sustain programs to meet the employment, housing and treatment needs of serious criminal justice populations. Further, we need to study and develop a better understanding of the issues associated with implementing criminal justice programs and assuring that programs are delivered with fidelity.*

Those participating in SVORI programs overall had better outcomes following release from prison across employment, housing, and health domains than comparable individuals who did not participate in SVORI programs. SVORI program participants also were somewhat less likely to be rearrested, but these improvements did not translate, overall, into a reduction in reincarceration. *The logic model underlying reentry programs is that programs that improve employment, reduce drug use, and address mental health and other needs among justice populations will lead to reduced criminal behavior and recidivism. Although there is some evidence to support this, we do have the full range of information needed to know which types of programs help which types of populations. Further study is needed to identify the effectiveness of programs that are evidenced based and have been carefully implemented. We need to develop a better understanding of the effects on both intermediate outcomes such as employment and drug use and the recidivism outcomes of such concern to the public and policymakers.*

Finally, I would like to point out that we have come a long way in our understanding of prisoner reentry since reentry was identified as an issue by the Administration and Congress ten years ago. However, the comprehensive, detailed SVORI multi-site evaluation we were able to conduct is highly uncommon for justice research.

I only touched on some of the highlights of what we have been able to learn by having the luxury to study 16 SVORI programs and thousands of subjects over a number of years. Because of a shortage of funding for criminal justice research,

many justice program evaluations focus on single programs with small numbers of subjects who are followed for short periods of time. Such evaluations often do not provide good statistical tests of effectiveness—particularly, as is often the case, if the evaluation is conducted while the program is being developed and implemented.

Fortunately, under the auspices of the Second Chance Act of 2007, the Office of Justice Program (OJP) agencies including the Bureau of Justice Assistance and the National Institute of Justice are working with agencies and the research community to further our understanding of programs, implementation issues, and outcomes related to prisoner reentry programs. These activities, building on the knowledge gained over the past decade's efforts on prisoner reentry issues, will provide policy makers independent, objective information to assist them in making important decisions in this vital and increasingly expensive policy area.

Although there are many priorities competing for federal dollars, adequate funding for comprehensive evaluations can lead to improved policy development, improved program implementation and administration, better use of taxpayer dollars, and improved outcomes—returns on investment that will also make us safer.

Thank you.

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[1] The Multi-site Evaluation of the Serious and Violent Offender Reentry Initiative was funded by NIJ grant # 2004-IJ-CX-002; the evaluation design was funded by a previous 1-year cooperative agreement NIJ # 2003-RE-CX-K101 from the National Institute of Justice, U.S. Department of Justice. Points of view in this testimony are those of the author and do not necessarily represent those of the U.S. Department of Justice.

[2] National and state level statistics reported here are from reports by the Bureau of Justice Statistics.

[3] For example, the Prisoner Reentry Initiative that was funded by the federal government after SVORI explicitly excludes people who have ever been convicted of violent or sex offenses.)

[4] Records were incomplete for the juvenile males because of state reporting practices.

[5] Since female SVORI program participants were less likely to be rearrested within 24 months—only 49% compared with 60% of the females who did not participate—we have speculated that those who did not participate may have been in jail awaiting trail or serving short sentences and, thus, at less risk of reincarceration in state prisons because they were off the street.

Mr. SCOTT. Thank you.
Mr. Cassidy.

TESTIMONY OF RICHARD T. CASSIDY, HOFF CURTIS, BURLINGTON, VT

Mr. CASSIDY. Thank you Mr. Chairman, Members of the Committee.

The law of collateral consequences in the United States is in a state of shocking disarray. It is not just a Federal problem, it is not just a State problem, it is a problem at all levels of government; and it will require government cooperation to improve the situation.

You have already heard a great deal this morning about the serious problems to reintegration in the community that collateral consequences cause people coming out of prison and other incarceration programs. I won't repeat that.

But let me say to you that it is important to understand that this problem is not just a problem for people who have served time in prison. As the example of the Vermont National Guard member outlined in my written testimony makes very clear, the collateral consequences of convictions can reach out of the distant past and strike down an individual who has a conviction, even one who has never served a single day in prison. That story is not unique. It is a story that is played out again and again across this country, and it is a tragedy.

Meanwhile, the number and variety of collateral consequences in this country have mushroomed. To date, no comprehensive collection of collateral consequences has ever been completed, but under a grant pursuant to section 5 of the Court Security Act of 2007, the National Institute of Justice contracted with the American Bar Association to do the first ever truly comprehensive national study.

Preliminary results drawn from eight States show an average of over 720 statutory and regulatory collateral consequences in each State that was studied. Nearly 80 percent of those collateral consequences are occupational in nature. Almost every one lasts for life.

Once complete, that study will need support, because the information that it provides will have to be continued and has to be updated on a continual basis in order for the public policymakers and participants in the criminal justice system to understand what collateral consequences exist and how they relate to the various crimes that individuals may have been convicted of. There is no obvious source for continuation of that project except the Federal Government, and I urge you to consider including continuation of that funding in the Second Chance Act.

The Uniform Collateral Consequences of Conviction Act, which was promulgated by the Uniform Laws Commission, provides a solid basis from which to organize State law on this subject and is also a very useful potential model for the Federal Government. It addresses some very significant problems.

First, as I mentioned in talking about the study, it ensures that participants in the process understand what the collateral consequences associated with convictions are. The *Padilla* case suggests to those who read it carefully that, at least with respect to important and relatively certain collateral consequences, understanding the implications of conviction may be required in order for a defendant to make an adequate plea of guilty to a crime.

The Uniform Collateral Consequences Act also creates a system of appropriate relief from collateral consequences. It operates at two levels. First, it creates an order of limited relief to assist prisoners seeking reentry into society by lifting the automatic bar of collateral sanctions as to employment, education, housing, public benefits, and occupational licensing. The effect is to require that government dealing with these subjects treat convicted individuals the same way that they would treat other individuals who admit the same conduct but do not have a conviction.

Second, it would establish a certificate of restoration of rights for individuals who have been out of prison for more than 5. It would, in effect, lift collateral consequences except sex offender registries, drivers' licenses, and law enforcement employment limitations.

To administer these programs, the States will need to create or revitalize some sort of parole-board-like process to receive and act upon relief applications.

The Federal Government can help this by providing some kind of grant program to encourage States to set up and operate those structures, at least initially. You can also help by giving effect to State acts lifting collateral consequences from the Federal level and with respect to Federal convictions. You can also help by incorporating the concepts of the Uniform Collateral Consequences Act such as its relief mechanisms into Federal law.

If I can say one thing and one thing only in closing, it is providing some method of relief apart from the pardon process which, frankly, in most jurisdictions is simply not operative, is essential.

Thank you.

[The prepared statement of Mr. Cassidy follows:]

PREPARED STATEMENT OF RICHARD T. CASSIDY

Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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Written Testimony of Richard T. Cassidy

Chair, Drafting Committee on Uniform Collateral Consequences of Conviction Act of the Uniform Law Commission

To the
United States House of Representatives
Committee on Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

"Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated"

June 9, 2010

Thank you for the opportunity to submit testimony on behalf of the Uniform Law Commission (ULC). The ULC is also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL).

I am founding member of the Burlington, Vermont law firm Hoff Curtis. In practice since 1980, I served for 14 years as a member of the Vermont Board of Bar Examiners, including 11 years as its Chair. Since 1999, I have served in the American Bar Association (ABA) House of Delegates; as well as a term on the ABA Board of Governors. I currently chair the ABA's Standing Committee on the Delivery of Legal Services.

I have significant experience with litigation and alternative dispute resolution involving the legal profession, higher education, health care, and manufacturing. My clients have included college students, faculty, and administrators as well as individuals, businesses, governmental agencies, and not-for-profit entities.

I am not typically a criminal lawyer, but I do come to this work based on the experience of my own practice. Many years ago I regularly did legal work for a businessman who had a conviction in his past. He had been hired out of prison by a compassionate employer who was well aware of his record. He had steadily advanced in the business. After a subsequent change in federal law, it became illegal for him to work in the business of which he had become the chief operating officer without the consent of our state commissioner of banking and insurance. The businessman was not aware of the change in the law, until his company was acquired and his new employer learned of the law (several years after its adoption) and of his conviction. The businessman consulted me. I sent him home immediately until we could seek consent, rather than risk that he would knowingly violate the law and expose himself to the possibility of a new prosecution. Fortunately, be was able to get consent after a number of weeks of unscheduled leave. I was struck by the harshness of applying such a new law to a fully rehabilitated individual based on an old conviction.

I came to have an opportunity to work to develop policy on this issue because in 1994, the Governor of Vermont appointed me to the Uniform Law Commission, a 118-year-old national, nonprofit, nonpartisan legal organization of commissioners from every state who draft new laws or improve existing laws where uniformity among the states is necessary or desirable.

After participating in approval of the ABA Criminal Justice Standards on Collateral Consequences of Conviction in 2003,[1] I proposed the ULC open a Study Committee on the need for uniformity regarding this subject. From 2005 through 2009, I chaired the Commission's Drafting Committee on the Uniform Collateral Consequences of Conviction Act (UCCCA), which seeks to improve understanding of the nature of the collateral consequences problem and provide modest means by which people who suffer from disabilities associated with collateral consequences may, in appropriate circumstances, gain at least partial relief from them.

[1] American Bar Association, *Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons* (3rd ed. 2003)., available at http://www.abanet.org/crimjust/standards/collateral_toc.html

The UCCCA was adopted by the Commission in July, 2009. It was endorsed by the American Bar Association in February, 2010. The ULC now is seeking passage of the UCCCA by state legislatures across the country.

Uniform Law Commission

Now in its 118th year, the ULC works to harmonize state laws in critical areas where consistency is desirable and practical and supports the federal system by addressing issues of national significance best resolved at the state level.

The Uniform Law Commission (ULC) has worked for the uniformity of state laws since 1892. It was originally created by state governments to consider state law, determine in which areas of the law uniformity is important, and then draft uniform and model acts for consideration by the states. For well over a century, the ULC's work has brought consistency, clarity, and stability to state statutory law. Included in this important work have been such pivotal contributions to state law as the Uniform Commercial Code, the Uniform Partnership Act, the Uniform Anatomical Gift Act, the Uniform Interstate Family Support Act, the Uniform Electronic Transactions Act, and the Uniform Prudent Management of Institutional Funds Act.

The ULC is a non-profit unincorporated association, comprised of commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. Each jurisdiction determines the method of appointment and the number of commissioners actually appointed. Most jurisdictions provide for their commission by statute. All commissioners must be qualified to practice law. While some serve as state legislators, or employees of state government, most are private practitioners, judges, or law professors. Commissioners donate their time and expertise as a pro bono service and receive no salary or fee for their work with the ULC. It has some 350 members.

The ULC has drafted more than 250 uniform acts in various fields of law setting patterns for uniformity across the nation, in such areas as business entity law, interstate child support and custody, investment allocation rules, and trust and estates law. The ULC's work prevents states from having to perform duplicative and costly research in addressing shared legislative issues. Uniform Acts are voluntarily adopted by state legislatures and localized to respond to each state's statutory framework and concerns.

ULC Procedures

Uniform Laws are the products of a painstaking development process. Briefly, here's how the process of drafting and promoting passage of uniform acts works: Each uniform act typically takes two to four years to complete. The process starts with the ULC Scope and Program Committee. It investigates each proposed act, and then reports to the Executive Committee whether a subject is one in which it is desirable and feasible to draft a uniform law. If the Executive Committee approves a recommendation, a drafting committee of commissioners is appointed and begins to convene regularly. Tentative drafts are fully vetted at multiple drafting

committee meetings. Advisors from the ABA and observers from any entity interested in the act are welcome to participate in these meetings.

Draft acts are then submitted for initial debate by the entire ULC membership at an annual meeting. They are read and debated line by line before the entire conference membership and then revised by the drafting committee. Normally after consideration at a second annual meeting,[2] acts are promulgated in a vote by the states. Commissioners in each state and territory submit ULC acts for consideration by state legislatures.

The ULC receives the major portion of its financial support from state appropriations. In return, the ULC provides the states with two related services:

- drafting uniform state laws on subjects where uniformity is desirable and practical
- supporting the effort to enact completed acts.

The ULC is able to get maximum results on a minimum budget because uniform law commissioners donate their time and expertise.

As such, ULC is an ideal entity for addressing traditionally state law issues that are of national concern and would benefit from state-to-state uniformity, such as collateral consequences of conviction.

The ULC is not an interest group and has no partisan political agenda; drafting meetings are open to the public and all drafts are available on the internet at the ULC's website: nccusl.org Because ULC drafting projects are national in scope, we are often able to attract a broad range of advisors and observers to participate in our projects, resulting in a drafting process that has the benefit of a greater range and depth of expertise than could be brought to bear upon any individual state's legislative effort.

The Problem: Barriers to Reentry into Society for Formerly Convicted Persons[3]

The U.S. prison population has increased dramatically since the early 1970s. In 1974, 1.8 million people had served time, or 1.3% of the adult population.[4] In 2001, 5.6 million people, or 2.7% of the adult population, had served time. The Department of Justice estimates that if the

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[2] The Act discussed herein, the Uniform Collateral Consequences of Conviction Act (the UCCCA), was approved after consideration at four annual meetings. is The full text of the UCCCA is available at http://www.law.upenn.edu/bll/archives/ulc/uecsada/2009_final.htm.

[3] This portion of the testimony is largely taken directly from the prefatory note to the Uniform Collateral Consequences of Conviction Act prepared by our reporter, Professor Gabriel "Jack" Chin, whose work is gratefully acknowledged.

[4] Heather C. West & William J. Sabol, *Prisoners in 2007*, at 1, Bureau of Justice Statistics Bulletin (Dec. 2008, NCJ 224280); Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, at 1, Bureau of Justice Statistics Special Report (Aug. 2003, NCJ 197976).

2001 imprisonment rate remains unchanged, 6.6% of Americans born in 2001 will serve prison time in their lives.[5]

In addition to those who have served time in prison, an even larger proportion of the population has been convicted of a criminal offense without going to prison. Apparently, no knows how many Americans carry the burden of a criminal record. However, according to the U.S. Department of Justice, there were about 100 million people with criminal records in tbe United States as of December 2008.[6]

Members of minority groups are far more likely than whites to have a criminal record: Almost 17% of adult black makes have been incarcerated, compared to 2.6% of white males.[7] A recent study has shown that "a criminal record has a significant negative impact on hiring outcomes, even for applicants with otherwise appealing characteristics," and that "the negative effect of a criminal conviction is substantially larger for blacks than for whites."[8]

The growth of the convicted population means that there are literally millions of people being released from incarceration, probation and parole supervision every year. They must successfully reintegrate into society or be at risk for recidivism. Society has a strong interest in preventing recidivism. An individual who could have successfully reentered society, but for avoidable cause reoffends, generates the financial and human costs of the new crime, expenditure of law enforcement, judicial and corrections resources, and the loss of the productive work that the individual could have contributed to the economy. Society also has a strong interest in seeing that individuals convicted of crimes can regain the legal status of ordinary citizens to prevent the creation of a permanent class of "internal exiles" who cannot establish themselves as law-abiding and productive members of the community.[9]

As the need for facilitating reentry becomes more pressing, several developments have made it more difficult. First, a major challenge for many people with criminal records is the increasingly burdensome legal effect of those records. A second major development is the availability to all arms of government and the general public, via Internet, of aggregations of public record information, including criminal convictions, about all Americans.[10] Twenty years ago, an applicant might not have been asked for her criminal record when renting an apartment or applying for a job, and it would have been difficult for even an enterprising administrator to find, say, a 15 year old, out-of-state, marijuana offense. Now, gathering this kind of information is

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[5] Bonczar, *supra*.
[6] U.S. Dept. of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2008, NCJ 228661 (Oct. 2009), at 3.
[7] Bonczar, *supra*, at 5.
[8] Devah Pager & Bruce Western, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men 4* (Oct. 2009, NCJ 228584) http://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf
[9] *Cf.* Nora V. Demleitner, *Preventing Internal Exile: The Need For Restrictions On Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999).
[10] *See, e.g.*, BUREAU OF JUSTICE STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY, AND CRIMINAL JUSTICE INFORMATION (Aug. 2001, NCJ 187669).

cheap, easy and routine.[11] According to a 2009 survey of the Society of Human Resources Management, 92% of their members perform criminal background checks on some or all jobs (up from 51% in 1996).[12] Studies in Milwaukee[13] and Los Angeles[14] show that employers are refusing to hire people with criminal records, even for entry level jobs. Apart from impairment of self-esteem and informal social stigma, a criminal conviction negatively affects an individual's legal status. For many years, an individual convicted of, say, a drug felony, lost his right to vote for a period of time or for life.[15] Convicted individuals may be ineligible to hold public office.[16] Federal law bars many persons with convictions from possessing firearms,[17] serving in the military[18] and on juries, civil and criminal.[19] If a non-citizen, a person convicted of a crime may be deported.

These disabilities have been called "collateral consequences" "civil disabilities" and "collateral sanctions." The term "collateral sanction" is used in the Uniform Collateral Consequences of Conviction Act (UCCCA) to mean a legal disability that occurs by operation of law because of a conviction but is not part of the sentence for the crime. It is "collateral" because it is not part of the direct sentence. It is a "sanction" because it applies solely as a result because of conviction of a criminal offense. The Uniform Act also uses the term "disqualification" to refer to disadvantage or disability that an administrative agency, civil court or other state actor other than a sentencing court is authorized, but not required, to impose based on a conviction. Collectively, collateral sanctions and disqualifications together comprise collateral consequences.

In recent years, collateral consequences have been increasing in number and severity. Federal law now imposes dozens of them on state and federal offenders alike.[20] To identify just some of those applicable to individuals with felony drug convictions, 1987 legislation made individuals with drug convictions ineligible for certain federal health care benefits;[21] a 1991 law required states to revoke some driver's licenses upon conviction or lose federal funding,[22] in 1993, Congress made individuals with drug convictions ineligible to participate in the National and Community Service Trust Program.[23] In 1996, Congress provided that individuals convicted of

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[11] Corinne A. Carey, *No Second Chance: People With Criminal Records Denied Access To Public Housing*, 36 U. TOLEDO L. REV. 545, 553 (2005); *see generally* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 ST. THOMAS L. REV. 387 (2006).

[12] Society for Human Resource Management, *Background Checking: Conducting Criminal Background Checks* (Jan. 22, 2010).

[13] Devah Pager, *The Mark of a Criminal Record*, 108 American Journal of Sociology 937, 955-58 (March 2003).

[14] Harry Holzer et al., *The Effect of an Applicant's Criminal History on Employer Hiring Decisions and Screening Practices: Evidence from Los Angeles* (National Poverty Center Working Paper Series Dec. 2004).

[15] *See* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (Oxford 2006).

[16] *See, e.g.*, State *ex rel.* Olson v. Langer, 256 N.W. 377 (N.D. 1934).

[17] 18 U.S.C. § 922(g)(1).

[18] 10 U.S.C. § 504(a).

[19] Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003).

[20] *See generally* KELLY SALZMANN & MARGARET COLGATE LOVE, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (ABA 2009) (http://www.abanet.org/cecs/internalexile.pdf).

[21] 42 U.S.C. § 1320a-7(a)(4).

[22] 23 U.S.C. § 159.

[23] 42 U.S.C. § 12602(e).

drug offenses would automatically be ineligible for certain federal benefits.[24] A year later, Congress rendered them ineligible for the Hope Scholarship Tax Credit.[25] In 1998, individuals convicted of drug crimes were made ineligible for federal educational aid,[26] and for residence in public housing.[27] In addition, 1988 legislation authorized state and federal sentencing judges to take away eligibility for federal benefits in the form of grants, contracts, loans, professional or commercial licenses,[28] and any person convicted of a drug offense may, at the discretion of the sentencing court, be made ineligible for federal benefits for up to one year.[29]

Like Congress, state legislatures have embraced regulation of convicted individuals. Studies of disabilities imposed by state law or regulation done by law students in Arizona, Maryland, and Ohio show literally hundreds of collateral sanctions and disqualifications on the books in those states.[30] Studies done for Connecticut, the District of Columbia, Michigan, New York, Minnesota, and Washington are to similar effect.[31] An April, 2006 Florida Executive Order directs collection of collateral consequences by all state agencies.[32] These laws limit the ability of convicted individuals to work in particular fields, to obtain state licenses or permits, to obtain public benefits such as housing or educational aid, and to participate in civic life.

It is important to note that collateral consequences are imposed by federal, state and local regulation and practice as well as by legislative action. Notably, a complaint has recently been filed with the EEOC over a refusal on the part of the Census Bureau to hire people with convictions for temporary employment as census takers.

The legal system is only beginning to manage the proliferation of collateral consequences. One

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[24] 21 U.S.C. § 862a.
[25] 26 U.S.C. § 25A(b)(2)(D).
[26] 20 U.S.C. § 1091(r).
[27] 42 U.S.C. § 13662.
[28] 21 U.S.C. § 862(a). For the first conviction ineligibility period may be up to five years; for a second it may be up to 10 years; and for a third or subsequent conviction ineligibility is mandatory and permanent. *Id.*
[29] 21 U.S.C. § 862(b). For a second conviction the ineligibility period may be up to five years. The period of ineligibility may be waived if the person declares himself to be an addict and submits to long-term treatment. *Id. See also* SALZMANN & LOVE, supra note 20 at 36-37; *id.* at 47 App. 1 ("Federal Consequences Affecting a Person with a Felony Drug Conviction").
[30] *See* Kate Adamson et al., *Collateral Consequences of Criminal Conviction in Arizona*, The Law, Criminal Justice and Security Program, University of Arizona (2007); Kimberly R. Mossoney & Cara A. Roecker, *Ohio Collateral Consequences Project*, 36 U. TOLEDO L. REV. 611 (2005); Re-Entry of Ex-Offenders Clinic, University of Maryland School of Law, *A Report on Collateral Consequences of Criminal Convictions in Maryland* (2007). (http://www.sentencingproject.org/detail/publication.cfm?publication_id=164).
[31] *See* George Coppolo et al., *Consequences of a Felony Conviction Regarding Employment*, Report No. 2005-R-0311, Connecticut General Assembly, Office of Legislative Research (2005). Available at http://www.cga.ct.gov/2005/rpt/2005-R-0311.htm; PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN THE DISTRICT OF COLUMBIA: A GUIDE FOR CRIMINAL DEFENSE LAWYERS (2004); Michigan Reentry Law Wiki, Michigan Poverty Law Program (http://reentry.mplp.org/reentry/index.php/Main_Page); NEW YORK STATE BAR ASS'N, SPECIAL COMMITTEE ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY (2006). *See also* MINN. STAT. Ch. 609B, Collateral Sanctions (2007); Kim Ambrose, *Beyond the Conviction: What Defense Attorneys in Washington State Need to Know About Collateral & Other Non-Confinement Consequences of Criminal Convictions*, WASHINGTON DEFENDER ASSOCIATION (2005).
[32] *See* Fl. Exec. Order No. 6-89 (Apr. 25, 2006).

problem is that collateral consequences are administered largely outside of the criminal justice system. Court decisions have not treated them as criminal punishment, but mere civil regulation.[33]

The most important consequence of this principle is in the context of guilty pleas. In a series of cases, the Supreme Court has held that a guilty plea is invalid unless "knowing, voluntary and intelligent." Until recently, courts have held that while a judge taking a guilty plea must advise of the "direct" consequences---imprisonment and fine---defendants need not be told by the court or their counsel about collateral consequences.[34] For example, the Constitution has not typically been held to require that a defendant pleading guilty to a drug felony with a stipulated sentence of probation be told that, even though she may walk out of court that very day, a wide range of public benefits and opportunities may no longer be available to her: Military service, government employment, welfare benefits, higher education, public housing, many kinds of licensure, even driving a car, may be out of the question. Inevitably, individuals with convictions, most not legally trained, are surprised when they discover legal barriers they were never told about.

The major exception to the exclusion of collateral consequences from the guilty plea process has been in the area of deportation. More than half of American jurisdictions provide by rule, statute or court decision that defendants must be advised of the possibility of deportation when pleading guilty. Recently, in *Padilla v. Kentucky*,[35] the United States Supreme Court held that defense counsel was obligated, under the Sixth Amendment, to advise of the possibility that a guilty plea would lead to deportation.

The 7-2 decision in *Padilla* appears to profoundly change the legal landscape surrounding the collateral consequences of conviction. The defendant, Jose Padilla, was a lawful permanent resident who claimed constitutionally insufficient counsel when his lawyer failed to advise him of the consequences to his immigration status of a plea guilty to drug distribution charges. With such information the defendant claimed he would not have entered a guilty plea and instead opted to take his case to trial. The Supreme Court found that the immigration implications of a guilty plea are so integral to the penalties associated with the plea that the advice of counsel on such matters is within the ambit of the Sixth Amendment right to counsel. Justice Stevens, writing for the majority, said that silence of counsel is "fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement." Counsel now must inform a client whether a plea carries a risk of deportation for the advice of counsel to be found competent.

The rationale of the majority opinion rejected the conclusion that the distinction between a direct sanction of conviction and a "collateral" one is meaningful in terms of determining whether competence requires that a consequence of conviction be disclosed to a defendant in connection with plea negotiations. Instead, Justice Stevens focused on the importance and certainty of a

[33] *See* Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1686 n.10 (2003).
[34] *See, e.g.*, Foo v. State, 102 P.3d 346, 357-58 (Hawai'i 2004); People v. Becker, 800 N.Y.S.2d 499, 502-03 (Crim. Ct. 2005); Page v. State, 615 S.E.2d 740, 742-43 (S.C. 2005); Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 706-08 (2002)).
[35] 130 S. Ct. 1473 (March 31, 2010).

particular consequence. This suggests that *Padilla* may well be extended to require accurate counseling about the collateral consequences of a conviction far beyond immigration issues.[36]

If this reading of *Padilla* proves to be correct, it appears in the future, competent defense counsel will be required to accurately advise defendants in criminal cases about the important and certain collateral consequences that will attach to a particular conviction. For reasons, I will explain below, some very significant research (which is underway) will be required to enable counsel to meet this obligation.

Another problem is that it has become increasingly difficult to avoid or mitigate the impact of collateral consequences. Most states have not yet developed a comprehensive and effective way of "neutralizing" the effect of a conviction in cases where it is not necessary or appropriate for it to be decisive. In almost every U.S. jurisdiction, offenders seeking to put their criminal past behind them are frustrated by a legal system that is complex and unclear and entirely inadequate to the task. As a practical matter, in most jurisdictions people convicted of a crime have no hope of ever being able to fully discharge their debt to society.[37]

The criminal justice system must pay attention to collateral consequences. If the sentence is a reliable indicator, collateral consequences in many instances are what is really at stake, the real point of achieving a conviction. In 2004, 60% of those convicted of felonies in state courts were not sentenced to prison; 30% received probation or some other non-incarceration sentence and 30% received jail terms.[38] In a high percentage of cases, the real work of the legal system is done not by fine or imprisonment, but by changing the legal status of convicted individuals. The legal effects the legislature considers important are in the form of collateral sanctions imposed by dozens of statutes. Yet the defendant as well as the court, prosecutors and defense lawyers involved need know nothing about them. As a National District Attorney's Association resolution recognizes, "the lack of employment, housing, transportation, medical services and education for ex-offenders creates barriers to successful reintegration and must be addressed as part of the reentry discussion."[39]

Consider for a moment the impact on an individual family of the collateral consequences of conviction: Eighteen years ago, in June of 1992, a young, newly married couple who live in my county had an argument.[40] The young husband told his wife he planned to move out of their apartment. Some kind of physical altercation ensued. The police affidavit says the husband "grabbed her, shook her and slammed her against the door," and adds that wife told police that he had also pushed her up against a sink. Today, the wife says that she was trying to make him

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[36] *See* Margaret Colgate Love & Gabriel J. Chin, Padilla v. Kentucky: The Right to Counsel and the Collateral Consequences of Conviction, 34 THE CHAMPION 18 (May 2010).
[37] *See generally* MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (William S. Hein & Co. 2006).
[38] Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2004*, at 3, Bureau of Justice Statistics Bulletin (July 2007, NCJ 215646).
[39] NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, POLICY POSITIONS ON PRISONER REENTRY ISSUES §4(a) at 7 (Adopted July 17, 2005).
[40] This account is drawn from "*1992 Conviction Sinks Soldier's Guard Career*" by *Sam Hemingway, Staff Reporter*, BURLINGTON FREE PRESS, Sunday, May 16, 2010.

stay at the apartment and that he simply "removed my arms" from him as he tried to depart. A month later, the husband pled guilty to domestic assault in Vermont District Court. As part of a plea agreement, the state dropped a count of unlawful mischief. The husband paid a fine of $10 and was placed on probation. He was released from probation in April of 1993 after attending 27 weeks of Domestic Abuse Education Program classes.[41]

I suppose the young couple thought these events were behind them. They were wrong.

The couple stayed together and raised two children. The husband had been a member of the Vermont National Guard. He reenlisted in 1996 and says he disclosed his misdemeanor conviction at that time. He became a full-time National Guard technician in 2000. He was deployed to Kuwait in 2004-2005. He has been promoted several times, ultimately to sergeant first class.[42]

In 2009, during a background check in anticipate of deployment to Afghanistan, the National Guard discovered his conviction. Under the Lautenberg amendment, adopted in 1995, a person with a domestic assault conviction cannot lawfully possess a firearm.[43] Facing discharge from the National Guard, the soldier sought expungement of his conviction. Two Vermont judges denied his request, each concluding that the courts lacked authority to expunge an adult conviction. A third judge declined to reopen his conviction, even with the support of the county prosecutor, noting that he could find no evidence the case was mishandled at the time of conviction.[44]

After the first effort to expunge his conviction, the soldier sought a gubernatorial pardon. Vermont's Governor, James H. Douglas, declined a pardon.[45] He has stated: "The Congress of the United States determined that under the gun control law, people with a conviction of domestic assault ought not to carry a firearm. I am troubled by the notion that I might be called upon to substitute my judgment for that of the United States Congress."[46]

As a result, the soldier is a soldier no more. He has lost the opportunity to serve his country in Afghanistan. He has lost his 16 year military career in the National Guard and a substantial portion of his military pension. Unemployed, he says: "I'm just lost. I wake up every day

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[41] *Id.*
[42] *Id.*
[43] 18 U.S.C. § 922(g)(9). Unlike the more general prohibition on gun possession for those convicted of a felony, 18 U.S.C. § 922(g)(1), the prohibition attaching to domestic violence convictions is not subject to waiver for possession of a firearm in government employment in 18 U.S.C. § 925.
[44] *Id.* at 32.
[45] Unfortunately the exercise of the executive power to pardon in most states has become is relatively rare. For example, in his nearly 8 years in office, Governor Douglas has granted only thirteen pardons, less than two a year. "Pardons Present Challenges for Governors" by Sam Hemingway, Staff Reporter, Burlington Free Press, Sunday, May 16, 2010. While every US jurisdiction offers pardon as a way of avoiding or mitigating collateral consequences, in only about only third of the states is pardon a reasonably accessible and reliable form of relief. Supra, n. 37. On the federal level, Presidential pardons have not been available on a regular basis since the Reagan Administration. *Id.* President Obama has yet to grant a single pardon. "Obama Should Exercise the Pardon Power," Kenneth Lee, *National Law Journal*, April 12, 2010.
[46] *Id.* at 32.

wondering how I am going to provide for my family. ... I devoted my whole life to the Guard. It was such a great way of life for me. I felt I fit into something. It was a way I could give back to my community and my country."[47]

As a nation, our law on the subject of the collateral consequences of conviction is in disarray. We go about the process of punishing crime ignorant of the full extent of the penalties we impose. No one knows the full extent of the collateral consequences of conviction, because, in most of our jurisdictions, they have never even been collected. Our policy makers decide what consequences to impose without knowing what already exists. Our prosecutors, defense lawyers, judges and even defendants negotiate plea agreements while ignorant of the long term impact of their decisions.

By doing so we have created a dizzying array of collateral consequences of conviction. Some of these consequences are necessary and appropriate measures designed to protect the public. Many are not. Many are applied with little regard for the particular circumstances of the individual case. Often the consequences become roadblocks to successful reentry into law abiding society and push convicted persons back to a life of crime.

If, as Attorney General Eric Holder has suggested, "we must be 'tough on crime[,]' but we must also commit ourselves to being 'smart on crime[,]'"[48] it is time for change. We need a more thoughtful, reasoned approach to the problem of the collateral consequences of conviction.

The ULC Response

In 2003 the American Bar Association issued its "Standards on Collateral Sanctions and Discretionary Disqualification of Conviction Persons."[49] In response to this study, I proposed that the ULC consider drafting an act to address the problems of the exponential growth of collateral consequences. The ULC Committee on Scope and Program recommended in July 2003 that a study committee be formed. After two years of study, in July 2005, the ULC appointed a Drafting Committee on Uniform Collateral Consequences of Conviction Act.

The drafting committee was greatly assisted by numerous observers to the committee representing a wide variety of interested and affected groups, including the American Bar Association Criminal Justice Section, the ABA Judicial Division and the National Association of Attorneys General and the National Association of Criminal Defense Lawyers.

After four years of drafting, which included numerous in-person drafting committee meetings, the Uniform Collateral Consequences of Conviction Act was approved by the ULC in July 2009. It was subsequently approved by the ABA House of Delegates in February 2010.

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[47] *Id.* at 32.
[48] Prepared Remarks of Attorney General Eric Holder at the 2009 ABA Convention, Chicago, Ill., August 3, 2009.
[49] See note 1, supra.

The Uniform Collateral Consequences of Conviction Act[50]

The UCCCA address three significant problems:

1. The need for information about collateral consequences;
2. The need to harmonize state law relating to collateral consequences; and
3. The need for some relief from collateral consequences.

1. Information.

Compilation and Collection of Collateral Consequences.
One of the first issues confronted by the drafters of the UCCCA was the complete disorganization of law and regulations related to collateral consequences. Coupled with this disorganization was a lack of awareness exhibited by the public, practitioners, and the judiciary regarding the existence and pervasiveness of these consequences. As drafted, the UCCCA will ensure that collateral consequences are known to all involved in the criminal proceeding -- furthering the fairness of our criminal justice system.

The UCCCA requires states to collect in a single document all collateral consequences contained in state law and regulations. Each consequence must be summarized by a short description that explains the nature and extent of the penalty. Further, the document must include all provisions for avoiding or mitigating the penalty. The completed list must be made available to the public upon completion. All collateral consequences must be authorized by statute or regulation. This collection will not represent a body of positive law, nor will it constitute a change to existing state law.

The federal government has already taken action to assist the states and territories with significant research burden of creating such a collection. Section 510 of the Court Security Act of 2007[51] requires that the United States Department of Justice survey the collateral consequences in each of the 50 states and four territories and make the results of that survey available to each state. Collection of the myriad existing collateral consequences is being addressed through a grant recently awarded by the National Institute of Justice (NIJ) to the American Bar Association.[52] The Section, in collaboration with George Washington University School of Law, has commenced the ABA Adult Collateral Consequences Project. The Project seeks to catalog every collateral consequence of criminal convictions in the United States, including the District of Columbia, Puerto Rico and the Virgin Islands and then create a database allowing users to determine exactly what consequences follow from particular criminal offenses. Eventually, the Project intends to create a free online resource for attorneys, policymakers, and the public to input specific criminal offenses and view the collateral consequences attaching to convictions.

The contract for this study was awarded in December 2009, and the study is expected to be

[50] The full text of the UCCCA is reproduced at Appendix 1.
[51] Court Security Improvement Act of 2007, Pub. L. 110-177 § 510, 121 Stat. 2534, 2544.
[52] I serve as a member of the Advisory Committee to The ABA Adult Collateral Consequences Project.

completed by December 2012. At present, the Project is in the data collection stage. Initial collections have been completed for 8 states:

States Completed	Collateral Consequences Identified
Arizona	933
New York	1119
New Hampshire	644
Alaska	497
Washington	586
Minnesota	660
Maryland	902
Mississippi	423

This represents an average of 720 collateral consequences, imposed by statute and regulation, indentified in each state studied so far. Data collection is currently underway for the states of: Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, New Mexico, and North Carolina.

Obviously, completion of the Project study will ease state accession to the UCCCA collection requirement. This study will also improve the ability of lawyers and courts to give notice of the collateral consequences associated with a crime to a defendant.

Notice to Defendants.
Under the UCCCA, an individual charged with a criminal offense must be provided with notice of the existence of collateral consequences. The aggregation of all state law collateral consequences will, for the first time, facilitate effective lawyer-client counseling on this subject. With the collection of collateral consequences in hand, defense lawyers will be able to fully inform the accused of the consequences of a guilty plea before trial, and afford the accused information vital to informed decision making. Similarly, the existence of such information will enable prosecutors and judges to consider the impact of collateral consequences when considering plea offers and sentences

Notifying an individual convicted of an offense of the existence of collateral consequences is also required at the time of sentencing, and if the individual is sentenced to prison, at the time of release. This will reduce the risk that an offender will reoffend due to ignorance of applicable collateral consequences. Offenders must also be notified of the opportunity to obtain relief from the collateral consequences.

As noted about, the recent Supreme Court decision in *Padilla v. Kentucky,*[53] places an affirmative obligation on criminal defense attorneys to advise clients the impact a guilty plea or conviction will have on immigration status. While *Padilla's* holding only requires that action be taken to assure that adequate counsel is given on the subject of deportation, the rationale of the case suggests that adequate counsel will also be required as to all important and certain collateral

[53] See note 35, supra,

consequences. It seems unlikely that importance and certainty will prove a sufficiently certain standard to permit lawyers and judges to distinguish in advance between consequences as to which accurate advice will be required and those as to which it will not.

As a result, the ULC Standby Committee on the UCCCA, has recommended that a new subsection (b) be added to Section 5 of the Act which would instruct trial courts to confirm that the defendant has received and understood notice of collateral consequences and had an opportunity to discuss them with defense counsel.[54] Such a colloquy is an obvious step that courts could take to reduce the risk that *Padilla* will have a destabilizing effect on the plea process. These changes will considered by the ULC at its upcoming meeting in Chicago in July.

2. Harmonization of State Law.

The increasing mobility of all individuals in society and lack of uniformity throughout the states in defining specific crimes creates unpredictability as to whether collateral consequences will be imposed based on crimes committed in other states. Under the UCCCA, determinations of the applicability of collateral consequence for an out-of-state crime are to be made using the test set forth by the Supreme Court in *Blockburger v United States*.[55] An out-of-state conviction constitutes a conviction in a new state if the elements of the offense are the same. If there is no offense in the new state with the same elements of the out-of-state conviction, the conviction is deemed to be the most serious offense established by the elements of the offense. Further, convictions that have been overturned or pardoned, including those that are out-of-state convictions, may not be the basis for imposing collateral consequences. The UCCCA also provides two alternatives for states to choose from when addressing the impact of "mercy" relief granted by other jurisdictions, such as expungement or set-aside, for purposes of assigning collateral consequences. One alternative does not give rise to collateral consequences if the conviction has been relieved, while the other treats the conviction the same as any other conviction.

3. Providing Some Relief from Collateral Consequences.

The UCCCA balances the interests of public safety with the need to improve opportunities for successful reintegration of persons with convictions. The Act would establish two devices to provide relief, an Order of Limited Relief and a Certificate of Restoration of Rights. Neither

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[54] The proposed UCCCA language is as follows:

> "(b) Before a court accepts a plea of guilty or nolo contendre from an individual, the court shall confirm that the defendant received and understands the notice required by subsection (a) and has had an opportunity to discuss the notice with defense counsel."

Because *Padilla* involves collateral consequences imposed as result of federal law, the Standby Committee also recommends that the identification and collection of collateral consequences required under Section 4 of the Act be expanded to include reference to the most recent collection of collateral consequences imposed by federal law. It also recommends that a reference to a state's Megan's Law in Section 12 (1) be updated to reference more recent federal legislation relating to sex offender registration and notification. Conforming changes are recommended to the Official Comments as well.

[55] 284 U.S. 299 (1932).

device would relieve obligations related to sex offender registration, motor vehicle licensing, or the right to employment by law enforcement agencies.

Order of Limited Relief
The Order of Limited Relief permits a court or agency to lift the automatic bar of a collateral sanction related to employment, education, housing, public benefits, or occupational licensing. The petition for the order can be presented to the sentencing court before, or at, the time of sentencing. Failure to petition for the order at that time does not bar subsequent relief. The offender can petition the designated agency or board within the state at any time after sentencing occurs. The reviewing entity must review the petition and can issue the relief if it finds that granting the petition does not pose a public safety risk and that the relief will substantially improve the ability of the offender to reintegrate into society. An Order of Limited Relief does not guarantee that the benefit sought will be obtained. It only ensures that an ex-offender seeking such a benefit is treated on an equal footing with an individual who has admitted engaging in the same underlying behavior, but has never been convicted.

Certificate of Restoration of Rights
The Certificate of Restoration of Rights is broader than the Order of Limited Relief. If granted, the Certificate applies to all collateral sanctions, not just those associated with employment, education, housing, public benefits, or occupational licensing. The provisions found in the UCCCA are based upon the procedures utilized in New York, the only state with comprehensive procedures to relieve the restrictions imposed by collateral consequences after a period of law abiding behavior. Under Section 10 of the UCCCA, an offender may petition the appropriate state board or agency for the Certificate after a five year period in which the individual demonstrates conduct conforming to the law. Within that period, the individual must additionally show that they have been in school or employed and have a lawful source of income. The UCCCA empowers the board or agency to make exceptions to the restorations of certain rights if it determines the exception is in the interest of public safety. An ex-offender could use a Certificate of Restoration of Rights to show potential employers, landlords, or licensing agencies that he or she has made substantial progress towards rehabilitation; reducing the stigma of a criminal past.

Suggestions for Federal Action

As the foregoing makes clear, the proliferation of collateral consequences of conviction is problem of both federal and state law. Action at the federal and state levels will be necessary if a more thoughtful and well-crafted policy is to emerge.

- The federal government has already begun to take a positive role in this effort by initiating the ABA's Adult Collateral Consequences Project described above. Once the Project has cataloged the collateral consequence of criminal convictions, and made its work product available on line, some additional funding will be required to keep the collection current on an ongoing basis. No source of such funding, other than the federal

government, appears conceivable.

- The Uniform Collateral Consequences of Conviction Act can make a major contribution to this effort if it is widely adopted as state law. State budget problems due to the recession create a significant disincentive to adoption of the UCCCA because some modest government expenditures would be required to administer the processes through which applications for Orders of Limited Relief and Certificate of Restoration of Rights will be processed. A federal grant program to provide at least seed money to support the initial efforts of state and territorial governments to establish and begin to run administrative organizations to process relief applications would greatly assist efforts to adopt the UCCCA.

- Precedent already exists for giving federal effect to state relief measures from collateral consequences. Under the federal firearms law, the right to carry a firearm can be restored to an ex-offender if his civil rights have been restored under state law.[56] The Transportation Safety Administration and other federal agencies administering collateral consequences in federal laws also give effect to certain state relief.[57] These provisions could be interpreted to permit relief measures under the UCCCA to be treated as qualifying relief under these federal schemes. The same idea could be applied to other federal collateral consequences that are based on state convictions.

- A federal collateral consequence of conviction act could usefully adopt many of the provisions of the UCCCA for use in connection with federal convictions. For example, federal law could be

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[56] 18 U.S.C. §921(a)(20) provides:

> "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly [or implicitly as a matter of state law] provides that the person may not ship, transport, possess, or receive firearms."

The federal courts have essentially defined "restoration of civil rights" as having three components: the right to vote, the right to seek and hold public office, and the right to serve on a jury. See *Hampton v. United States*, 191 F.3d 695 (6th Cir. 1999).

But note that if state law retains any sort of firearms restriction (*i.e.* allowing long guns but not handguns) the federal restriction still applies, effectively nullifying the partial restoration. See *Caron v. United States*, 524 U.S. 308 (1998). In addition, federal offenders appear to have no way of restoring their rights except through a presidential pardon. Cf. *Beecham v. United States*, 511 U.S. 368 (1994).

[57] *See, e.g. proposed* 24 C.F.R. Part 3400, published at 74 Fed. Reg. 66548 (Dec. 15, 2009)(implementation of SAFE Act prohibition on licensing of convicted persons to originate mortgages); Transportation Security Administration, U.S. Dep't of Homeland Security, *Disqualifiers: HAZMAT Endorsement Threat Assessment Program*, available at http://www.tsa.gov/what_we_do/layers/hazmat/disqualifiers.shtm; Transportation Security Administration, U.S. Dep't of Homeland Security, *Program Information Transportation Worker Identification Credential*, available at http://www.tsa.gov/what_we_do/layers/twic/program_info.shtm.

adopted to authorize the U.S. Parole Board, or some other entity, to consider and in appropriate cases grant, Orders of Limited Relief and Certificate of Restoration of Rights to assist deserving persons convicted of violations of federal criminal law.

Conclusion

I appreciate the opportunity to submit this written testimony and look forward to addressing the Members of the Subcommittee to discuss the problems of collateral consequences and how the Congress can take steps to reduce the extent to which collateral consequences serve as barriers to successful reentry to society of ex-offenders.

For further information on the UCCCA or on the Uniform Law Commission, please contact me or ULC Legislative Counsel Eric Fish at the ULC offices in Chicago at 312-450-6600, eric.fish@nccusl.org

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ATTACHMENT

UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-EIGHTEENTH YEAR
IN SANTA FE, NEW MEXICO
JULY 9-16, 2009

WITH PREFATORY NOTE AND COMMENTS

November 20, 2009

ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 118th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.
- ULC keeps state law up-to-date by addressing important and timely legal issues.
- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.
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- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

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UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT

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UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT

Prefatory Note

Both the criminal justice system and society as a whole face the problem of managing the growing proportion of the free population that has been convicted of a state or federal criminal offense. In a trend showing little sign of abating, the U.S. prison population has increased dramatically since the early 1970s. Heather C. West & William J. Sabol, *Prisoners in 2007*, at 1, Bureau of Justice Statistics Bulletin (Dec. 2008, NCJ 224280); Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, at 1, Bureau of Justice Statistics Special Report (Aug. 2003, NCJ 197976). Prison growth is large in absolute and relative terms; in 1974, 1.8 million people had served time in prison, representing 1.3% of the adult population. In 2001, 5.6 million people, 2.7% of the adult population, had served time. The Department of Justice estimates that if the 2001 imprisonment rate remains unchanged, 6.6% of Americans born in 2001 will serve prison time during their lives. Bonczar, *supra*. This may be an underestimate given that the incarceration rate has increased every year since 2001. *See also* PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA IN 2008 (2008) (http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf).)

In addition to those serving or who have served prison time, an even larger proportion of the population has been convicted of a criminal offense without going to prison. Over four million adults were on probation in 2007, about twice as many as the number in jail or in prison. Laura E. Glaze & Thomas P. Bonczar, *Probation and Parole in the United States, 2007*, at 1-2, Bureau of Justice Statistics Bulletin (Aug. 2009, NCJ 224707). *See also* PEW CENTER ON THE STATES: ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS (2009) (http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf). According to the U.S. Department of Justice, "[n]early 81 million individuals were in the criminal history files of the State criminal history repositories on December 31, 2006 (An individual offender may have records in more than one State)." *Survey of State Criminal History Information Systems, 2006*, at 4, Bureau of Justice Statistics (Oct. 2008, NCJ 224889). Minorities are far more likely than whites to have a criminal record: Almost 17% of adult black makes have been incarcerated, compared to 2.6% of white males. Bonczar, *supra*, at 5. A recent study has shown that "a criminal record has a significant negative impact on hiring outcomes, even for applicants with otherwise appealing characteristics," and that "the negative effect of a criminal conviction is substantially larger for blacks than for whites." Devah Pager & Bruce Western, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men 4* (Oct. 2009, NCJ 228584) (http://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf).

The growth of the convicted population means that there are literally millions of people being released from incarceration, probation and parole supervision every year. They must successfully reintegrate into society or be at risk for recidivism. Society has a strong interest in preventing recidivism. An individual who could have successfully reentered society but for avoidable cause reoffends generates the financial and human costs of the new crime, expenditure of law enforcement, judicial and corrections resources, and the loss of the productive work that

the individual could have contributed to the economy. Society also has a strong interest in seeing that individuals convicted of crimes can regain the legal status of ordinary citizens to prevent the creation of a permanent class of "internal exiles" who cannot establish themselves as law-abiding and productive members of the community. *Cf.* Nora V. Demleitner, *Preventing Internal Exile: The Need For Restrictions On Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999).

As the need for facilitating reentry becomes more pressing, several developments have made it more difficult. First, a major challenge for many people with criminal records is the increasingly burdensome legal effect of those records. A second major development is the availability to all arms of government and the general public, via Internet, of aggregations of public record information, including criminal convictions, about all Americans. *See. e.g.,* BUREAU OF JUSTICE STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY, AND CRIMINAL JUSTICE INFORMATION (Aug. 2001, NCJ 187669). Twenty years ago, an applicant might not have been asked for her criminal record when renting an apartment or applying for a job, and it would have been difficult for even an enterprising administrator to find, say, a 15 year old, out-of-state, marijuana offense. Now, gathering this kind of information is cheap, easy and routine. Corinne A. Carey, *No Second Chance: People With Criminal Records Denied Access To Public Housing*, 36 U. TOLEDO L. REV. 545, 553 (2005); *see generally* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 ST. THOMAS L. REV. 387 (2006).

Apart from impairment of self-esteem and informal social stigma, a criminal conviction negatively affects an individual's legal status. For many years, an individual convicted of, say, a drug felony, lost his right to vote for a period of time or for life. *See* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (Oxford 2006). Convicted individuals may be ineligible to hold public office. *See, e.g.,* State *ex rel.* Olson v. Langer, 256 N.W. 377 (N.D. 1934). Federal law bars many persons with convictions from possessing firearms (18 U.S.C. § 922(g)(1)), serving in the military (10 U.S.C. § 504(a)), and on juries, civil and criminal. Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003). If a non-citizen, a person convicted of a crime may be deported. These disabilities have been called "collateral consequences" "civil disabilities" and "collateral sanctions." The term "collateral sanction" is used here to mean a legal disability that occurs by operation of law because of a conviction but is not part of the sentence for the crime. It is "collateral" because it is not part of the direct sentence. It is a "sanction" because it applies solely because of conviction of a criminal offense. The Act also uses the term "disqualification" to refer to disadvantage or disability that an administrative agency, civil court or other state actor other than a sentencing court is authorized, but not required, to impose based on a conviction. Collectively, collateral sanctions and disqualifications are defined as collateral consequences.

In recent years, collateral consequences have been increasing in number and severity. Federal law now imposes dozens of them on state and federal offenders alike. To identify just some of those applicable to individuals with felony drug convictions, 1987 legislation made individuals with drug convictions ineligible for certain federal health care benefits (42 U.S.C. § 1320a-7(a)(4); a 1991 law required states to revoke some driver's licenses upon conviction or lose federal funding (23 U.S.C. § 159), in 1993, Congress made individuals with drug

convictions ineligible to participate in the National and Community Service Trust Program. 42 U.S.C. § 12602(e). In 1996, Congress provided that individuals convicted of drug offenses would automatically be ineligible for certain federal benefits. 21 U.S.C. § 862a. A year later, Congress rendered them ineligible for the Hope Scholarship Tax Credit. 26 U.S.C. § 25A(b)(2)(D). In 1998, individuals convicted of drug crimes were made ineligible for federal educational aid (20 U.S.C. § 1091(r)), and for residence in public housing. 42 U.S.C. § 13662. In addition, 1988 legislation authorized state and federal sentencing judges to take away eligibility for federal public benefits. 21 U.S.C. § 862. *See generally* KELLY SALZMANN & MARGARET COLGATE LOVE, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (ABA 2009) (http://www.abanet.org/cecs/internalexile.pdf); *id.* at 47 App. 1 ("Federal Consequences Affecting a Person with a Felony Drug Conviction").

Like Congress, state legislatures have embraced regulation of convicted individuals. Studies of disabilities imposed by state law or regulation done by law students in Maryland and Ohio show literally hundreds of collateral sanctions and disqualifications on the books in those states. *See* Kimberly R. Mossoney & Cara A. Roecker, *Ohio Collateral Consequences Project*, 36 U. TOLEDO L. REV. 611 (2005); Re-Entry of Ex-Offenders Clinic, University of Maryland School of Law, *A Report on Collateral Consequences of Criminal Convictions in Maryland* (2007) (http://www.sentencingproject.org/detail/publication.cfm?publication_id=164). Studies done for the District of Columbia, Michigan, New York, and Minnesota are to similar effect. *See* PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN THE DISTRICT OF COLUMBIA: A GUIDE FOR CRIMINAL DEFENSE LAWYERS (2004); Michigan Reentry Law Wiki, Michigan Poverty Law Program (http://reentry.mplp.org/reentry/index.php/Main_Page); NEW YORK STATE BAR ASS'N, SPECIAL COMMITTEE ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY (2006). *See also* MINN. STAT. Ch. 609B, Collateral Sanctions (2007). An April, 2006 Florida Executive Order directs collection of collateral consequences by all state agencies. *See* Fl. Exec. Order No. 6-89 (Apr. 25, 2006). These laws limit the ability of convicted individuals to work in particular fields, to obtain state licenses or permits, to obtain public benefits such as housing or educational aid, and to participate in civic life.

The legal system has not successfully managed the proliferation of collateral consequences in several respects. One problem is that collateral consequences are administered largely outside of the criminal justice system. Court decisions have not treated them as criminal punishment, but mere civil regulation. *See* Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1686 n.10 (2003). The most important consequence of this principle is in the context of guilty pleas. In a series of cases, the Supreme Court held that a guilty plea is invalid unless "knowing, voluntary and intelligent." Courts have held that while a judge taking a guilty plea must advise of the "direct" consequences—imprisonment and fine—defendants need not be told by the court or their counsel about collateral consequences. *See, e.g.*, Foo v. State, 102 P.3d 346, 357-58 (Hawai'i 2004); People v. Becker, 800 N.Y.S.2d 499, 502-03 (Crim. Ct. 2005); Page v. State, 615 S.E.2d 740, 742-43 (S.C. 2005); Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 706-08 (2002)). For example, the Constitution does not require that a defendant pleading guilty to a drug felony with

a stipulated sentence of probation be told that, even though she may walk out of court that very day, a wide range of public benefits and opportunities may no longer be available to her: Military service, government employment, welfare benefits, higher education, public housing, many kinds of licensure, even driving a car, may be out of the question. Inevitably, individuals with convictions, most not legally trained, are surprised when they discover legal barriers they were never told about. The major exception to the exclusion of collateral consequences from the guilty plea process is in the area of deportation. More than half of American jurisdictions provide by rule, statute or court decision that defendants must be advised of the possibility of deportation when pleading guilty.

Another problem is that is has become increasingly difficult to avoid or mitigate the impact of collateral consequences. Most states have not yet developed a comprehensive and effective way of "neutralizing" the effect of a conviction in cases where it is not necessary or appropriate for it to be decisive. In almost every U.S. jurisdiction, offenders seeking to put their criminal past behind them are frustrated by a legal system that is complex and unclear and entirely inadequate to the task. As a practical matter, in most jurisdictions people convicted of a crime have no hope of ever being able to fully discharge their debt to society. *See generally* MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (William S. Hein & Co. 2006).

The criminal justice system must pay attention to collateral consequences. If the sentence is a reliable indicator, collateral consequences in many instances are what is really at stake, the real point of achieving a conviction. In 2004, 60% of those convicted of felonies in state courts were not sentenced to prison; 30% received probation or some other non-incarceration sentence and 30% received jail terms. Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2004*, at 3, Bureau of Justice Statistics Bulletin (July 2007, NCJ 215646). In a high percentage of cases, the real work of the legal system is done not by fine or imprisonment, but by changing the legal status of convicted individuals. The legal effects the legislature considers important are in the form of collateral sanctions imposed by dozens of statutes. Yet the defendant as well as the court, prosecutors and defense lawyers involved need know nothing about them. As a National District Attorney's Association resolution recognizes, "the lack of employment, housing, transportation, medical services and education for ex-offenders creates barriers to successful reintegration and must be addressed as part of the reentry discussion." NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, POLICY POSITIONS ON PRISONER REENTRY ISSUES §4(a) at 7 (Adopted July 17, 2005).

This Act deals with several aspects of the creation and imposition of collateral consequences. The provisions are largely procedural, and designed to rationalize and clarify policies and provisions that are already widely accepted in many states.

Section 3 makes clear that neither the provisions of the Act nor non-compliance with them are a basis for invalidating a plea or conviction, making a claim of ineffective assistance of counsel, or suing anyone for money damages.

Section 4 requires collection of collateral sanctions and disqualifications contained in state law, and provisions for avoiding or mitigating them, in a single document. The purpose is

to make the law accessible to judges, lawyers, legislators and defendants who need to make decisions based on it.

Sections 5 and 6 propose to make the existence of collateral consequences known to defendants at important moments in a criminal case: At or before formal notification of charges, so a defendant can make an informed decision about how to proceed (Section 5), and at sentencing and when leaving incarceration, so they can conform their conduct to the law (Section 6). Given that collateral sanctions and disqualifications will have been codified, it will not be difficult to make this information available.

Section 7 is designed to ensure that automatic, blanket collateral sanctions leaving no room for discretion are adopted formally, providing that they can be created only by statute, ordinance or formal rule.

Section 8 offers guidance for imposing discretionary disqualifications based on criminal conviction on a case-by-case basis.

Section 9 defines the judgments that count as convictions for purposes of imposing collateral consequences. Sections 9(a) and (b) explain how out-of-state convictions and juvenile adjudications will be used to impose collateral consequences in the enacting state. The rest of the section excludes convictions that have been reversed or otherwise overturned (9(c)), pardoned (9(d)), or did not result in a final conviction because of diversion or deferred adjudication (9(f)). Some states have forms of relief based on rehabilitation or passage of time, allowing convictions to be expunged, sealed, or set aside; in the case of out of state convictions, 9(e) asks states to make a choice about whether to give effect to grants of such relief by other states.

Sections 10 and 11 create new mechanisms for relieving collateral sanctions imposed by law. By definition, collateral consequences can only be imposed by state actors, so relieving them would not impose requirements on private persons or businesses, whose dealing with persons with convictions would be regulated, if at all, by law other than this act.

Section 10 creates an Order of Limited Relief, aimed at an individual in the process of reentering society. It offers relief from one or more collateral sanctions based on a showing that relief would facilitate reentry. The Order of Limited Relief merely lifts the automatic bar of a collateral sanction, leaving a licensing agency or public housing authority, for example, free to consider on a case-by-case basis whether it is appropriate to deny the opportunity to an individual.

Section 11 creates a Certificate of Restoration of Rights for individuals who can demonstrate a substantial period of law-abiding behavior consistent with successful reentry and desistence from crime. The Certificate of Restoration of Rights offers potential public and private employers, landlords and licensing authorities concrete and objective information about an individual under consideration for an opportunity, and thereby could facilitate the reintegration of individuals with convictions whose behavior demonstrates that they are making efforts to conform their conduct to the law.

Some of the issues have been anticipated by the ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2004), and the solutions they propose are mentioned.

UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Collateral Consequences of Conviction Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Collateral consequence" means a collateral sanction or a disqualification.

(2) "Collateral sanction" means a penalty, disability, or disadvantage, however denominated, imposed on an individual as a result of the individual's conviction of an offense which applies by operation of law whether or not the penalty, disability, or disadvantage is included in the judgment or sentence. The term does not include imprisonment, probation, parole, supervised release, forfeiture, restitution, fine, assessment, or costs of prosecution.

(3) "Conviction" includes an [adjudication as a juvenile delinquent]. "Convicted" has a corresponding meaning.

(4) "Decision-maker" means the state acting through a department, agency, officer, or instrumentality, including a political subdivision, educational institution, board, or commission, or its employees[, or a government contractor, including a subcontractor, made subject to this [act] by contract, by law other than this [act], or by ordinance].

(5) "Disqualification" means a penalty, disability, or disadvantage, however denominated, that an administrative agency, governmental official, or court in a civil proceeding is authorized, but not required, to impose on an individual on grounds relating to the individual's conviction of an offense.

(6) "Offense" means a felony, misdemeanor, [insert term for lesser offenses in enacting state], or [insert term for delinquent acts] under the law of this state, another state, or the United States.

(7) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(8) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Legislative Note: *If the enacting jurisdiction uses different terms for imprisonment, probation or parole, they should be added to the second sentence of Section 2(2). If the statutes of the enacting jurisdiction provide for violations or other lesser offenses, the term used to refer to them should be identified in Section 2(6).*

Comment

The definitions in paragraphs (2) and (5) are taken from the ABA Standards. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standard 19-1.1 (3d ed. 2004). They exclude from the definition of collateral sanction or disqualification direct criminal punishment, such as fine, imprisonment, capital punishment, probation, parole, or supervised release. They also exclude the incidents and conditions of those direct punishments. Accordingly, classification and assignment of prisoners, and conditions of probation or parole are neither collateral sanctions nor disqualifications. Private conduct, such as the hiring decisions of private employers, is also not included. Covered actions generally include such things as denial of government employment and elective or appointive office, ineligibility for government licenses, permits, or contracts, disqualification from public benefits, public education, public services, or participation in public programs, and elimination or impairment of civil rights, such as voting, or jury service.

Whether one of these disabilities is a "collateral sanction" or a "disqualification" depends on how it is applied. If a medical licensing board by law, regulation or policy "must" deny a license to an applicant with a felony conviction, then it is a collateral sanction, because the effect is automatic. If a medical licensing board "may" deny a license to those with felony convictions, then the regulation or policy is a "disqualification." However, if a criminal court takes away a medical license as punishment at sentencing, the action is neither a collateral sanction nor a disqualification. *See, e.g.,* United States v. Singh, 390 F.3d 168 (2d Cir. 2004). Even if they are enforced by criminal sanctions, restrictions which are not part of the sentence imposed by the court and apply only to convicted individuals constitute collateral sanctions.

So long it is imposed by the government, it does not matter whether a collateral consequence is imposed by law, regulation, or formal or informal practice. Thus if a city personnel office has an unwritten but unvarying practice of never hiring individuals with felony convictions, that could constitute a collateral sanction. Laws and policies requiring disclosure of

criminal convictions, and allowing the decision-maker to consider them as part of a "good moral character" or general fitness analysis fall within the definition of a disqualification. Similarly, laws and policies requiring a criminal background check impliedly constitute disqualifications, since it may fairly be assumed that the only reason the information is sought is that the results may be considered by the decision-maker.

Some states have offenses lesser than misdemeanors or felonies, such as infractions or violations. *E.g.*, MODEL PENAL CODE § 1.04(5). While these may not be deemed crimes under the law of the state, it is possible for them to carry collateral consequences. Thus, these lesser offenses are included within the definition of "offense" in Section 2(6).

These definitions and the Act apply to juveniles prosecuted as adults. They also apply to juveniles prosecuted in a family, juvenile or similar court if the adjudication or judgment of conviction, however denominated, gives rise to collateral sanctions or disqualifications under state law.

SECTION 3. LIMITATION ON SCOPE.

(a) This [act] does not provide a basis for:

(1) invalidating a plea, conviction, or sentence;

(2) a cause of action for money damages; or

(3) a claim for relief from or defense to the application of a collateral consequence

based on a failure to comply with Section 4, 5, or 6.

(b) This [act] does not affect:

(1) the duty an individual's attorney owes to the individual;

(2) a claim or right of a victim of an offense; or

(3) a right or remedy under law other than this [act] available to an individual

convicted of an offense.

Comment

Non-compliance with this Act does not give an individual the ability to attack a plea or conviction, or the application of a collateral sanction to the individual based on lack of notice. While states adopting this act should comply with it, non-compliance does not necessarily render a conviction or plea illegal or unfair. This is consistent with current law. This section neither adopts nor rejects the body of decisions holding incorrect or misleading advice about collateral consequences may render a plea constitutionally invalid. *See, e.g.*, United States v. Couto, 311

F.3d 179, 187-88 (2d Cir. 2002); Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979); United States v. Kwan, 407 F.3d 1005, 1016-18 (9th Cir. 2005). Section (b)(3) leaves in place any other remedies that exist in the enacting state.

SECTION 4. IDENTIFICATION, COLLECTION, AND PUBLICATION OF LAWS REGARDING COLLATERAL CONSEQUENCES.

(a) The [designated governmental agency or official]:

(1) shall identify or cause to be identified any provision in this state's Constitution, statutes, and administrative rules which imposes a collateral sanction or authorizes the imposition of a disqualification, and any provision of law that may afford relief from a collateral consequence;

(2) not later than [insert number of] days after [insert the effective date of this [act]], shall prepare or cause to be prepared a collection of citations to, and the text or short descriptions of, the provisions identified under paragraph (1);

(3) shall update or cause to be updated the collection within [insert number of] days after each [regular session] of the [legislature]; and

(4) in complying with paragraphs (1) and (2), may rely on the study of this state's collateral sanctions, disqualifications, and relief provisions prepared by the National Institute of Justice described in Section 510 of the Court Security Improvement Act of 2007, Pub. L. 110-177.

(b) The [designated governmental agency or official] shall include or cause to be included the following statements in a prominent manner at the beginning of the collection required by subsection (a):

(1) This collection has not been enacted into law and does not have the force of law.

(2) An error or omission in this collection is not a reason for invalidating a plea, conviction, or sentence or for not imposing a collateral sanction or authorizing a disqualification.

(3) The laws of the United States, other jurisdictions, and [insert term for local governments] which impose additional collateral sanctions and authorize additional disqualifications are not listed in this collection.

(4) This collection does not include any law or other provision regarding the imposition of or relief from a collateral sanction or a disqualification enacted or adopted after [insert date the collection was prepared or last updated].

(c) The [designated governmental agency or official] shall publish or cause to be published the collection prepared and updated as required by subsection (a). The collection must be available to the public on the Internet without charge not later than [insert number of] days after it is created or updated.

Comment

In a real sense, convicted persons are regulated. Each state effectively has a title of its code called *Collateral Consequences*, regulating the legal status of this group in scores or hundreds of ways. But instead of publishing these laws together, the statutes are divided up and scattered. The sanctions have proliferated unsystematically, with a prohibition on individuals with felony convictions obtaining one kind of license popping up in one section of a state's code, a prohibition on obtaining some other kind of government employment appearing in an agency's rules.

While some disabilities may be well known, such as disenfranchisement and the firearms prohibition, in most jurisdictions no judge, prosecutor, defense attorney, legislator or agency staffer could identify all of the statutes that would be triggered by conviction of the various offenses in the criminal code. Although the information would be useful to many people, including judges, prosecutors, defense lawyers and those supervising individuals with convictions, as well as legislators and other policymakers, it would be extremely costly for any of them to develop the information on their own. Dispersal of these laws and rules defeats the purpose of having published codes in the first place.

Section 4(a) requires an appropriate government official or agency in each state to create a collection with citations to and short descriptions of any provision in the state constitution, statutes and administrative rules that create collateral sanctions and authorize disqualifications.

The appropriate agency could be, depending on the jurisdiction, the revisor of statutes, the attorney general's office, the judicial branch, or the legislative counsel's office. The task of collection has been simplified by a recent federal law which mandates the Director of the National Institute of Justice to identify collateral sanctions and disqualifications in the constitutions, codes and administrative rules of the 50 states. Court Security Improvement Act of 2007, Pub. L. 110-177 § 510, 121 Stat. 2534, 2544. Accordingly, the federal government will do the bulk of the initial work. However, the federal government study may not extend to disqualifications in the form of official policies and practices that have not been formally promulgated in a statute or agency regulation, so that jurisdictions may want to expand their collections accordingly. *Cf.* 42 U.S.C. § 3797w(e)(4) (requiring applicants for grants under the Second Chance Act of 2007 to provide "a plan for analysis of the statutory, regulatory, rules-based, and practice-based hurdles to reintegration of offenders into the community")

This collection will not be positive law, nor will it alter existing law. Yet, collecting collateral sanctions and disqualifications in the state's law, and describing them in simple, plain language, would make the formal written law knowable to those who use and are affected by it. Compare Il. Pub. Act 096-0593 (Aug. 18, 2009) (requiring inventory of all state laws and policies restricting employment of persons with criminal records); MICH. COMP. LAWS § 28.425a(9) (requiring collection and distribution to firearms licensees of state firearms laws).

Sections (a)(2) and (3) and (c) leave bracketed the time periods for preparation of the initial collection, updating it after legislative sessions, and posting it on the Internet, recognizing that different conditions exist in different jurisdictions. But reasonable periods for preparation of the initial collection would be 180 days, 45 days for updating it after a session of the legislature, and 14 days for posting on the Internet after the initial collection or revision.

In jurisdictions without codified regulations, the legislature should require boards, agencies and other promulgators of regulations to notify the agency assigned responsibility for the collection of new regulations creating collateral sanctions or disqualifications.

The ABA Standards recommended formal codification, i.e., removing such provisions from their current locations and transferring them wholesale to a new title. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standard 19-2.1 (3d ed. 2004). However, this approach was rejected because it might leave the amended laws confusing and difficult to understand. Most of the benefit of full codification can be achieved by creating the collections described here.

Once the collections are created, they should be made available widely; this is the goal of Section 4(c). These documents should be viewable and downloadable on the Internet without charge, and if feasible distributed as a hardcopy booklet in public libraries and courthouses for individuals without access to computers and the Internet.

Many collateral consequences that will be important to individuals are imposed by federal law, including deportation of non-citizens and ineligibility to possess firearms. This Act does not require each state to identify federal collateral sanctions. However, to assist in

providing notice to defendants and facilitate compliance with the law, enacting jurisdictions should include links to available collections of federal collateral sanctions on the website where the state's collection is posted. *See* KELLY SALZMANN & MARGARET COLGATE LOVE, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (ABA 2009) (http://www.abanet.org/cecs/internalexile.pdf). *See also* Court Security Improvement Act of 2007 § 510(a), 121 Stat. at 2543 (directing the National Institute of Justice to collect federal as well as state collateral consequences).

SECTION 5. NOTICE OF COLLATERAL CONSEQUENCES IN PRETRIAL PROCEEDING. When an individual receives formal notice that the individual is charged with an offense, [the designated government agency or official] shall cause information substantially similar to the following to be communicated to the individual:

NOTICE OF ADDITIONAL LEGAL CONSEQUENCES

If you plead guilty or are convicted of an offense you may suffer additional legal consequences beyond jail or prison, [probation] [insert jurisdiction's alternative term for probation], periods of [insert term for post-incarceration supervision], and fines. These consequences may include:

- being unable to get or keep some licenses, permits, or jobs;
- being unable to get or keep benefits such as public housing or education;
- receiving a harsher sentence if you are convicted of another offense in the future;
- having the government take your property; and
- being unable to vote or possess a firearm.

If you are not a United States citizen, a guilty plea or conviction may also result in your deportation, removal, exclusion from admission to the United States, or denial of citizenship.

The law may provide ways to obtain some relief from these consequences.

Further information about the consequences of conviction is available on the Internet at [insert Internet address of the collection of laws published under Section 4(c)].

Legislative Note: *The legislature should designate an appropriate agency or official to give the notice provided by this Section. Appropriate actors to give notice, depending on state procedure, could include the court or court clerk, pretrial services, jail authorities, or the prosecution.*

Comment

The Purpose of Advisement. Individuals charged with criminal offenses should understand what is at stake. Therefore, they should know about collateral sanctions. Collateral sanctions and disqualifications are also important for the court in sentencing. *See, e.g.*, United States v. Pacheco-Soto, 386 F. Supp.2d 1198 (D.N.M. 2005) (downward departure based on deportable alien status); State v. Yanez, 782 N.E.2d 146, 155 (Ohio App. 2002) (noting that deportation may affect sentence); ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standard 19-2.4(a) (3d ed. 2004). They also may be important to the prosecutor in making charging decisions and arguing for a particular sentence. *See* Robert M.A. Johnson, *Collateral Consequences, Message from the President of the National District Attorney's Association*, May-June, 2001 (http://www.ndaa-apri.org/ndaa/about/president_message_may_june_2001.html).

However, there is no constitutional requirement that collateral sanctions and disqualifications be considered as part of the criminal proceedings. Most courts hold that under the due process clause of the Constitution, in order to make a guilty plea knowing, voluntary and intelligent, a defendant must be told of the term of imprisonment, fine, and post-release supervision that will result from their convictions. Even without constitutional requirement, however, most states provide for disclosure of some at least some collateral sanctions. The principal context is in the case of deportation of non-citizens. A number of decisions hold that it is not constitutionally required to inform individuals pleading guilty of the possibility of deportation if they are not citizens of the United States. Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir. 2004); Commonwealth v. Fuartado, 170 S.W.3d 384, 385-86 (Ky. 2005). Yet, a majority of states provide for advising defendants of potential deportation. Twenty six states, Puerto Rico and the District of Columbia provide for notice by court rule or statute. *See* ALASKA R. CRIM. P. 11(c)(3)(c); AZ. R. CRIM P. 17.2(f); CAL. PEN. CODE § 1016.5; CT. GEN. STAT. ANN. § 54-1j; D.C. STAT. § 16-713(a); FLA. R. CRIM. P. 3.172(C)(8); GA. CODE ANN. § 17-7-93(c); HAW. REV. STAT. § 802E-1 - E-3; IDAHO CRIM. R. 11(d)(1); 725 ILL. COMP. STAT. 5/113-8; IOWA CT. R. CRIM. 2.8(2)(b)(3); ME. R. CRIM. P. 11(h); MD. R. 4-242(e); MA. GEN. L. ANN. 278 § 29D; MA. R. CRIM P. 12(c)(3)(C); MINN. R. CRIM. P. 15.01(10)(d); MONT. CODE ANN. § 46-12-210(1)(f); NEB. REV. STAT. § 29-1819.02(1); N.M. R. CRIM. P. 5-303(F)(5); N.Y. CRIM. PROC. L. § 220.50(7); N.C. STAT. § 15A-1022(a)(7); OH. REV. CODE § 2943.031(A); OR. REV. STAT. § 135.385(d); PUERTO RICO R. CRIM. P. 70; R.I. GEN. L. § 12-12-22; TEX. CODE CRIM. P. ART. 26.13(a)(4); VT. STAT. ANN. Tit. 13, § 6565(c); WASH. REV. CODE § 10.40.200(2); WISC. STAT. ANN. § 971.08(1)(c). Kentucky and New Jersey provide for notice though standard plea forms. Ky. Plea Form AOC-491, at 2 ¶ 10(Ver. 1.01, Rev. 2-03) (http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf); New Jersey Judiciary Plea Form, N.J. Dir. 14-08, at 3 ¶ 17 (plea form promulgated pursuant to N.J. R. CRIM. P. 3-9) (http://www.judiciary.state.nj.us/forms/10079_main_plea_form.pdf). Court decisions in Colorado and Indiana require advice of possible deportation in at least some cases. People v. Pozo, 746 P.2d 523 (Colo. 1987); Segura v. State, 749 N.E.2d 496 (Ind. 2001).

A few other jurisdictions require advisement of other collateral sanctions. Indiana and Wyoming require warnings that defendants will lose the right to possess firearms based on certain criminal convictions. IND. CODE § 35-35-1-2(a)(4); WY. STAT. ANN. § 7-11-507. Wyoming also requires the court to advise defendants "in controlled substance offenses [of] the potential loss of entitlement to federal benefits." WY. R. CRIM. P. 11(b)(1). Military law requires defense counsel to advise of potential sex offender registration. United States v. Miller, 63 M.J. 452, 459 (C.A.A.F. 2006). Even jurisdictions not requiring advisement of particular collateral consequences often recognize that it is sound public policy. Thus, Utah court rules provide: "Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea." UTAH R. CRIM. P. 11(e). Yet, the Advisory Committee Note explains that "the trial court may, but need not, advise defendants concerning the collateral consequences of a guilty plea." *See also, e.g.,* United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993). Accordingly, courts or prosecutors often advise defendants of collateral sanctions in the absence of a court rule or constitutional obligation. *See, e.g.*, United States v. Nam Hong, No. 07-CR-172-S (01), 2009 WL 688610, ¶ 15 & 16 (W.D.N.Y. Jan. 28, 2009) (Plea Agreement) (noting that the "defendant has had an opportunity to fully determine what the consequences of the defendant's conviction may be on the defendant's immigration status").

A substantial majority of United States jurisdictions, then, require advice of one or more collateral sanctions, showing broad support for the idea that sound public policy and fairness require advice beyond the constitutional floor. Yet, advising a defendant of some collateral sanctions without addressing all of them may be misleading. It could reasonably be understood to imply that the imprisonment, fine and other direct punishment, plus the collateral sanctions specifically mentioned, represent the totality of the legal effects of the conviction. *See, e.g.,* United States v. Glaser, 14 F.3d 1213 (7th Cir. 1994) (notice of restoration of rights misleading in not mentioning firearms restriction); *cf.* Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993) (applying maxim *expressio unius est exclusio alterius*, the statement of one thing is the exclusion of other things). For example, it would be reasonable but incorrect for a defendant pleading guilty in Wyoming to assume that because the court advised that firearms privileges and "federal benefits" might be lost, no state benefits, such as access to public housing, were at risk.

To provide clear notice to individuals facing criminal charges, Section 5 requires notice about a broad range of potential consequences in several categories. This is the approach of the ABA Criminal Justice Standards, which provide:

> Before accepting a plea of guilty or nolo contendere, the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to the forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant's immigration status. The court should advise the defendant to consult with defense counsel if the

> defendant needs additional information concerning the potential consequences of the plea.

ABA STANDARDS FOR CRIMINAL JUSTICE: GUILTY PLEAS, Standard 14-1.4(c) (3d ed. 1999). *See also* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATIONS, Standard 19-2.3(a) (3d ed. 2004).

The ABA Standards also require defense counsel to inform clients about collateral consequences. ABA STANDARDS FOR CRIMINAL JUSTICE: GUILTY PLEAS, Standard 14-3.2(f) (3d ed. 1999) ("To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.") While most courts have held that a defense counsel's failure to advise the client of applicable collateral consequences has no effect on the plea, misadvice about important collateral consequences may. *See, e.g.*, United States v. Couto, 311 F.3d 179, 187-88 (2d Cir. 2002); Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979); United States v. Kwan, 407 F.3d 1005, 1016-18 (9th Cir. 2005). This Act imposes no new duties on defense counsel. Section 3(b)(1).

The Method and Timing of Advisement. Section 5 provides that notice will be given by a government agency or official. Appropriate actors to give notice, depending on state procedure, could include the court or court clerk, pretrial services, jail authorities, or the prosecution.

The method of notification is deliberately flexible. Notice could be given in writing, either separately or as part of another document. If service of charges on a defendant or a defendant's appearance is by mail, notice may be given by mail. The information may be presented to people being arraigned as a group through a recording. Although the fact of notice should be in the record, it would be sufficient for defense counsel or another actor to confirm on the record that notice was given outside of open court.

The notice should accompany arraignment, or other proceeding at which the defendant receives notice of the issuance of formal charges, such as indictment, information, complaint, or other charging instrument sufficient to bring a defendant to trial. Informal notice that charges are forthcoming does not trigger this section. Nor does an arrest, even one based on specific charges, unless the arrest alone is sufficient for prosecution and conviction without an additional charging document. If arraignment is waived, notice should be given at or before waiver of arraignment.

The notice should be provided in a language that the defendant understands. Translation should create little additional cost, because there is generally an interpreter at arraignment for non-English speaking defendants.

The Effect of Non-Compliance with Section 5 on the Validity of the Plea. Compliance with this provision should be sufficiently simple, that questions of the consequences of non-compliance should rarely arise. However, the criminal justice system depends on the finality of judgments. Accordingly, there is strong reason not to upset a plea for a technical deficiency in guilty plea procedure, and this is the prevailing rule. *See, e.g.*, FED. R. CRIM. P. 11(h) ("A

variance from the requirements of this rule is harmless error if it does not affect substantial rights."). Section 3(a)(1) provides that the general rule applies here, so failure to receive notice of collateral sanctions and disqualifications is not a basis for challenging a plea or conviction. *See also* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATIONS, Standard 19-2.3(b) (3d ed. 2004) ("Failure of the court or counsel to inform the defendant of applicable collateral sanctions should not be a basis for withdrawing the plea of guilty, except where otherwise provided by law or rules of procedure, or where the failure renders the plea constitutionally invalid.")

SECTION 6. NOTICE OF COLLATERAL CONSEQUENCES AT SENTENCING AND UPON RELEASE.

(a) An individual convicted of an offense shall be given notice as provided in subsections (b) and (c):

(1) that collateral consequences may apply because of the conviction;

(2) of the Internet address of the collection of laws published under Section 4(c);

(3) that there may be ways to obtain relief from collateral consequences;

(4) of contact information for government or nonprofit agencies, groups, or organizations, if any, offering assistance to individuals seeking relief from collateral consequences; and

(5) of when an individual convicted of an offense may vote under this state's law.

(b) The [designated government agency or official] shall provide the notice in subsection (a) as a part of sentencing.

(c) If an individual is sentenced to imprisonment or other incarceration, the officer or agency releasing the individual shall provide the notice in subsection (a) not more than [30], and, if practicable, at least [10], days before release.

Comment

Section 6 provides for notice of collateral consequences as a part of sentencing and, in addition, if an individual is sentenced to imprisonment or other incarceration, at the time of release. The requirement for notice upon release from "imprisonment or other incarceration"

does not apply to noncustodial sentences (e.g., electronic monitoring, halfway houses, home arrest, or other restraints on liberty less than jail or prison). Although Section 5 contemplates that individuals being sentenced will have received general notice of collateral sanctions at the beginning of the criminal proceeding, for many defendants that will have been months or years earlier. The point of notice is not fairness to the defendant in deciding how to proceed; the conviction by this stage is a fact. Rather, formal advisement promotes obedience to the law. If, for example, individuals convicted of felonies do not know they are prohibited from possessing firearms, they may violate the law out of ignorance when they would have complied with the law had they known. *See, e.g.*, United States v. Bethurum, 343 F.3d 712 (5th Cir. 2003) (defendant properly convicted of being felon in possession of a firearm, notwithstanding claim that he would not have pleaded guilty had he realized he would not be entitled to possess a firearm); Saadiq v. State, 387 N.W.2d 315 (Iowa) (conviction permissible in spite of defendant's claim that he was not told he could not possess a firearm), *appeal dismissed*, 479 U.S. 878 (1986). In *Lambert v. California*, 355 U.S. 225 (1957), the Court found a due process violation in convicting an individual with a felony conviction of violation of a registration provision of which she had no knowledge or reason to know.

This section also requires notice of provisions of law providing for relief from collateral sanctions. Several states require by statute or court rule that this information be made available, others no doubt make it available by policy or informally. *See, e.g.*, NEB. REV. STAT. § 29-2264(1); AZ. R. CRIM. P. 29.1; 15 CAL. CODE REGS. § 2511(B)(7); N.Y. R. UNIF. TRIAL COURTS § 200.9(a); *cf.* MD. CODE, CRIM PROC. § 6-232(a); MD. RULES, Rule 4-329. States have concluded that it is fair to the individual and beneficial to society to let at least some individuals with convictions pay their debt to society. Notification to all individuals with convictions will facilitate the participation of deserving but legally unsophisticated individuals. However, failure to provide notice as contemplated in Section 6 does not invalidate the applicability of the collateral sanctions, or provide a cause of action for money damages. *See* Section 3(a). Section 6 does not of its own force repeal any other notice requirements that are part of the law of enacting jurisdictions.

The notice contemplated by this section is modest. It could be printed on a form issued in the ordinary course of sentencing or processing an individual for release. There is no right to counsel upon being discharged from prison, probation or parole, so the timing and form of the notice should account for the fact that in almost all cases, individual defendants will interpret the notice for themselves. At sentencing, it might be appropriate for notice to be given by the court, or by defense counsel or the prosecution. Upon release from jail or prison, corrections authorities will give the notice.

In a number of states, there has been confusion among both government officials and others about when persons convicted of an offense may vote. Accordingly, Section 6(a)(5) requires specific notice about voting rights. This will help to ensure not only that those convicted of disenfranchising offenses will not vote unless and until they satisfy any requirements provided by law, and that also those not convicted of disenfranchising offenses, and thus allowed to vote under state law, can understand their rights.

SECTION 7. AUTHORIZATION REQUIRED FOR COLLATERAL SANCTION; AMBIGUITY.

(a) A collateral sanction may be imposed only by statute or ordinance, or by a rule authorized by law and adopted in accordance with [insert citation to state administrative procedure act or any other applicable law].

(b) A law creating a collateral consequence that is ambiguous as to whether it imposes a collateral sanction or authorizes a disqualification must be construed as authorizing a disqualification.

Comment

Reentry and reintegration of individuals with criminal convictions is a matter of important state policy. If a program of prisoner reentry and reintegration fails because convicted individuals are broadly and unreasonably excluded from opportunities and benefits, then the state as a whole suffers the consequences. Accordingly, Section 7(a) provides that blanket collateral sanctions may be created only by statute or ordinance, or through formal rulemaking by an agency authorized by statute to create collateral sanctions. Any collateral consequences imposed by the state constitution are, of course, unaffected by Section 7(a).

Section 7(b) is a rule of construction. In cases of ambiguity, a provision must be construed to impose a discretionary disqualification rather than an automatic collateral sanction.

SECTION 8. DECISION TO DISQUALIFY. In deciding whether to impose a disqualification, a decision-maker shall undertake an individualized assessment to determine whether the benefit or opportunity at issue should be denied the individual. In making that decision, the decision-maker may consider, if substantially related to the benefit or opportunity at issue: the particular facts and circumstances involved in the offense, and the essential elements of the offense. A conviction itself may not be considered except as having established the elements of the offense. The decision-maker shall also consider other relevant information, including the effect on third parties of granting the benefit or opportunity and whether the individual has been granted relief such as an order of limited relief or a certificate of restoration

of rights.

Comment

The principle that at least some licenses, benefits and employment opportunities should not be denied to people with criminal convictions unless the conviction is substantially or directly related to the opportunity is well established in state codes. More than 30 states have statutory restrictions on disqualifications imposed by state actors. *See* MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE, Ch. 4 (William S. Hein & Co. 2006). A core principle of many of these laws is that individuals should be excluded from situations where their conviction presents a risk to public safety, but they should not be excluded if there is no connection between the crime committed and the opportunity or benefit sought. *See also* NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, POLICY POSITIONS ON PRISONER REENTRY ISSUES § 7, at 10 (Adopted July 17, 2005) (while supporting collateral consequences necessary to protect the public, states that "[r]elief from some collateral sanctions may be appropriate if they do not relate to the conduct involved in the offense of conviction.")

Section 8 offers guidance to decisionmakers imposing discretionary disqualifications. It is minimally directive, in order to give decision-makers flexibility to use factors reasonable under the circumstances. Section 8 requires decisionmakers to make disqualification decisions based on the conduct underlying the conviction, rather than on the fact that a person has been convicted alone. Thus, a decision-maker may take into account the particular facts and circumstances involved in the offense, as well as the essential elements of the offense, subject to a substantial relationship standard. For example, if the Plumber's Board grants licenses to those, say, who were fired from a job or suspended from school for marijuana possession, then it is likely not unreasonably dangerous or risky to public safety to license applicants convicted of precisely the same conduct. On the other hand, if an agency would deny a position to a school bus driver applicant who had his parental rights terminated in a civil action based on child abuse, that is strong evidence that a conviction for child abuse is directly related to fitness for the employment. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standard 19-3.1 (3d ed. 2004).

This section does not change existing law to the extent that it allows rejection of an applicant based on lack of qualification or misconduct unrelated to a criminal conviction. Nothing in this Section or any other part of the Act authorizes or requires preferences for applicants who have criminal convictions.

The time elapsed since the misconduct occurred may be relevant. Some jurisdictions have a term of years, after which, if the individual has not been convicted of another crime, rehabilitation is presumed. *See, e.g.*, N.M. STAT. ANN. § 28-2-4(B) (three years after imprisonment or completion of parole and probation); N.D. CENT. CODE § 12.1-33-02.1(2)(c) (five years after discharge from parole, probation or imprisonment). *See* Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 327 (2009) ("Recidivism probability declines with time 'clean,' so there is some point in time when a person with a criminal record who remained free of further contact

with the criminal justice system is of no greater risk than any counterpart of the same age, an indication of redemption from the mark of crime.")

Some sources provide more specific guidelines which may be helpful to decision-makers. The following is from the Model Sentencing and Corrections Act:

> **Model Sentencing and Corrections Act, § 4-1005. [Discrimination; Direct Relationship].**
>
> (a) This section applies only to acts of discrimination directed at persons who have been convicted of an offense and discharged from their sentence.
>
> (b) It is unlawful discrimination, solely by reason of a conviction:
>
> (1) for an employer to discharge, refuse to hire, or otherwise to discriminate against a person with respect to the compensation, terms, conditions, or privileges of his employment. For purposes of this section, "employer" means this State and its political subdivisions and a private individual or organization [employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year];
>
> (2) for a trade, vocational, or professional school to suspend, expel, refuse to admit, or otherwise discriminate against a person;
>
> (3) for a labor organization or other organization in which membership is a condition of employment or of the practice of an occupation or profession to exclude or to expel from membership or otherwise to discriminate against a person; or
>
> (4) for this State or any of its political subdivisions to suspend or refuse to issue or renew a license, permit, or certificate necessary to practice or engage in an occupation or profession.
>
> (c) It is not unlawful discrimination to discriminate against a person because of a conviction if the underlying offense directly relates to the particular occupation, profession, or educational endeavor involved. In making the determination of direct relationship the following factors must be considered:
>
> (1) whether the occupation, profession, or educational endeavor provides an opportunity for the commission of similar offenses;

(2) whether the circumstances leading to the offense will recur;

(3) whether the person has committed other offenses since conviction or his conduct since conviction makes it likely that he will commit other offenses;

(4) whether the person seeks to establish or maintain a relationship with an individual or organization with which his victim is associated or was associated at the time of the offense; and

(5) the time elapsed since release.

(d) [The State Equal Employment-Opportunity Commission has jurisdiction over allegations of violations of this section in a like manner with its jurisdiction over other allegations of discrimination.]

See also, e.g., MINN. STAT. § 364.03; N.Y. CORR. L. § 753; N.D. CENT. CODE § 12.1-33-02.1; VA. STAT. ANN. § 54.1-204(B).

SECTION 9. EFFECT OF CONVICTION BY ANOTHER STATE OR THE UNITED STATES; RELIEVED OR PARDONED CONVICTION.

(a) For purposes of authorizing or imposing a collateral consequence in this state, a conviction of an offense in a court of another state or the United States is deemed a conviction of the offense in this state with the same elements. If there is no offense in this state with the same elements, the conviction is deemed a conviction of the most serious offense in this state which is established by the elements of the offense. A misdemeanor in the jurisdiction of conviction may not be deemed a felony in this state, and an offense lesser than a misdemeanor in the jurisdiction of conviction may not be deemed a conviction of a felony or misdemeanor in this state.

(b) For purposes of authorizing or imposing a collateral consequence in this state, a juvenile adjudication in another state or the United States may not be deemed a conviction of a felony, misdemeanor, or offense lesser than a misdemeanor in this state, but may be deemed a

juvenile adjudication for the delinquent act in this state with the same elements. If there is no delinquent act in this state with the same elements, the juvenile adjudication is deemed an adjudication of the most serious delinquent act in this state which is established by the elements of the offense.

(c) A conviction that is reversed, overturned, or otherwise vacated by a court of competent jurisdiction of this state, another state, or the United States on grounds other than rehabilitation or good behavior may not serve as the basis for authorizing or imposing a collateral consequence in this state.

(d) A pardon issued by another state or the United States has the same effect for purposes of authorizing, imposing, and relieving a collateral consequence in this state as it has in the issuing jurisdiction.

Alternative A

(e) A conviction that has been relieved by expungement, sealing, annulment, set-aside, or vacation by a court of competent jurisdiction of another state or the United States on grounds of rehabilitation or good behavior, or for which civil rights are restored pursuant to statute, has the same effect for purposes of authorizing or imposing collateral consequences in this state as it has in the jurisdiction of conviction. However, such relief or restoration of civil rights does not relieve collateral consequences applicable under the law of this state for which relief could not be granted under Section 12 or for which relief was expressly withheld by the court order or by the law of the jurisdiction that relieved the conviction. An individual convicted in another jurisdiction may seek relief under Section 10 or 11 from any collateral consequence for which relief was not granted in the issuing jurisdiction, other than those listed in Section 12, and the [designated board or agency] shall consider that the conviction was relieved or civil rights

restored in deciding whether to issue an order of limited relief or certificate of restoration of rights.

Alternative B

(e) A conviction that has been relieved by expungement, sealing, annulment, set-aside, or vacation by a court of competent jurisdiction of another state or the United States on grounds of rehabilitation or good behavior, or for which civil rights are restored pursuant to statute, is deemed a conviction for purposes of authorizing or imposing collateral consequences in this state as provided in subsection (a). An individual convicted in another jurisdiction may seek relief under Section 10 or 11 from any authorized or imposed collateral consequence, other than those listed in Section 12, and the [designated board or agency] shall consider that the conviction was relieved or civil rights restored in deciding whether to issue an order of limited relief or certificate of restoration of rights.

End of Alternatives

(f) A charge or prosecution in any jurisdiction which has been finally terminated without a conviction and imposition of sentence based on participation in a deferred adjudication or diversion program may not serve as the basis for authorizing or imposing a collateral consequence in this state. This subsection does not affect the validity of any restriction or condition imposed by law as part of participation in the deferred adjudication or diversion program, before or after the termination of the charge or prosecution.

Comment

Sections 9(a) and (b) provide for imposing collateral consequences in the enacting state based on convictions from other states. Because the definitions of offenses vary from state to state, an out-of-state conviction, in many cases, will not be identical to a conviction in the enacting state. Out-of-state convictions are domesticated using essentially the approach of *Blockburger v. United States*, 284 U.S. 299 (1932), comparing the elements of the offense of conviction to offenses in the enacting state. However, an out-of-state sub-criminal offense

cannot become a misdemeanor or felony, and a misdemeanor cannot become a felony.

Section 9(b) explains how out-of-state juvenile adjudications are treated in the enacting jurisdiction. This section neither suggests as a policy matter that collateral consequences should apply based on juvenile adjudications, nor changes existing state law. Thus, if state law other than this act imposes collateral consequences based on juvenile adjudications, 9(b) explains how out of state adjudications will be treated. But if existing state law does not impose collateral consequences for juvenile adjudications, nothing in this Section or this Act alters existing law.

Section 9(c) provides that convictions that have been overturned on the merits do not give rise to collateral consequences. If the conviction has been overturned based on legal or factual error, on appeal, motion for a new trial, or collateral review, it does not give rise to a collateral consequence in this state. Similarly, Section 9(f) provides that a prosecution that has finally terminated without a conviction based on participation in a deferred adjudication or diversion program does not give rise to collateral consequences. Section 9(f) applies whether or not a defendant is required to enter a plea as part of the program, if at the end of the program there is no final judgment of conviction in place. Section 9(d) gives comity in the enacting state to pardons from other jurisdictions, giving them the same effect that they would have in the state where the pardon occurred.

Some states have forms of relief from collateral consequences based on rehabilitation or good behavior, variously denominated expungement, vacation, set-aside and sealing. In the state where the relief is granted, this Act does not change its legal effect; it has whatever force it has in that jurisdiction. Section 9(e) contains bracketed options for the effect of out-of-state relief based on rehabilitation or good behavior. The first option gives out-of-state relief the same effect as it has in the jurisdiction of conviction; the second option gives no prescriptive effect to relief granted in other jurisdictions based on rehabilitation or good behavior, but permits consideration of such relief when individuals with out-of-state convictions seek relief in the enacting jurisdiction under Sections 10 and 11.

This Section does not address judgments of tribal courts. The problems in considering tribal convictions are significant. Tribal court records are not always publically available to agencies imposing collateral consequences, which could make their imposition arbitrary. Further, the maximum penalty a tribal court can impose for an offense is one year, 25 U.S.C. § 1302(7), traditionally a misdemeanor sentence. In addition, the U.S. Sentencing Guidelines generally do not count tribal sentences for purposes of calculating criminal history. U.S.S.G. § 4A1.2(i) (2008). Perhaps this is because, while the Supreme Court has not resolved the issue, many courts hold that trial judgments are not entitled to full faith and credit under the Constitution, although they can be recognized under rules of comity. Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997). The law of the states now varies widely on treatment of tribal court judgments (except in certain areas, such as child custody, where federal law requires full faith and credit. 25 U.S.C. § 1911(d)). Without pretending that there are not serious arguments on the other side, or denying that circumstances might not change in a way warranting a different answer, it seemed that a uniform resolution was unattainable at the moment.

SECTION 10. ORDER OF LIMITED RELIEF.

(a) An individual convicted of an offense may petition for an order of limited relief from one or more collateral sanctions related to employment, education, housing, public benefits, or occupational licensing. The petition may be presented to the:

(1) sentencing court at or before sentencing; or

(2) [designated board or agency] at any time after sentencing.

(b) Except as otherwise provided in Section 12, the court or the [designated board or agency] may issue an order of limited relief relieving one or more of the collateral sanctions described in subsection (a) if, after reviewing the petition, the individual's criminal history, any filing by a victim under Section 15 or a prosecutor, and any other relevant evidence, it finds the individual has established by a preponderance of the evidence that:

(1) granting the petition will materially assist the individual in obtaining or maintaining employment, education, housing, public benefits, or occupational licensing;

(2) the individual has substantial need for the relief requested in order to live a law-abiding life; and

(3) granting the petition would not pose an unreasonable risk to the safety or welfare of the public or any individual.

(c) the order of limited relief must specify:

(1) the collateral sanction from which relief is granted; and

(2) any restriction imposed pursuant to Section 13(a).

(d) An order of limited relief relieves a collateral sanction to the extent provided in the order.

(e) If a collateral sanction has been relieved pursuant to this Section, a decision-maker

may consider the conduct underlying a conviction as provided in Section 8.

Comment

Sections 10 and 11 attempt to harmonize society's interests in public safety and its interest in offender reentry and reintegrating offenders into society. Sections 10 and 11 create new mechanisms for relief of collateral sanctions under some circumstances. Section 10 is aimed at removing specific legal barriers for individuals first reentering society. It allows an individual to apply for relief from a collateral sanction relating to employment, education, housing, public benefits, or occupational licensing on a showing that the relief will assist in leading a law-abiding life. Section 11 allows an individual to seek general restoration of rights after a period of time has passed in which the individual has demonstrated adherence to the law.

Sections 10 and 11 are based in part on the Model Sentencing and Corrections Act ("MSCA"), § 4-1005. However, this Act does not identify a list of prohibited collateral consequences, as do the MSCA and the ABA Standards. The MSCA, § 4-1001(b) provides that a convicted individual "retains all rights, political, personal, civil and otherwise", including, among others it lists, the right to vote. The ABA Standards has a list of sanctions which should never be imposed under any circumstances, such as "deprivation of the right to vote, except during actual confinement." ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standard 2.6(a) (3d ed. 2004).

Relief under Section 10 (an Order of Limited Relief) may be granted by the court as a part of sentencing, that is, as part of the guilty plea process or after a jury's guilty verdict, until the close of the proceeding at which sentencing is imposed. If the individual does not obtain relief at sentencing, the order can be issued only by the board or agency (in many states it is likely to be the parole board) assigned responsibility for issuing the orders. The board or agency may act after sentencing even if the individual is still on parole, probation, or otherwise under the control of the court for other purposes. The procedure and evidence to be considered is addressed in Section 13.

Issuance of an Order of Limited Relief does not guarantee that an individual will receive the benefit or opportunity sought; it merely allows case-by-case determination under Section 10(e), and Section 8. Thus, while Section 10(d) provides that the state shall not impose a collateral sanction that has been relieved by an Order, Section 10(e) specifically provides that the decision-maker may examine the facts of the holder's misconduct under Section 8. In effect, a Section 10 Order converts a collateral sanction from which relief is granted into a disqualification.

For example, a regulation might prohibit all individuals with felony convictions from being licensed as Paramedics. An individual who had been a paramedic before conviction, or completed paramedic training after conviction, might persuade a court or the designated board or agency that it was appropriate for the individual to be licensed and employed as a paramedic, and therefore to issue an Order of Limited Relief. That would lift the absolute bar, but would not restrict the Paramedic licensing board from considering whether a license should issue, based on the conduct underlying the conviction, and the board's knowledge of the particular duties and

functions of licensees. The decision maker is also entitled to consider the conviction conclusive proof that the individual committed every element of the offense of conviction. Agencies may by rule or policy require applicants to provide or disclose information necessary or helpful to the agency's decision.

The individual must show that relief would "materially assist" in obtaining employment, education, housing, public benefits or occupational licensing, and that the individual has "substantial need" for the benefit to live a law-abiding life. The "materially assist" requirement means that with the relief, alone or through satisfaction of additional conditions, the individual would be eligible for the benefit. The "substantial need" requirement means that the individual must show that the benefit is important in the particular case. Having some housing and employment or other lawful support are important to every individual. But if, for example, an individual already had private housing, and sought relief in order to enter public housing, the individual would be required to show that living in public housing will facilitate living a law-abiding life. This might be shown if the public housing is in a location that will make employment feasible, or move the applicant away from an area that her probation officer says offers too many temptations to crime. A person already employed might nevertheless show substantial need for an occupational license if with the license the individual would earn enough to pay child support, restitution, or educational expenses.

Sections 10 and 11 differ from the MSCA by limiting its coverage to state actors, excluding private employers. Regulation of public employment and licensing is less controversial than would be reaching into the decisions of private businesses. In addition, public employment and licensing are often done with the public interest in mind (for example, in the context of veteran's preferences, or reserved opportunities for the disabled). If any category of employer is going to take a chance by helping individuals with convictions, it is likely to be the public sector. *See, e.g.,* ABA Commission on Effective Criminal Sanctions, Report to the House of Delegates on Employment and Licensure of Persons with a Criminal Record, No. 103C at 7-9 (Feb. 2007) (discussing municipal and state anti-discrimination policies and programs in New York, Florida, Chicago and Boston); Editorial, *Cities that Lead the Way*, N.Y. TIMES, Mar. 31, 2006 (discussing anti-discrimination policies for city agencies and city contractors in Boston, Chicago and San Francisco).

However, the Act contemplates that enacting states might choose to make private corporations performing government functions or services, by contract or statute, subject to Sections 10 and 11 through the definition of "decision-maker" in Section 2(4). It is far less intrusive to ask private companies who choose to do business with the state to comply with a policy like this; if a private company finds it objectionable, they may forego the business. Further, even if this is not a point upon which uniformity is likely, this section is not meant to discourage states from deciding on their own that private employers as a group should be covered; some now do and there is no reason they should not continue if it is consistent with their public policy. States should examine their laws governing public employment and licensing to ensure that they conform to this policy.

Sections 10 and 11 can be invoked by individuals facing collateral sanctions in the enacting state based on out-of-state convictions. Section 10 relief granted in one state has effect

only in that state, because no state has the power to relieve a sanction imposed by the law of a second state, in the second state's territory. Whether Section 11 relief from one state will be given effect in a second state depends on which alternative version of Section 9(e) is in force in the second state.

SECTION 11. CERTIFICATE OF RESTORATION OF RIGHTS.

(a) An individual convicted of an offense may petition the [designated board or agency] for a certificate of restoration of rights relieving collateral sanctions not sooner than [five] years after the individual's most recent conviction of a felony [or misdemeanor] in any jurisdiction, or not sooner than [five] years after the individual's release from confinement pursuant to a criminal sentence in any jurisdiction, whichever is later.

(b) Except as otherwise provided in Section 12, the [designated board or agency] may issue a certificate of restoration of rights if, after reviewing the petition, the individual's criminal history, any filing by a victim under Section 15 or a prosecutor, and any other relevant evidence, it finds the individual has established by a preponderance of the evidence that:

(1) the individual is engaged in, or seeking to engage in, a lawful occupation or activity, including employment, training, education, or rehabilitative programs, or the individual otherwise has a lawful source of support;

(2) the individual is not in violation of the terms of any criminal sentence, or that any failure to comply is justified, excused, involuntary, or insubstantial;

(3) a criminal charge is not pending against the individual; and

(4) granting the petition would not pose an unreasonable risk to the safety or welfare of the public or any individual.

(c) A certificate of restoration of rights must specify any restriction imposed and collateral sanction from which relief has not been granted under Section 13(a).

(d) A certificate of restoration of rights relieves all collateral sanctions, except those

listed in Section 12 and any others specifically excluded in the certificate.

(e) If a collateral sanction has been relieved pursuant to this Section, a decision-maker may consider the conduct underlying a conviction as provided in Section 8.

Comment

Like Section 10, Section 11 allows the designated board or agency to relieve collateral sanctions. Section 11 relief, called a Certificate of Restoration of Rights, is more comprehensive; relieving all collateral sanctions imposed by the law of the issuing state (except those listed in Section 12 or withheld pursuant to 13(a)). There is no required showing of substantial need. However, the applicant must show good behavior for a period of years prior to the issuance of the Certificate. (The number of years is to be determined by enacting states, but the Act brackets five years.) For that period, the individual must have no disqualifying convictions and no incarceration pursuant to sentence, have been employed, in school, or in rehabilitation, or, if retired or disabled, show a lawful source of income (which could include public assistance), and have complied with all terms of any criminal sentence.

The Act brackets whether conviction of a misdemeanor will render an individual ineligible, because a state might conclude that some minor traffic or parking offenses and the like should not be disqualifying. However, Section 11(b) makes issuance of a Certificate discretionary by providing that the board "may issue" one. Accordingly, even in a state not providing for automatic ineligibility based on misdemeanor convictions, a misdemeanor involving violence or dishonesty, or a pattern of low-level violations, might be grounds for denial.

Section 11(d) provides that a Certificate of Restoration of Rights relieves all collateral sanctions, except those listed in Section 12, and any that the board elects not to relieve pursuant to Section 13(a). The certificate also would not relieve collateral sanctions imposed by the state constitution which the legislature has no power to relieve. With those exceptions, the holder of a certificate would enjoy the same civil rights and the same opportunity to apply for all benefits and opportunities as someone who had never been convicted of a crime. This does not mean, however, that the conviction of a person holding a Section 11 certificate may not be considered by a decision-maker. Thus, while Section 11(d) provides that the state shall not impose a collateral sanction that has been relieved by a Certificate, it specifically provides that the decision-maker may examine the facts of the holder's misconduct under Section 8. In effect, a Section 11 certificate converts a collateral sanction from which relief is granted into a disqualification.

Section 13(a) contemplates that a Section 11 certificate may be granted with case-by-case restrictions. For example, under Section 13(a), the board might conclude that an individual has demonstrated good behavior, warranting general relief from the burdens of a conviction, yet because the individual's past offenses involved alcohol, might not want the individual to have a liquor license, or work in the liquor business. In such a case, the Certificate will so state. Section 11(c).

SECTION 12. COLLATERAL SANCTIONS NOT SUBJECT TO ORDER OF LIMITED RELIEF OR CERTIFICATE OF RESTORATION OF RIGHTS. An order of limited relief or certificate of restoration of rights may not be issued to relieve the following collateral sanctions:

(1) requirements imposed by [insert citation to state's "Megan's Law" enacted pursuant to 42 U.S.C. Section 14071 or its associated regulations];

(2) a motor vehicle license suspension, revocation, limitation, or ineligibility pursuant to [insert citation to state DWI laws], or [insert citation to provision for motor vehicle license suspension, revocation, limitation, or ineligibility based on traffic offenses], for which restoration or relief is available pursuant to [insert citation to occupational, temporary, and restricted licensing provisions]; or

(3) ineligibility for employment pursuant to [insert references to laws restricting employment of convicted individuals by law enforcement agencies, including the attorney general, prosecutor's office, police department, sheriff's department, state police, or department of corrections].

Comment

Section 12 provides that Orders of Limited Relief from Collateral Sanctions issued under Section 10 and Certificates of Restoration of Rights issued under Section 11 do not relieve certain collateral sanctions. Section 12(1) provides that sex offender registration requirements cannot be relieved. Section 12(2) provides that sanctions related to motor vehicle licensing cannot be relieved. In these particular areas, additional methods of relief would be duplicative and perhaps inconsistent with the detailed and elaborate provisions for individual evaluation that now exist. Section 12(3) provides that laws prohibiting hiring of persons with criminal records by law enforcement agencies may not be relieved by a Section 10 Order or Section 11 Certificate. However, that some states exclude persons with convictions from law enforcement-related employment does not mean they must or always do. Nothing in this Section prohibits states from permitting law enforcement agencies to consider hiring individuals with criminal records.

Although not specifically mentioned in this section, if the state constitution imposes collateral consequences that the legislature has no power to remove, no relief granted under this Act purports to cover them.

SECTION 13. ISSUANCE, MODIFICATION, AND REVOCATION OF ORDER OF LIMITED RELIEF AND CERTIFICATE OF RESTORATION OF RIGHTS.

(a) When a petition is filed under Section 10 or 11, including a petition for enlargement of an existing order of limited relief or certificate of restoration of rights, the [designated board or agency] shall notify the office that prosecuted the offense giving rise to the collateral consequence from which relief is sought and, if the conviction was not obtained in a court of this state, the [Office of the Attorney General of this state or an appropriate prosecuting office in this state]. The court may issue an order and the [designated board or agency] may issue an order or certificate subject to restriction, condition, or additional requirement. When issuing, denying, modifying, or revoking an order or certificate, the [designated board or agency] may impose conditions for reapplication.

(b) The [designated board or agency] may restrict or revoke an order of limited relief or certificate of restoration of rights it issued or an order of limited relief issued by a court in this state if it finds just cause by a preponderance of the evidence. Just cause includes subsequent conviction of a felony in this state or of an offense in another jurisdiction that is deemed a felony in this state under Section 9(a). An order of restriction or revocation may be issued:

(1) on motion of the [designated board or agency], the office of the prosecutor that obtained the conviction, or a government agency designated by that prosecutor;

(2) after notice to the individual and any prosecutor that has appeared in the matter; and

(3) after a hearing under the [insert reference to the state administrative procedure

act] if requested by the individual or the prosecutor that made the motion or any prosecutor that has appeared in the matter.

(c) The court or [designated board or agency] shall order any test, report, investigation, or disclosure by the individual it reasonably believes necessary to its decision to issue, modify, or revoke an order of limited relief or certificate of restoration of rights. If there are material disputed issues of fact or law, the individual and any prosecutor notified under subsection (a) or another prosecutorial agency designated by a prosecutor notified under subsection (a) may submit evidence and be heard on those issues.

(d) The [designated board or agency] shall maintain a public record of the issuance, modification, and revocation of orders of limited relief and certificates of restoration of rights. The criminal history record system of the [state criminal justice record agency] must include issuance, modification, and revocation of orders and certificates.

(e) The [designated board or agency] may adopt rules for application, determination, modification, and revocation of orders of limited relief and certificates of restoration of rights, in accordance with [insert reference to state administrative procedure act.

Comment

Section 13(a) provides for notice to the prosecution of a request for an Order of Limited Relief or Certificate of Restoration of Rights. If a request is made at sentencing, the ordinary rules of criminal procedure require notice to the prosecutor. If a request is made after sentencing, Section 13(a) provides for the board or agency to notify the prosecutor. Because many applicants will be unrepresented, notice directly from the board will ensure that prosecutors actually receive notice. For out-of-state convictions, both the original prosecutor and an appropriate prosecutor in this state must be notified. An out-of-state prosecutor may have useful information, but may choose not to participate, because the conviction is old or minor, for example. In that event, an in-state prosecutor must have the opportunity to appear and participate. If an applicant seeks relief from more than one conviction, every prosecutor's office that obtained a conviction from which relief is sought must receive notice. Sections 13(a) and (c) contemplate both that more than one prosecutor can participate in a particular case, and that prosecutors may elect not to appear, and decision may be rendered without their participation. However, relief cannot be granted based on default; non-participation by the prosecution does

not relieve the board of ordering tests it deems necessary under Section 13(c) or determining whether relief is warranted based on the available information.

Section 13(a) allows the grant of conditional relief. For example, a Certificate of Restoration of Rights could withhold the right to seek public housing in the building where the victim lives, or could condition relief on participation in a rehabilitative program. If relief is denied, reapplication can also be conditioned. An applicant could be required to wait for a period of time to reapply, or to reapply only after specified rehabilitation or training.

Section 13(b) allows for restriction or revocation of a previously issued Order or Certificate. It should be noted that to some extent restriction or revocation will be automatic based on some subsequent convictions, because Orders and Certificates relieve collateral consequences from past offenses. A new conviction generates its own collateral consequences, which are not relieved by a previously issued Order or Certificate. Nevertheless, because Orders and Certificates are part of the records of the criminal justice system, it is appropriate that their status be formally recognized. An Order or Certificate can be restricted or revoked based on non-criminal conduct if the conduct renders the continued effectiveness of relief unwarranted or improvident.

The fact that an Order or Certificate has been issued, modified or revoked, must be available to the public. However, to the extent that applications of individuals or statements of prosecutors or victims contain personal or sensitive information, this Section itself does not require that they be disclosed to the public. Their availability will be governed by rule or other law of the enacting jurisdiction.

Section 13(e), granting the board rulemaking authority, is bracketed. Courts have procedural authority from other sources. If board already has rulemaking authority, the section is unnecessary. Whether the board obtains rulemaking authority from Section 13(e) or from other law, it includes the authority to require reasonable fees of applicants with the ability to pay.

SECTION 14. RELIANCE ON ORDER OR CERTIFICATE AS EVIDENCE OF DUE CARE. In a judicial or administrative proceeding alleging negligence or other fault, an order of limited relief or a certificate of restoration of rights may be introduced as evidence of a person's due care in hiring, retaining, licensing, leasing to, admitting to a school or program, or otherwise transacting business or engaging in activity with the individual to whom the order was issued, if the person knew of the order or certificate at the time of the alleged negligence or other fault.

Comment

This section provides protection for public and private entities transacting with holders of Orders of Limited Relief and Certificates of Restoration of Rights by making reliance admissible evidence of due care. Unless persons with criminal records are to be permanently unemployed and homeless, some businesses must transact with them, yet, they take legal risks if they do. Business owners have limited sources of objective evidence about the backgrounds of applicants, and they may reasonably rely on an Order of Limited Relief or Certificate of Restoration of Rights issued by government authority after investigation.

SECTION 15. VICTIM'S RIGHTS. A victim of an offense may participate in a proceeding for issuance, modification, or revocation of an order of limited relief or a certificate of restoration of rights [in the same manner as at a sentencing proceeding pursuant to [insert citation to state crime victim's act]] [to the extent permitted by rules adopted by the [designated board or agency]].

Legislative Note: *If the enacting state has a victim's right act, applications for an order of limited relief or a certificate of restoration of rights should be treated as a sentencing, and the appropriate statutory citation inserted in the first bracket. Otherwise, use the second bracket.*

Comment

This section contemplates that victims will receive notice and have an opportunity to participate in proceedings under Section 10 and 11. Both Orders of Limited Relief and Certificates of Restoration of Rights take into account the effect on public safety in determining whether the relief should be granted. The victim will often be in a position to provide useful information about the potential impact on public safety. Accordingly, the act provides for notice to victims through the victim's rights act if one exists in the state. If there is no victim's rights act, then the designated board or agency is required to establish a method for notice and participation under its rulemaking power.

SECTION 16. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 17. SAVINGS AND TRANSITIONAL PROVISIONS.

(a) This [act] applies to collateral consequences whenever enacted or imposed, unless the law creating the collateral consequence expressly states that this [act] does not apply.

(b) This [act] does not invalidate the imposition of a collateral sanction on an individual before [the effective date of this [act]], but a collateral sanction validly imposed before [the effective date of this [act]] may be the subject of relief under this [act].

Comment

Section (a) provides that an Order of Limited Relief or Certificate of Restoration of Rights granted applies to subsequently enacted collateral consequences that are within the scope of the relief. Thus, a Certificate issued without condition or exception would apply to newly created collateral consequences, unless the collateral consequences are within Section 12, or the law creating the collateral consequence expressly provides that it cannot be relieved by a Certificate. An Order relieving a particular collateral consequence would continue to apply after the law creating the consequence is amended, renumbered or recodified, unless the new law expressly states that it cannot be relieved by an Order of Limited Relief.

Under Section (b), individuals who have lost a license, office or other benefit or opportunity based on criminal conviction are not automatically restored upon receiving relief under Section 10 or 11. However, upon receiving relief, they may reapply for any available benefits for which they are otherwise eligible.

SECTION 18. EFFECTIVE DATE. This [act] takes effect . . .

Mr. SCOTT. Thank you very much.

We want to thank all of our witnesses, and then we will have questions under the 5-minute rule.

I will defer to the gentleman from Puerto Rico, 5 minutes.

Mr. PIERLUISI. Thank you, Mr. Chairman.

Actually, there are so many things we can cover. You have all done very well testifying today. Let me try to address two subjects.

First, listening to you, Mr. Moore, I see you mentioned trying to get your record expunged or sealed; and I raise this issue to the whole panel. Is this working, expungement and sealing of records? Should we encourage it? Is it consistent throughout America? What are we seeing out there in this area? Would it be helpful for individuals such as Mr. Moore in trying to come back and be employed again?

That is the first area I want to raise; and I welcome any comments from the panelists on this issue, expungement and sealing of criminal records.

The second area is government jobs. You know, I am one who believes that government should lead by example. So is it harder to get a job in government as opposed to the private sector once you have a criminal record? Shouldn't it be easier getting gainful employment in government, both at the State level, Federal level, local level? So I want your testimony in that area, too. What have you seen? What could we encourage or not in those two areas, expungement of records and government jobs vis-a-vis private jobs.

So, Mr. Mauer, if you would like to start, and then anybody else.

Mr. MAUER. I think other members of the panel have more specific information on some of the issues.

Just on the expungement-sealing issue, I think there are a variety of mechanisms we would want to consider: executive actions, legislative actions, licensing boards, and the like.

One of the particular ways to frame the issue, I think, emerging research by a criminologist shows us that when a person has been out of prison, completed their sentence, after 6 or 7 years of being out and remaining arrest-free, then his or her chances of being involved in a crime is no different than yours or mine at that point. So that is partly telling us what public policy should look like.

If in fact there are restrictions, we should certainly at the very least have a time limit. We also should be doing education with potential employers so they become more familiar with any risk that they believe they are taking on.

I think, in general, the expungement process, the pardon process, I think in broad terms what we see today is that it is severely under used, any mechanisms by which we restore rights, starting with the White House and going to governors of all 50 States. We have had periods in our history when it was much more freely used. It was viewed as a reasonable, charitable, compassionate approach; and I think part of the sort of climate on crime control policy has made these officials very reluctant, unfortunately, to take advantage of this.

Mr. EMSELLEM. I would like to speak to the issue of public employment. I can say I am from California. On the subject of expungement, there technically isn't even an expungement policy in California. You can go to the court and have your record dismissed, but it shows up as a dismissal, which in many cases when you apply for a job, in some cases you can say you don't have a record. For government jobs and other jobs, it still shows up.

So there is a lot of variation I should just say among the States on expungement policies, and they are very important policies, and they can make a very big difference.

On the subject of public employment, I want to really talk about that a little bit, because that is a big priority for us in our organization. We are trying to really think through how the Federal Government conducts its background check policies and making sure that the Federal Government and State and local governments are complying with some very basic standards that were set up under title VII by the EEOC. There are very helpful standards that require that the job the person is being considered for, if they have a record, that the record is job-related, that it connects to the job. That has to take into consideration the age and seriousness of the offense.

What we have right now throughout the public and private sectors is what Mark was talking about earlier, just this huge proliferation of background checks, huge numbers of workers with records, but the process of hiring, any standards whatsoever haven't even close to caught up with the reality of the situation. So it is really time for the Federal Government to let both State and local governments to take some time to evaluate their current standards, most don't comply with title VII, and then work forward from there.

In some States, a lot of States, recently New Mexico, Minnesota, Connecticut is just about to sign off on a bill that adopted a policy they call "ban-the-box" that removes the question about the criminal records from the job application and it delays the criminal background check until the end of the hiring process so that folks have a shot at the job based on their merits, but it doesn't compromise safety in any way because the person is still—they are still conducting that background check at the end of the process. Twenty-one cities and States, 21 counties and cities also have ban-the-box; and that is just in the last 4 or 5 years.

So there is a lot of good thinking out there. There is a lot of opportunity. It is a good time to take a good look at everybody's policies and kind of move forward from there.

Mr. MOORE. I would like to address this concern, because, basically, I am living it.

I have a problem with the background check because, basically, a potential employer, it gives them a chance to look not only at a conviction but they also get a chance to look at your arrest record. And on most of your applications they ask if you have been convicted of a felony within the realms of a 5-year to 7-year to 10-year period. When you put that down there and they have the opportunity to check your background, they decide mainly to not hire you depending on the length of your criminal record, if you have arrests, not convictions.

So as a combined, I guess, overload for most criminal activity that the individual may have done in the past, they may not even have done whatever the charge was. They may have been cleared of it or what have you, but it remains on your criminal record. And, as a result, like I say, when the potential employer puts this together in some cases, I wouldn't hire if I was the employer myself looking at not only the one conviction that you had maybe 20 or

30 years ago but the combined total amount of charges that you have related to arrests on the record.

So that right there within itself is the first obstacle or blockage toward being respected for who you are today, the changes that you did in your life to make yourself a mature, responsible adult, to try to take care of your family. Because, in essence, that is what we all do. We go to work every day so that we can have peace of mind because we have paid our bills and we are ready for the next month when your bill flow comes in. But you can't do this if you don't have an income.

So in looking at the whole situation, I think that the whole community of each jurisdiction in the United States really—not just the criminal himself, but I am talking about every tax-paying citizen—is really putting themselves in jeopardy. Because now you have got these guys that come out that want to do good, but they can't do good because they can't get a job. So now when you are talking about recidivism that is what is going to happen, because everybody wants to be able to take care of themselves and their family, pretty much.

With that said, I would like to just—I thought about constructing maybe a clearinghouse, where an individual, I am really basically speaking for myself, because there are basically a lot of other people that are in a worse predicament than I am, but it still all remains to be the same because it all boils down to employment.

If we get like a clearinghouse together where each individual can be streamlined or scrutinized in reference to what their record is and what can be hidden from the public and what should be on your record and what shouldn't be, I mean, if we have in each jurisdiction a clearinghouse like that, then that would be over half the battle and pretty much give an individual with this collateral consequence of having a criminal record a chance to take himself care of himself and his family.

I thank you for giving me a chance to talk.

Mr. QUIGLEY. Will the gentleman yield?

Mr. PIERLUISI. Yes. No, I am done. I am out of time.

Mr. QUIGLEY. It is just on the same point.

Mr. SCOTT. I ask unanimous consent that the gentleman be given an additional minute.

Without objection.

Mr. QUIGLEY. My experience in Cook County that relates to expungement is it is varied, even within Cook County, depending on which courthouse you actually have to go back and do your expungement with. So across the State it is widely varied; and, for many people, the expungement process is a daunting task. While there are a few legal clinics that help people, it appears that if we are going to use expungements, they ought to be available for everyone.

Unfortunately, right now, the people who are getting expungements are the ones who can afford someone to handle the process for them. I don't know if that is true nationally, but it is certainly true in Cook County.

So I appreciate your remarks on that.

Mr. SCOTT. The gentleman's time has expired.

Mr. Gohmert.

Mr. GOHMERT. Thank you. I appreciate everybody's testimony and your perspectives.

There was a comment made about—of course, there was some discussion about government jobs and also about voting. Since we know from what statistics have been provided to us that 70 percent or so are going to recommit offenses, then it would seem we shouldn't get the cart before the horse. I mean, government is bad enough. America looks at Washington and thinks we don't need any more crooks up there than what we have already got.

But there was some mention about some time period. It seemed like it is kind of like with cancer. You know, you got a 5-year window and you know if you survive 5 years odds are very good that you are going to survive as anybody else would. So it may be that maybe we are looking at potentially a time period where, if you don't re-offend in that period, then you are eligible for certain jobs and you are eligible at a certain point to vote.

And that is an interesting point, Mr. Mauer. Some, where they are prohibited from voting, vote, and some where they are not prohibited, they are not allowed. So that is a good point, that we need to have better-educated folks working to assure that.

But, Mr. Moore, you mentioned that everyone just wants to take care of their family. But one of the things that disturbed me, that when I put people on probation I made it a matter of incentive, either by maximizing the number of hours that they had to do community service and then crediting those off, if they finally got around for the first time in their lives providing some support for their children or families or even just found out where they are. Some of the presentence reports, they didn't know where their kids were.

So I appreciate someone like yourself that really does want to take care of family. But that wasn't my experience. Everyone didn't want to take care of their family. And it was one of the vast shortcomings in society, because it seemed to be a reciprocal thing. You would think that if someone went through life without knowing their father at all, without having any relationship, by golly, when they had kids, they would really address that. But it seemed to be more the exception that broke the cycle. Most seemed to fall back into it.

So these all seem to be social issues that need addressing. So maybe we can help keep people out of prison in the first place. But the point that was made about wanting to take care of their families, I wish it were so, but it seemed like that would be something that needs to be done to prevent the next generation from following in daddy's footsteps.

I would appreciate any comments, insights. All of you in one way or another deal with this issue, but do you have any suggestions from a societal standpoint of what we could be doing to try to break that cycle? Mr. Moore?

Mr. MOORE. Okay. Also, while I was speaking, I mentioned the fact, because I do realize what you just said in reference to everybody is not within the framework of positivism, okay, in terms of trying to take care of their family. There is a lot to that.

During the speech or during my submitting what I have to say in reference to it, I brought up the point that if we can formulate

somewhat of sort of like a clearinghouse, where each individual in each jurisdiction of the United States can have a chance to be scrutinized, okay, in reference to what they want to do with the rest of their lives. Because, I mean, I hate to say it, but some people do need to be locked up, and some people are just not prepared, and then when they get an opportunity, they don't take advantage of it, which makes it bad for a person like myself.

So that was just one of my suggestions in reference to getting that idea to whom you are really dealing with. I am not saying that everybody is going to get scrutinized 100 percent, because still, even if you do that, you can't understand what is inside an individual's head in reference to what they really want to do with their life. I am just one of those—to further exacerbate my problem, I am going through all of the stuff that I am going through because of individuals like that.

So I fully understand what you are saying. I don't have a problem with the fact that not everybody is trying to take care of their family.

Mr. GOHMERT. But we do need to get to that point where more people do care until we break that cycle.

Mr. MOORE. Yes, sir. Absolutely.

Mr. GOHMERT. Anyway, time is so short in one of these hearings. You have 5 minutes to make an opening statement and you submit statements in writing. But really, as you think about these issues, we would welcome your input in writing in the form of letters, suggestions, or something additionally that you want to submit. Everybody up here really—you know, we may disagree about the means, but I think everybody does want to get to an end where we have a lot less crime and we break these cycles of recidivism that we haven't done a good job of breaking.

Mr. LEWIS. Congressman Gohmert, I would like to add to that.

A lot of the research we have done on recidivism does indicate that after about 3 years the likelihood of you re-offending does drop dramatically. It actually drops significantly after that first year, if you can stay out for a year, and then it really trails off after 3 years. There is hardly any data there. So I would like to suggest considering as a reasonable relief to collateral consequences considering a 3-year time limit.

On the issue of employment——

Mr. GOHMERT. In that regard, was there any data in what you found that indicated a much higher chance of non-recidivism if there were additional education, like high school, college courses? Was there any data in which you——

Mr. LEWIS. Not specifically on education, but certainly on employment, and employment is certainly related to education. And what really compounds the issue of employment for ex-offenders is the fact that they do have limited education, they do have limited job skills, there is low levels of viable work experience to go along with that; and, in addition, there is oftentimes some substance abuse challenges that we have to deal with. That is why it is important to make sure that ex-offenders do indeed have access to employment and training opportunities, to income supports and to even welfare benefits while they are trying to find sustainable employment and improve their job skills.

Mr. GOHMERT. Thank you.

Mr. SCOTT. The gentleman from Michigan, the Chairman of the full Committee.

Mr. CONYERS. Thank you, Mr. Chairman.

This is a very important hearing, and I think we can put on the record that we have been talking with Judge Gohmert and Chairman Scott, and we are planning an extended hearing. We want to continue this subject in Detroit and Michigan. We want to enlarge the panel. We want to bring in some people and hopefully the Governor of Michigan, the State of Michigan's corrections chief, which is a very effective woman, one of the first female corrections chiefs we have had in the State, who is doing an excellent job.

We would like all of you—Nikichi Tieva with the Criminal Justice Roundtable is here, Charlie Sullivan of CURE, because we have got to go deeper. Judge Gohmert is going to come in with us, and we are going to put this hearing on our Web site, and then we are going to blog it so that thousands of other people who want to comment will be able to call in and add to it. And we will be keeping, of course, the conversations, so that other people will be able to benefit.

This hearing will be a full Committee hearing, of course, with the leaders here working with us on it. It is going to be in August during the recess, because we know when we come back in September all the appropriations matters and Afghanistan and the oil spill and everything else is going to be on it. So we are going to take a full day in Detroit, probably at Coble Hall, and bring in a number of other people that some of you can recommend.

We are not just going to, of course, repeat the same things. We are going to be examining each others' comments and others so we will be bringing in even a deeper appreciation of what it is we are up against.

Calvin Moore, your idea of a clearinghouse is brilliant. Have you ever thought about—no, I won't do that.

Let me ask you to continue the discussion that our colleague from Puerto Rico began about the expungement and sealing of records and why it is that getting government employment, especially Federal, is tougher because of FBI and other checks that we do that make it even more complicated than getting private sector employment.

There were others that had not commented on that part of our hearing, that if any of you wanted to contribute to it, you can now.

Ms. LATTIMORE. I would just like to make a couple of points.

One is that this notion of automatic restoration of rights is something that is done in other countries, with 5-year, 10-year time frames, depending on the offense, depending on the behavior during the process, depending on the right, and that the Committee might be interested in getting some information on that.

I think another important point that was raised is this issue of the accuracy of records. I think this is another place where the Committee might be able to provide some leadership to the various agencies to try to improve the quality of the criminal justice records that are out there and to try to assure they are accurate. Because this is information that is collected at the State level, but it is disbursed primarily through the FBI to the NCIC, and assur-

ing the quality of those records, particularly since so many of those—so much of that information is available on line.

So, for $19.95, you can get a 1-year membership into these public record searches on line and go up and check whatever they have managed to pull together from all these various State agencies on anybody. So the fact that these records are as good as they are, which oftentimes they are not very good, you know, you don't have to do a full official criminal background check. If you come to me looking for a job, I can go on line and pull up whatever people have managed to pull up.

So I would point, I think, the Committee toward maybe considering that at some time. Because, given that people's lives are affected by that and it is something that I think crosses State lines, it certainly would be in the jurisdiction of the Committee.

Mr. CONYERS. Our friend Mr. Mueller at the FBI is going to hear about this if he isn't listening, because I am being told that the FBI can charge for the cost. It isn't even like they are incurring any debt necessarily. But I would like to extend him a courteous notice of a hearing that we are going to have in August, and I want him to be there and his person as well.

We have got to get to the bottom of this.

Ms. LATTIMORE. If you will excuse me, it really goes back to State and local governments that have relatively little or poor investment in infrastructure. So they are quick to get the first note in, but then, after that, there is no system in place to backfill and make sure that things are corrected.

Mr. CASSIDY. Chairman Conyers, one point that you mentioned about expungement and sealing of records that is critical ties into what Dr. Lattimore just said about public records; and that is that expungement and sealing are most effective, quite frankly, for juveniles. Because the records with respect to adults are public records; and, today, once it is in the record, it is everywhere and people can't walk away from it. I don't mean to discourage expungement and sealing. I do think that——

Mr. CONYERS. In other words, expungement is a porous process anyway.

Mr. CASSIDY. At best. And it may put an ex-offender in a very difficult situation where they believe they are free of their past and they are asked a direct question and they don't understand whether they are supposed to lie or tell the truth, and they are on a knife's edge either way they go. So any expungement device that is developed has to address the question of what the offender is instructed to say.

Mr. SCOTT. The gentleman's time has expired.

Mr. CONYERS. Could we get Mr. Moore?

Mr. MOORE. I will do this in brevity.

Basically, it has been my experience when you are applying for employment in either the District or Federal Government, it is usually a process of who you know that is already working within the realms of what you are applying for.

Mr. CONYERS. To help you, or harm you?

Mr. MOORE. I am sorry?

Mr. CONYERS. To get help, you have to know someone?

Mr. MOORE. I am talking about to gain meaningful employment in the government agencies, Federal or District, it is usually my experience that you can easily get in if you have someone that already works within that department and they know you and they can vouch for you. Outside of that, it is pretty difficult to obtain a job within either one of those places, the Federal Government or the District Government.

I just wanted to make that comment. The private sector is totally different, something different.

Mr. SCOTT. The gentleman's time has expired.

The gentleman from Tennessee.

Mr. COHEN. Thank you, Chairman Scott and Chairman Conyers, for your interest and your work on this issue and, Mr. Gohmert, for participating and your interest, also. I know you, as a criminal court judge, have seen people who have been convicted and what can happen.

This is a very important issue in my district in Memphis, Tennessee, the 9th District of Tennessee. Hardly a day goes by that I don't have somebody come up to me and say, Congressman, I need a job, but because I have a previous felony I can't get one, and they want to take—sometimes they are with their children, and I feel so bad for them, that they have got their daughter or son who is maybe 10 or 7 or 8 and that their father has to come up and express to me the situation they are in.

And this is because of actions of our government. It is their actions to start with, but nobody should have a scarlet letter for life. There should be within everyone—whether you are Judeo-Christian, Muslim, agnostic, Christopher Hitchens, or whatever, you should have the idea that people can be forgiven and people can improve, and that is what man is about, is about hope and improvement and learning from your experiences.

The Criminal Code doesn't really see that, and they punish these people forever. It hurts our society. It leads them back into crime, so it hurts the whole society, not just that individual and their family, but the entire society, and it is one of the problems with our criminal justice system.

Our criminal justice system has so many holes in it where we refuse to see the truth. One of them is drug laws. So many people get drug convictions, and the collateral consequences of felony convictions, drug convictions, whether felonies or misdemeanors, are great, and they lead to the lack of opportunities for employment, for housing, for scholarships, for TANF grants, for you name it. It is a scarlet letter that keeps these people in a situation where they are more likely to be recidivists and go back into crime because they can't get into Main Street. So it hurts. It contributes to the drug problem. It contributes to the crime problem.

What we have got to do is get a get a bill that we can get passed. I have introduced a bill today—or will be introducing a bill today called the Fresh Start Act. It wouldn't affect everybody, indeed. But it will say, after 7 years, if you have been convicted in Federal court of a non-violent crime, regardless of anything else, no other conditions, you get your record expunged.

You go back to the court that sentenced you. The U.S. Attorney can weigh in and make some observations. But for two crimes that

we came up with, which would be sex offenders, where we know there is a likelihood or there is I think it is a likelihood of repeat offenses and danger to the public, and financial crimes of over $10,000, where people should know that somebody has committed fraud and defrauded somebody in certain amounts so they can protect their investors or their own business—and with those two exceptions, anybody can go into the Federal court and get their sentence expunged, which means they can go back out and say I have never been convicted before, I have a clean slate, and get a job. And these collateral consequences wouldn't affect them as well.

It would be incentive grants to the States to have a similar type of laws and pass their own expungement laws, and financial penalties if they don't, incentive grants if they do. This is the type of action we need. Mr. Rangel has got a bill that is similar but not quite as liberal as mine.

I think you need—and I picked 7 years simply because the law has a lot of areas with 7 years, 14, and 21 on statute of limitations and property rights and all that stuff, and it is something that stuck in my head from law school. Not much did, but that did.

I think, Mr. Mauer, you mentioned 6 years. Is that the kind of magic bullet?

Mr. MAUER. Well, 6 to 7 is what the research shows, somewhere in that range.

Mr. COHEN. So we are within the margin of error, which is better than most laws. So we are introducing that bill today. I would ask everybody to sign on to the Fresh Start Act.

Just some of the things we have done, we did something in our education bill this year on I think misdemeanors that says they can get scholarships again if they have committed a misdemeanor drug offense. It used to be you couldn't get a scholarship. It makes no sense whatsoever.

The drug war, quote-unquote, has cost us billions of dollars, I presume most of these collateral consequences. And I am trying to think, Mr. Cassidy, were you the main spokesperson here on collateral consequences?

Mr. CASSIDY. I wouldn't make that claim, but certainly I did talk about it.

Mr. COHEN. Are most of these collateral consequences supposed to be deterrents or are they punishments?

Mr. CASSIDY. Well, I think that is a very good question. I think oftentimes what you have is a response to public anger about a particular instance and the first response is, well, let's go back and close the barn door. I am not sure they are very well crafted to achieve a purpose.

Mr. COHEN. So you are not saying they are deterrents. You are not saying they are punishments. You are saying they are political yahoo points?

Mr. CASSIDY. I think when you have a situation where, for example, in New York State it appears there are more than 1,000 collateral consequences related to conviction, you set up a situation where the net is so fine and the mesh is so clear that it is surprising we don't have a 100 percent recidivism rate.

Mr. COHEN. They are obviously not deterrents, because the crimes that are committed are growing in numbers. It is like prohi-

bition, and the American public is saying these are not our values. Yet we are incarcerating people and taking away their rights and spending lots of resources and money that we should be spending on education and health care and EPA standards and cleaning up the Gulf and all the other problems we have got, rather than incarcerating people and putting them to a life of indentured servitude by gift of your United States Government.

But I thank each of you for your testimony and your works and I thank Chairman Conyers and hope that we will have a bill on this that we can pass out of this Committee and get with Chairman Leahy and get this approved in this Congress. And thank Mr. Gohmert for leading in what I hope will be a bipartisan effort in seeing that we are moving forward with realistic, rational legislation and that we don't have to remove all of our cynicism to get to the right point at the right time.

Thank you, Mr. Chairman.

Mr. SCOTT. Thank you.

The gentleman's time has expired. I recognize myself at this point.

Mr. Emsellem, are arrest records generally available on criminal background checks?

Mr. EMSELLEM. Well, under Federal law, under an FBI check, if you are screened for any of the hundreds of occupations that require an FBI check, yes, the arrest is produced.

Under State laws, there are many State laws that say you can't provide the arrest record.

For private employers who go through the criminal background check private screening firms, Federal law says they can't produce an arrest record older than 7 years. So there is this huge variation.

To summarize, there is a lot of variation around access to arrest records, depending on State law, depending on whether it is an employer background check, depending on whether it is a Federal background check.

Mr. SCOTT. Dr. Lattimore, you had one program where the conclusion was that there is no change in recidivism?

Ms. LATTIMORE. The Serious and Violent Offender Reentry Initiative grant programs that funded 89 reentry programs across the country, prisoner reentry programs across the country, and that were basically supposed to do needs and risk assessment, provide education, vocational training, substance abuse treatment, and mental health, what we found was that they started making incremental improvements in the provision of those types of services but not as much as was needed. In most cases, we saw modest improvements in employment and housing and drug use outcomes; did not see any differences in reincarceration rates.

Part of this may be due to the impact of technical violations, which is another sort of complication when you study recidivism. You have got people that are on parole. Oftentimes, you put them in programs where they are actually being watched more closely than the people that aren't in the programs, which leads to an opportunity for them to be caught on some technical violation of parole. We are still continuing to sort of scrutinize our data with respect to whether and the extent to which that might have had some influence on the findings.

The other issue that I think is important to keep in mind that we have not studied as much—well, it has been studied relatively little—is this notion that comes out of the substance abuse treatment area of relapse. And given that so many prisoners come out of prison swearing that they are never going to go back, they are done, and some of them—something happens in that immediate transition period that we really don't fully understand about what all the factors, the characteristics of the individual, the environment they are in, the support they are receiving and so forth, we really don't understand where this attitude of not coming back is shifting and changing that leads to something where they get back in trouble again. You know, is it I can't find a job? Is it as soon as I got out I went back and started hanging out with the guys that got me in trouble before?

Mr. SCOTT. Have you seen some programs that work and some that don't?

Ms. LATTIMORE. There are programs. There is evidence that some employment-based programs work. There is some evidence of positive outcomes with drug courts. Certainly some substance abuse treatment. There is emerging evidence of sort for cognitive behavioral programs that attempt to change criminal thinking.

Mr. SCOTT. So some tend to work and some don't.

Ms. LATTIMORE. It is complicated by the fact you are talking about—when you talk about criminal justice populations, you are talking about—Judge, as you know—lots of different kinds of people, from the first-time marijuana smoker to people like in our study that had an average of 14 prior arrests when they were incarcerated.

So you talk about very serious populations and so forth. So there is evidence that some types of programs work for some populations, but in terms of the full grid we don't know.

Mr. SCOTT. Mr. Lewis, have you seen evidence to show what works and what doesn't work?

Mr. LEWIS. We have. In some of our work that we did at Prison Fellowship with the evaluation of the Interchange Freedom Initiative and of the Kairos Horizon Prison Program, we found that there is a growing body of empirical evidence that shows that folks who participate in faith-based programming while in prison and complete those programs do show significant reductions in both recidivism and in one of the studies were more likely to meet their child support obligations upon release.

So if I made a recommendation it would be to certainly continue faith-based programming while in prison, along with some of the other programming.

Mr. SCOTT. You mentioned health care. Have you reviewed the health care bill that passed to determine what impact that is going to have on recently released prisoners, whether they are going to have continue to have problems getting health care?

Mr. LEWIS. Just a cursory review of that.

Mr. SCOTT. Did you come to any conclusion?

Mr. LEWIS. No, I haven't.

Mr. SCOTT. You mentioned also children and the effect that—the collateral consequence to society, I guess, on the effect on children. What effect, and how can we limit the effects that involve children?

Mr. LEWIS. I am glad you mentioned that, Mr. Chairman, because that is an area that we are particularly concerned about, is the growing number of children that are impacted by incarceration and, therefore, impacted by collateral consequences.

Research shows that when a parent is incarcerated the children's lives are disrupted not only by separation from their parents but also they are more likely to endure poverty, to endure parental substance abuse or poor academic performance. They are more likely to suffer aggression, anxiety, depression. And on top of all of that, they are more likely to experience alcohol and drug abuse themselves; and the lifetime probability of incarceration of those children actually goes up significantly. So the children who are impacted by incarceration are also impacted by these collateral consequences, particularly in the area, I believe, of housing.

As a personal anecdote, when I was with Prison Fellowship, I can't tell you the number of ex-offenders that I ran into and interviewed during our recidivism portion of the study who, for example, wanted to do the right thing and wanted to connect with their families upon release. In most cases, the children's mother was living perhaps in public housing, and because that offender had a felony drug conviction and/or a gun conviction, probably both, he was prohibited from reuniting with his family.

Those cases, sadly, were few and far between, but we believe that is a good example of how children suffer the collateral consequences of incarceration.

Mr. SCOTT. Finally, Mr. Emsellem, you mentioned the TSA Waiver Program. How feasible would it be to implement that on a broad basis? Are there logistical complications that would make that difficult to do generally?

Mr. EMSELLEM. I think when it comes to Federal background checks there is really no reason why it couldn't be implemented by the various agencies that are doing the screening anyway. I mean, there are certain resource issues that would be involved, I think. With port worker background checks, they are charged a fee that goes toward the process.

But when we are talking about all the State various occupational restrictions or private employer restrictions, I think there are opportunities there, and there are a lot of States that have the equivalence of waivers with different occupations. But I would focus more, especially with private employment, on compliance with the EEOC guidelines, which, like I say, are very straightforward and they require all of the things we have been talking about, that the offense be job-related, be sensitive to the age of the offense, the nature of the offense, all those basic criteria. They are good standards.

The Federal Government was just sued over the census enumerators, all of them, on this title VII theory that the EEOC guidelines have been around for over 20 years.

So I think there is either—you know, you can go at both, and there is a lot of opportunity with waiver, with all the Federal laws that are implemented.

Mr. SCOTT. Thank you.

Mr. Gohmert, any other questions?

Mr. GOHMERT. Well, I might just comment, the discussion about expungement, there are cases when it would certainly be helpful. But then you guys know as well, there are some cases where you don't want that expunged.

For example—all I can do is make it a hypothetical because of the law—but, hypothetically, you are a child molester, you are caught, you are brought to court, and because the little children can't convince, can't remove all reasonable doubt from the jury's mind, you end up being acquitted. The whole record is expunged. So then you go to work for a couple of other entities that, one, a probation office and then a school and then you end up destroying lives for which you are convicted.

We know that, like child molesters, the studies I have seen indicate they are going to have a greater risk of re-offending. Some things you don't want that expunged. You want to be able to consider that, and some of the EEO criteria are very helpful in that record.

Then I had an appointed case where I had concerns about the defendant's mental state. Well, I brought in a psychiatrist. He was excellent and had been very helpful on another appointed case. But he said, he has got a problem, but it is called nowadays, under DSM-4, antisocial personality. It used to be a sociopath. He knows right from wrong. He can comport with the requirements of law. He just enjoys not doing so.

The best place for him—I said, well, maybe you could help us on mitigation and sentencing. He said, but, yeah, the best place for him is a very structured environment for as long as you can possibly keep him, hopefully, the rest of his life, because he enjoys hurting people. And I said that sounds like prison. He said, yeah, he needs to be there the rest of his life. Well, we may not use you on sentencing then.

But, anyway, there are some people who you don't want their records expunged, and I would hate for a law that just made it blanket across-the-board. There are others you want to encourage them to have a fresh start.

Ironically—I can't help but point this out—under the hate crimes bill we passed, it is a complete defense under the Federal hate crimes bill, not most State, but under the Federal hate crimes bill, if you raise a reasonable doubt that you selected your victim randomly. I just wanted to shoot somebody. It was a random shooting. I didn't care. That is a complete defense under the Federal law, ironically.

But I do appreciate the input. These are troubling issues, because we do want to have protection for society. On the other hand, you know, one of the things that has made America great is that we are a very forgiving society, which also makes it weird that so many people get in trouble in Washington covering things up, whereas history tells us if you just were open, people are very forgiving.

That is why I would like for your input to go beyond the hearing today. You know the reaction of the public. If this body were to come out and say we are going to let you expunge anybody after a certain period, there are some things that shouldn't be. That is why we really need to be cautious, or you end up doing more dam-

age than good if you have a law that sets up a system where people are going to get hurt and then they blame the law and then it gets even more Draconian.

Mr. SCOTT. If the gentleman will yield, is there a difference between expunging arrest records and conviction records? I would ask Mr. Emsellem what the civil rights implications may be for discriminating against someone on a job because of an arrest record for which there was no conviction.

Mr. EMSELLEM. The EEOC has two sets of guidelines. One relates to arrest records and one relates to conviction records. There is basically a blanket policy that you can't deny a job—blanket policy based arrest records because of the huge impact on people's color and the absence of any reliable indication that that is a real predictor of future job performance.

Convictions is another thing, and that is where you get into these criteria I was talking about before, that the offense is job related, that you are looking at the age and seriousness of the offense. That is not about expungement.

Mr. SCOTT. You can't have a blanket policy on arrests. What about a kind of haphazard policy or an individual policy? The fact that someone has been arrested and then ultimately found not guilty, can you discriminate against someone based on that record?

Mr. EMSELLEM. Not unless you can prove that that arrest actually—we are talking about EEOC and title VII. Not unless you can prove that the underlying activity actually happened. That is what basically the standard is. If you can show it is not in the arrest record anymore, you have got to go out and do your own determination whether what they were accused of doing actually happened.

Mr. GOHMERT. Well, I know in Texas if you are found not guilty at trial, then you can have your records expunged, including the arrest record, so there is no indication that you were ever arrested. And it probably is a factor of cost, as Mr. Cohen mentioned. Some are found not guilty, and they just don't have the money to pursue expungement. But then others, if you are found not guilty and you don't go through the formal expungement, then the arrest record is still out there. If you do, then you can't bring that up at all. It has to be completely eliminated from your record entirely.

Mr. SCOTT. Thank you.

The gentlelady from Texas.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

I think this is also a topic that needs to be periodically reviewed and reintroduced, meaning the topic of reentry. We went through this for a number of years with the Second Chance Act, and I believe that many of those in the criminal justice system, reform system, will say there are even barriers to implementing the Second Chance Act. There are even, if you will, obstacles in its full implementation, not to mention the poor funding that has been allowed for some of the initiatives that have been introduced through that legislation. So I believe this is important.

I cite as an example—and I don't know if this young man is aware of it. I would assume. He, having a lot of people interested in his future professional football career, might be ready to pounce on this, but who knows. A young man playing at the University of Texas at Austin, our premier football institution as well as aca-

demic institution, African American, was arrested, I guess along with some others, for armed robbery and, of course, presented a story of horrors. How could he do that.

Just quietly a week or so ago you heard quietly that all charges had been dropped, and he has now quietly dispatched himself off to another university.

The question is, will that individual have to forever and ever say that he was arrested.

The question is, what does expunging mean in terms of our Federal housing requirements? I think someone just evidenced a story about an individual not being able to be reunited with their family. If the record is expunged, does that mean under our Federal housing guidelines, a misguided law, and I understand the purpose of it, would that person still have to indicate that they have been incarcerated and/or arrested?

So let me just pose this question that I will go—I think I saw something from Mr. Cassidy, and I couldn't determine whether he was for or against the concept or the understanding of how arrest records block the reentry, because it indicated—includes some information on the record.

I want to go on record by saying that I have an aversion to child predators and individuals that have a propensity of repeating and preying on the innocent. So let me just put that on the table and put that aside.

The HUD rules came about because of the attempt by HUD to clean up public housing, where grandmothers either were, I wouldn't say forced, but maybe forced, but in many instances willingly had youngsters taking care of them; and they were being, in essence, running drug houses because the youngsters were in gangs or whatever they were and therefore creating an unsafe atmosphere. And you didn't want to throw grandma out, and so it was that you couldn't have these individuals in. That was sort of the underlying premise. It has expanded so that people coming back and wanting to get a job and come back to their family are now blocked.

So I would ask each of you to give me your sense of the most horrific aspects of reentry as relates to reentry. And you can cross the gambit. I know there are people here with expertise in work. There is housing. Because I really think the expunging is a very, I think, instructive approach, and as I understand my colleague has a very limiting approach that I think this Committee should consider.

Many of you know that I have been pushing under the Federal system good-time early release so that at 45 years you could be released if you are a nonviolent offender. That has caused a fire on the head of many of my colleagues, and I hope that maybe we will see the light of day of that legislation. Because I think that is important, releasing individuals who are nonviolent offenders in the Federal system without parole who are just taking up space.

But I would like to hear what you believe is the most horrific aspect of blocking a favorable reentry. Mr. Mauer—and forgive me if you are repeating yourself—but maybe you can come up with a new idea that we can have on the record as I ask each of you to answer that question.

And thank you, Mr. Chairman and Ranking Member, for holding this hearing.

Mr. MAUER. Well, just very briefly, I mean, two actions that have come out of Congress—and I think we have 15 years of experience with them now—are the ban on Pell grants for education in prison and the TANF food stamp bans, both adopted by Congress in the mid-1990's. I think there is no evidence whatsoever that shows that has had a positive effect. There is a great deal of evidence that shows it has made reentry more difficult. It probably has contributed to higher rates of recidivism, rather than lower. So if we really care about evidence-based approaches, I think it is time to revisit both of those policies.

Ms. JACKSON LEE. Excellent. Thank you.

Mr. EMSELLEM. I would say there are two pieces of criminal background checks for employment. First, get the records right. Clean them up so that they are not hurting folks who have clean records and they are still showing up as having a problem, either an arrest or conviction. And that covers the scope of FBI records, private records, all across the board.

And then also, you know, adopt standards—and they can be in Federal law, they can expand on the EEOC standards that we have been talking about, they can create presumptions based on certain time periods which is supported by the research—but create standards that everybody—that work also across the board, from Federal Government to State government to private employers and that everybody becomes really familiar with. That is what we are missing. It is the Wild West out there, basically, and it is time to create standards and enforce standards.

Ms. JACKSON LEE. Thank you.

Mr. Moore.

Mr. MOORE. Good morning. Yes, ma'am.

I myself have a problem with pedophilia, sex crimes, not to mention pretty much all crimes, but those are two major crimes that I really, really have a problem with.

How do we address the issue? I keep going back to what I said probably 25 minutes ago about establishing a way that you can scrutinize individuals when they do return in reference to a measure of crime that fall off the charts when we are dealing with pedophilia and stuff along the lines of sex crimes and crimes that will put people's lives in jeopardy as far as armed robberies and the like.

So in living this experience myself, not that I believe I am telling you anything, especially Judge Gohmert, things that he hasn't witnessed as far as criminals that come before him and you expunge their record and you really don't know what they are about once they return to society, you really have no idea. But it has been my experience as far as this thing called life goes there is also pros and cons and negativism and positivism to each and every given situation.

So in order to give the person a chance, you know, like I said, I keep hearing this thing about what I mentioned a little while ago, about scrutinizing the individual that you have before you to give them that chance, if it is a clearinghouse or something established where you can get an idea what this individual is all about. Does

he have a family? Does he care about himself or the people, tax-paying citizens? Pretty much that is basically what I have to say.

Ms. JACKSON LEE. Thank you, sir. That is very instructive.

Mr. Lewis?

Mr. LEWIS. I am concerned primarily about policies that limit participation of ex-offenders in employment and training programs, the receipt of income supports and including welfare benefits. If we are going to tackle the problem of prison reentry, we have to allow access to those programs.

Ms. JACKSON LEE. Would that include housing?

Mr. LEWIS. And that would include housing.

Ms. JACKSON LEE. You see the barriers to federally funded housing. Is that an issue that you think is of concern?

Mr. LEWIS. Yes, it is.

Ms. JACKSON LEE. Ms. Lattimore.

Ms. LATTIMORE. Thank you. I would agree with Mr. Lewis that job training and educational programming are needed. If people are going to be able to put a decent life together, they are going to have to have that, as well as treatment services. Substance abuse treatment and mental health services are not available at anywhere close to the level that are needed, given the needs of the population.

Ms. JACKSON LEE. So if there are Federal—a job training program—and, Mr. Chairman, I had one of my major infrastructure projects funded by Federal dollars. I had the CEO of that project say, "I think we are not allowed to hire ex-offenders." I was asking where he got that from. I even asked the President of the United States in a meeting, do Federal funds bar someone from getting a job moving trash, frankly. I am glad that our President said he had never heard of it.

But if I had not challenged, because I was trying to get a job training program, Mr. Chairman, Mr. Chairman Conyers, that would include ex-offenders, that specifically would go and outreach to them, which I am still pushing for, and that willy-nilly this well-thinking CEO of the project, getting $1 billion-plus from the Federal Government is saying, oh, we can't hire ex-offenders.

Mr. EMSELLEM. You should report them to the OFCCP. I mean, that is their job, and I think they are very interested in pursuing that, again because of the title VII standards. Blanket policies are illegal under title VII as applied to Federal contractors, State governments, private employers. So—unless there is some special provision. And no provision that I am aware of says no one with a record qualifies for a Federal job.

Ms. JACKSON LEE. I will dispatch myself to do it. Because the contractors, as you well know, who are being the major contractors are saying that, and they also have their own private policies, but they are using Federal dollars.

Can I get Mr. Cassidy?

Mr. CASSIDY. Congresswoman, I think you are hearing the right themes, housing, education, employment, job training. But all of those issues are limited by the hundreds—in some States, perhaps thousands—of laws and regulations that say no to ex-offenders. There has to be some rational order brought to that system. Without it, people just don't have a chance.

Ms. JACKSON LEE. So you are saying that we need to scrap the State laws that block individuals returning to their home States that are just a maze of opposition to them reentering?

Mr. CASSIDY. It is a State problem. It is a local problem. There has got to be cooperation from all three elements of government.

Ms. JACKSON LEE. Thank you.

Thank you very much, Mr. Chairman, for yielding to me.

Mr. SCOTT. I would like to thank the witnesses for their testimony today.

Members may have additional written questions which we will forward to you and ask that you answer as promptly as possible so the answers can be made part of the record.

The hearing will remain open for 7 days for submission of additional material.

If there are no further questions, without objection, the Subcommittee stands adjourned.

[Whereupon, at 12:16 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Chairman Scott and Committee Members,

I wanted to first Thank You for such an incredible opportunity a few weeks ago. I was truly honored to be asked to testify in the Congressional Hearing on the Rape Kit Backlog (HR4114). It is great to see your passion for the issue.

I wanted to offer some clarification/elaboration on my testimony after further reflection and looking back at the case file. The underwear I had been wearing that night did get tested, which is how the semen was found. The remainder of the kit was never tested because it required additional funding (including the DNA sample). The key piece for me is testing the ENTIRE kit could have produced a positive match to the suspect!

Please let me know if I can be of any further help as this moves forward.

Thank You!
Valerie Neumann
Cincinnati, OH
513-680-6325
vmeumann@gmail.com

June 9, 2010

The Honorable Robert C. Scott, Chairman
House Judiciary Committee, Subcommittee on
Crime, Terrorism & Homeland Security
1201 Longworth House Office Bldg.
Washington, D.C. 20515

Dear Congressman Scott:

We, the undersigned organizations, are writing to thank you for sponsoring and introducing the Fairness & Accuracy in Employment Background Checks Act of 2010. We strongly support this legislation, which provides critical safeguards when the FBI conducts criminal background checks for employment purposes. In today's tough economic times, this legislation is more important than ever before to help remove all unreasonable barriers people are facing in finding and keeping jobs.

While we recognize the necessity of criminal background checks for safety and security sensitive jobs, we are concerned that the FBI's system is so seriously flawed that it does a disservice to large numbers of U.S. workers and employers who want to enter into an employment relationship but are deterred from doing so by inaccurate FBI records. Each year, about nine million criminal background checks are generated by the FBI for civil purposes, mostly for employment. According to the Attorney General, however, nearly 50 percent of the FBI records are incomplete or inaccurate. As a result, thousands of people are denied jobs, or face delays in receiving jobs, which often raises serious civil rights concerns given the disproportionate impact of criminal background checks on people of color. Moreover, because of the inaccurate FBI records, employers are denied workers of their choice and federal and state agencies that require criminal background checks end up diverting valuable time and resources on worker appeals challenging the accuracy of the FBI's records.

The Fairness and Accuracy in Employment Background Checks Act of 2010 adopts proven strategies that fix the FBI records before they are released and the damage is already done. The FBI has a special unit that tracks down incomplete criminal records for federal gun checks required under the Brady Law. As a result of these investigations, two-thirds of the incomplete state records are updated within three business days. The bill applies this simple, yet proven, approach to employment background checks as well, thus ensuring that the records are accurate before they are released to the authorized employers and government agencies. In addition, the bill incorporates several basic consumer protections that already apply to private screening firms under the Fair Credit Reporting Act, thus ensuring that workers are treated fairly and with full knowledge of the facts when they submit to an FBI criminal background check for employment screening purposes.

This bill has already generated significant bi-partisan support from members on key Congressional committees in the House of Representatives, including Judiciary, Homeland Security, and Transportation and Infrastructure. At a time when finding and keeping a job is more of a struggle than ever for millions of workers, your leadership on this issue is of major significance to our community. We look forward to working with you to ensure passage of this critical legislation.

Sincerely,

AFL-CIO
Amalgamated Transit Union, AFL-CIO
American Civil Liberties Union
American Federation of Government Employees
American Federation of School Administrators, AFL-CIO
American Federation of Teachers
American Maritime Congress (AMC)
American Waterway Operators
The Bronx Defenders
Center for American Progress
Child Labor Coalition
Community Service Society of New York
International Brotherhood of Teamsters
International Federation of Professional and Technical Engineers, AFL-CIO
International Initiative to End Child Labor
International Longshoremen's Association
International Longshore & Warehouse Union
International Organization of Masters, Mates & Pilots
The Lawyers Committee for Civil Rights Under Law
The Leadership Conference on Civil and Human Rights
Legal Action Center
Marine Engineers' Beneficial Association
Marine Firemen's Union
Maritime Institute for Research and Industrial Development (MIRAID)
NAACP
NAACP Legal Defense & Educational Fund, Inc.
National Air Traffic Controllers Association
National Education Association
National Employment Law Project
National Employment Lawyers Association
National H.I.R.E. Network
National Legal Aid & Defender Association
National Workrights Institute
North Carolina Justice Center
Safer Foundation
Sailors' Union of the Pacific
Sargent Shriver National Center on Poverty Law
Seafarers International Union
Service Employees International Union
Transport Workers Union of America
Transportation Trades Department, AFL-CIO
United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)
United Food and Commercial Workers
United Steelworkers

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AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 8-9, 2010

RECOMMENDATION

RESOLVED, That the American Bar Association approves the Uniform Collateral Consequences of Conviction Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2009, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

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REPORT

Uniform Collateral Consequences of Conviction Act

A Summary

In 1974, 1.8 million people, or 1.3% or the adult population, had been imprisoned at some point of their life. By 2001 that number rose to number 5.6 million people, or 2.7% of the adult population. The Department of Justice estimates that if the 2001 imprisonment rate remains unchanged, 6.6% of Americans born in 2001 will serve prison time during their lives. In addition to those who have served prison time, an even larger proportion of the population has been convicted of a criminal offense without going to prison. According to a 2003 report of the Department of Justice, nearly 25% of the entire population (some 71 million people) had a criminal record.

Concern about the impact of collateral consequences has grown in recent years as the numbers and complexity of these consequences have mushroomed and the U.S. prison population has grown. Collateral consequences are the legal disabilities that attach as an operation of law when an individual is convicted of a crime but are not part of the sentence for the crime. Examples of collateral consequences include the denial of government issued licenses or permits, ineligibility for public services and public programs, and the elimination or impairment of civil rights. There is a real concern on a societal level that collateral consequences may impose such harsh burdens on convicted persons that they will be unable to reintegrate into society.

Indeed, the judge and lawyers in the case are frequently unaware of collateral consequences that will predictably have a substantial impact upon a defendant. Few jurisdictions provide a reliable way of avoiding or mitigating categorical restrictions based solely on conviction even years after the fact. Fewer still give decision-makers useful guidance in applying discretionary disqualifications on a case-by-case basis, or a measure of protection against liability. Jurisdictions are frequently at a loss about the effect to give relief granted by other jurisdictions.

The **Uniform Collateral Consequences of Conviction Act**, promulgated by the Uniform Law Commission in 2009, is an effort to improve public and individual understanding of the nature of this problem and to provide modest means by which people who suffer from these disabilities may, in appropriate circumstances, gain partial relief from those disabilities.

The key provisions of the UCCA are:

Collection

All collateral consequences contained in state laws and regulations, and provisions for avoiding or mitigating them, must be collected in a single document. The compilation must include both

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collateral sanctions (automatic bars) and disqualifications (discretionary penalties). In fulfilling their obligations under the Uniform Act, jurisdictions will be assisted by the federally-financed effort to compile collateral consequences for each jurisdiction that was authorized by the Court Security Act of 2007.

Notification

Defendants must be notified about collateral consequences at important points in a criminal case: At or before formal notification of charges, so a defendant can make an informed decision about how to proceed; and at sentencing and when leaving custody, so that a defendant can conform his or her conduct to the law. Given that collateral consequences will have been collected in a single document, it will not be difficult to make this information available.

Authorization

Collateral sanctions may not be imposed by ordinance, policy or rule, but must be authorized by statute. An ambiguous law will be considered as authorizing only discretionary case-by-case disqualification.

Standards for Disqualification

A decision-maker retains the ability to disqualify a person based on a criminal conviction, but only if it is determined, based on an individual assessment, that the essential elements of the person's crime, or the particular facts and circumstances involved, are substantially related to the benefit or opportunity at issue.

Overturned and Pardoned Convictions; Relief Granted by Other Jurisdictions

Convictions that have been overturned or pardoned, including convictions from other jurisdictions, may not be the basis for imposing collateral consequences. Charges dismissed pursuant to deferred prosecution or diversion programs will not be considered a conviction for purposes of imposing collateral consequences. The Act gives jurisdictions a choice about whether to give effect to other types of relief granted by other jurisdictions based on rehabilitation or good behavior, such as expungement or set-aside.

Relief from Collateral Consequences

The Act creates two different forms of relief, one to be available as early as sentencing to facilitate reentry (Order of Limited Relief) and the other after a period of law-abiding conduct (Certificate of Restoration of Rights).

- An Order of Limited Relief permits a court or agency to lift the automatic bar of a collateral sanction, leaving a licensing agency or public housing authority, for example, free to consider whether to disqualify a particular individual on the merits.

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- A Certificate of Restoration of Rights offers potential public and private employers, landlords and licensing agencies concrete and objective information about an individual under consideration for an opportunity or benefit, and a degree of assurance about that individual's progress toward rehabilitation, and will thereby facilitate the reintegration of individuals whose behavior demonstrates that they are making efforts to conform their conduct to the law.

Defense to Negligence

In a judicial or administrative proceeding alleging negligence or other fault, an order of limited relief or a certificate of restoration of rights may be introduced as evidence of a person's due care in hiring, retaining, licensing, leasing to, admitting to a school or program, or otherwise transacting business or engaging in activity with the individual to whom the order was issued.

The work of the Drafting Committee is available at www.nccusl.org, the website of the Conference

Respectfully submitted,

Robert A Stein
President
National Conference of Commissioners
On Uniform State Laws
February, 2010

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GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted by: Michael Kerr, Legislative Director

1. Summary of Recommendation(s).

   The National Conference of Commissioners on Uniform State Laws requests approval of the Uniform Collateral Consequence of Conviction Act by the ABA House of Delegates. The Act was approved by the National Conference in 2009.

2. Approval by Submitting Entity.

   The National Conference of Commissioners on Uniform State Laws approved it in July, 2009.

3. Has this or a similar recommendation been submitted to the House or Board previously?

   No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

   The Act incorporates or otherwise utilizes many of the policies and definitions contained in the the ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Person.

5. What urgency exists which requires action at this meeting of the House

   Not applicable.

6. Status of Legislation. (If applicable.)

   As of the submission of this report, the Uniform Collateral Consequences of Conviction Act has not been enacted in any state legislature.

7. Cost to the Association. (Both direct and indirect costs.)

   None.

8. Disclosure of Interest. (If applicable.)

   None.

9. Referrals

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project and those that expressed interest were provided with tentative drafts, as well as the final Act and Report. The work of the Drafting Committee is available at www.nccusl.org, the website of the Conference.

The ABA Advisor for the Uniform Collateral Consequences of Conviction Act was Margaret Colgate Love of the Commission on Effective Criminal Sanctions. Roger Drew was the Judicial Division Section Advisor. Thomas Earl Patton was the Business Section Advisor. Charles M. Ruchelman was the Taxation Section Advisor.

The Report with Recommendations has been referred to the Criminal Justice Section, Section of State and Local Government Law and the Government and Public Sector Lawyers Division.

10. Contact Person (Prior to the meeting.)

John A. Sebert, Executive Director, National Conference of Commissioners on Uniform State Laws, 111 North Wabash, Suite 1010, Chicago, IL. 60602, 312/450-6603

Michael R. Kerr, Legislative Director, National Conference of Commissioners on Uniform State Laws, 111 North Wabash, Suite 1010, Chicago, IL. 60602, 312/450-6620

11. Contact Person. (Who will present the report to the House.)

Robert A Stein, President, National Conference of Commissioners on Uniform State Laws, University of Minnesota Law School, 229 19th Ave. S., Minneapolis, MN 55455
Cell: 612-812-1612

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EXECUTIVE SUMMARY

1. Summary of the Recommendation

   That the ABA approves the Uniform Collateral Consequences of Conviction Act promulgated by the National Conference of Commissioners on Uniform State Laws in 2009 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the issue which the recommendation addresses

   The Uniform Collateral Consequences of Conviction Act, promulgated by the Uniform Law Commission in 2009, improves the understanding of penalties that attach when an individual is convicted of an offense, and in appropriate circumstances, offers a mechanism to provide partial relief from the disabilities. The Act facilitates notification of collateral consequences before, during, and after sentencing. Under the provisions of the Act, states are to create a collection of all collateral consequences, with citations and descriptions of the relevant statutes. At or before arraignment individuals will be advised of the particular collateral consequences associated with the offense for which they are charged. Notice is also to be given at the time of sentencing, and if an individual is sentenced to prison, at the time of release. Formal advisement promotes fairness and compliance with the law

   The Act provides mechanisms for relieving collateral sanctions imposed by law. The Act creates an Order of Limited Relief, designed to relieve an individual from one or more collateral consequence based on a showing of fitness for reentry. The Order does not automatically remove the consequence, but does remove the automatic disqualification imposed by law. A state agency remains able to disqualify an individual on a case by case basis. The Act also creates a Certificate of Restoration of Rights. The Certificate is granted to individuals who demonstrate a substantial period of law-abiding behavior consistent with successful reentry and desistance from crime. Issuance of a Certificate facilitates reintegration of those individuals who have demonstrated an ability to live a lawful life.

3. Please explain how the proposed policy position will address the issue

   Approval of the Uniform Collateral Consequences of Conviction Act by the House of Delegates would indicate to states that the Act is an appropriate mechanism for addressing the issues described above.

4. Summary of any minority views or opposition which have been identified

   The NCCUSL is not aware of any minority views or opposition to the Uniform Act.

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