COLLATERAL CONSEQUENCES

HEARING

BEFORE THE

OVER-CRIMINALIZATION TASK FORCE OF 2014

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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JUNE 26, 2014

COLLATERAL CONSEQUENCES

THURSDAY, JUNE 26, 2014

HOUSE OF REPRESENTATIVES

OVER-CRIMINALIZATION TASK FORCE OF 2014

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Task Force met, pursuant to call, at 9:30 a.m., in room 2237, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Task Force) presiding.

Present: Representatives Sensenbrenner, Bachus, Gohmert, Conyers, Scott, Cohen, Johnson, Bass, and Jeffries.

Staff Present: (Majority) Robert Parmiter, Counsel; Alicia Church, Clerk; and (Minority) Ron LeGrand, Counsel.

Mr. SENSENBRENNER. The Task Force on Over-Criminalization will come to order.

Without objection, the Chair will be authorized to declare recesses during votes on the floor. Let me say we are supposed to have an hour and a half worth of votes beginning at 10:30 to 10:45, and I don't think that it would be advisable to have the witnesses sit for an hour and a half, and I don't know how many Members will be coming back after an hour and a half; so I would like to wrap this up by 10:30, 10:45.

I have an opening statement. I yield myself 5 minutes.

Good morning, and welcome to the eighth hearing of the Judiciary Committee's Over-criminalization Task Force. Today's hearing will focus on the collateral consequences associated with a criminal conviction. Over its first seven hearings, the Task Force examined issues related to criminal intent, over-federalization, penalties, and other issues which affect criminal defendants during the investigative and prosecutorial phases of the criminal justice process.

However, today's hearing will examine the consequences that follow a criminal conviction which may not be immediately apparent during the pendency of a criminal case.

The American Bar Association knows that some collateral consequences serve an important and legitimate public safety, or a regulatory function, such as keeping firearms out of the hands of violent offenders, protecting children or the elderly from persons with a history of physical, mental or sexual abuse, or barring people convicted of fraud from positions of public trust. Others are directly related to the particular crime such as registration requirements for sex offenders, driver's license restrictions for those con-

victed of serious traffic offenses, or disbarment of those convicted of procurement fraud.

However, advocates for reform in this area including our panel today, have argued that in many cases the collateral consequences applicable to a given criminal conviction are scattered throughout the code books and frequently unknown to those responsible for their administration and enforcement. This claim should sound familiar to Members of this Task Force since the witnesses before us have repeatedly demonstrated that statutes carrying criminal penalties are also scattered throughout the U.S. Code.

Additionally the Supreme Court recognized in Padilla versus Kentucky in 2010, that when a person considering a guilty plea is unaware of serious consequences that will inexorably follow, this raises questions of fairness and implicates the constitutional right to effective assistance of counsel. I agree that this area is one that the Task Force should consider during its evaluation of the overcriminalization of Federal law.

However, there are several areas where I have serious concerns, most notably with regard to the argument advanced by many, including at least one of our witnesses today, that Congress should force private employers to ignore an employee's criminal history when making a hiring decision via a Ban the Box and other legislative initiatives.

Generally I do not believe that adult offenders who engage in violent and other forms of malum in se conduct should be able to complain about the consequences of their actions. Additionally, over the years Congress has repeatedly seen fit to make criminal history records available to employers, including schools, banks, power plants and other vital parts of our Nation's infrastructure in order to protect public health and safety. Proposals such as Ban the Box run directly contrary to that important effort.

Additionally, as the author of the Adam Walsh Child Protection and Safety Act of 2006, I have serious concerns with any efforts that characterize dangerous sex offenders who prey on our children as suffering from an unjust collateral consequence. Having said that, during my tenure in Congress, I have been a consistent proponent of efforts to help rehabilitate ex-offenders and to lessen their risk of their reoffending following release.

Last year I reintroduced H.R. 3465, the "Second Chance Reauthorization Act of 2013." This bipartisan legislation which has been co-sponsored by the Task Force's Ranking Member, Mr. Scott, would reauthorize and streamline the grant programs in the Second Chance Act to help ex-offenders become productive members of our society.

I want to thank the witnesses for appearing today and look forward to hearing about these and other issues associated with the collateral consequences of a criminal conviction.

It is now my pleasure to recognize for his opening statement, the Ranking Member of the Task Force, the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, our last hearing focused on the problem of overincarceration and the need for proportional evidence-based and individualized sentencing. The Pew Center on the States, estimates

that any ratio of over 350 per 100,000 in jail today begins to get a diminishing return for additional incarceration. They also tell us that anything over 500 per 100,000 actually becomes counterproductive because you are wasting so much money, you are messing up so many families. You have so many people with felony records it actually increases crime not decreases crime.

Data shows that since 1992, the annual prison costs have gone from about $9 billion to over $65 billion adjusted for inflation, and that increase of prison costs was over six times greater than higher education. This hearing focuses on the significant punitive and offered counterproductive collateral consequences that obstruct, impede, and undermine successful reentry. Our witnesses today will share the data that demonstrates that our existing system of State and Federal collateral consequences wastes the taxpayers' money, violates common sense, and are ultimately counterproductive to the goal of public safety.

Just like each of the 195 mandatory minimums got in our Federal code one at a time, each and every one of the over 45,000 collateral consequences that were written into State and Federal law got there slowly over time. When considered in isolation, a collateral consequence may not initially appear to be a high hurdle to reentry and success, but taken together, these collateral consequences form a tightly woven web that restricts individuals from overcoming the hurdles in their path.

Many of these collateral consequences are born from the worst of the worst of these tough on crime sound bites masquerading as sound public policy. Just as mandatory minimum sentences, sentence people before they are even charged or convicted based solely on the code section violated without any consideration to the seriousness of the crime or the role of the defendant, collateral consequences apply across the board and to "all convicted felons."

For example, in the drug context in the fiscal year 2012, 60 percent of convicted Federal drug defendants were convicted of offenses carrying a mandatory minimum penalty of some sort. Right now restrictions on your ability to work, live, learn and survive are the same irrespective of your expense, or how long ago it was or what role you played, the collateral consequences you face are not narrowly tailored or even tailored at all. It is a one size fits all, it is another example of tough on crime sweeping far too broadly and far too harshly. There is no reliable scientific data that demonstrates that any of these collateral consequences actually improve public safety, reduce recidivism, or save money. To the contrary, all of the evidence is just the opposite.

Collateral consequences of conviction affect an individual's ability to obtain necessary social services, employment, professional licenses, housing, student loans to further their education, the ability to interact with their children, and critically, power through the voting in the Democratic process. All of these restrictions, among tens of thousands of other ones, have resulted in lifelong civil penalties that prevent individuals from transitioning back to society successfully. They serve to marginalize and stigmatize those with prior convictions and treat them as second class citizens.

Just as the Children's Defense Fund has recognized that secure housing, employment, education and other social services are the

best crime-prevention resources to redirect individuals from what they call the cradle to prison pipeline, toward a cradle to college and career pipeline, so too must we apply the same data to redirect those reentering our communities after serving their sentences.

When there is no hope for a decent job because employers refuse to hire those with a prior conviction, we can't be surprised that some choose to return to the very paths that led them to prison in the first place. Often there is no bearing, no correlation, and no relevance between someone's prior conviction and the job they are applying.

Now, in some circumstances, there may be value in looking at the criminal conviction. For example, it makes sense for someone with an embezzlement conviction to be denied a job at a bank. But what does a 30-year-old marijuana possession conviction have to do with someone getting a good paying construction job? Now the EEOC has issued guidance that provides that an employer's use of an individual's criminal record may discriminate against them if there is a disproportionate impact on certain minorities without any job-related relationship. That could constitute discrimination and so although the criminal record may be relevant—can I have about 30 more seconds.

Mr. SENSENBRENNER. Without objection.

Mr. SCOTT. Although the criminal record may be relevant, the untargeted, overly broad denial of all jobs because of any Federal record may actually constitute discrimination.

Mr. Chairman, thank you for holding the hearing, and look forward to the testimony of our witnesses.

Mr. SENSENBRENNER. The the time of the gentleman has expired.

Without objection other Members' opening statements will be made a part of the record.

[The prepared statement of Mr. Goodlatte follows:]

Statement of House Judiciary Committee Chairman Bob Goodlatte
Over-criminalization Task Force Hearing on
"Collateral Consequences"
Thursday, June 26, 2014 at 9:30 a.m.

Thank you, Chairman Sensenbrenner. I look forward to the Task Force's continued examination of over-criminalization issues in this hearing, the fourth following its reauthorization earlier this year.

Recently, this Task Force considered the direct consequences of criminal conviction while examining the issues related to federal criminal penalties. Direct consequences, such as the sentences imposed for criminal violations, are generally prescribed by statute and raise few, if any, concerns with foreseeability or notice with respect to the behavior of a criminal defendant.

In contrast, the existence and seriousness of collateral consequences are often not as clear to a defendant during plea considerations. These sanctions or restrictions run the gamut from high profile statutory restrictions on sex offenders' access to children or violent felons' access to firearms, to civil fines and forfeitures, voting rights, and employment opportunities, among others.

As the Task Force has observed in prior hearings, the number of federal laws and regulations carrying criminal sanctions has increased dramatically in recent years. Perhaps not surprisingly, the number of collateral consequences that often accompany such convictions has also increased. It should be noted, however, that many of these effects were intentionally imposed by legislative bodies, including Congress, to

serve a valid public policy interest. For example, the prohibition with regard to access to children by convicted sex offenders, while technically collateral to convictions for those crimes, is nonetheless fully intended by Congress to protect public safety. On the other hand, it is clear that collateral consequences exist that were never fully considered by Congress and are not clearly foreseeable by defendants and their counsel.

Today's witnesses have examined this issue closely and provide valuable insight through their provided testimony and materials. The American Bar Association's National Inventory of Collateral Consequences of Conviction aims to catalog the state-by-state consequences of conviction and has, thus far, identified more than 45,000 such effects.

This inventory will serve as a valuable resource for all interested parties, from lawmakers to defendants.

The National Association of Criminal Defense Lawyers recently completed a report on collateral consequences in which a number of recommendations were made. I look forward to engaging Mr. Jones with regard to these recommendations.

Much of the discussion surrounding this topic revolves around the use of criminal history records for employment decisions. In fact, the report recommends restricting the use of such records in making employment decisions. However, it is clear that many positions of public trust are rightfully conditioned upon a favorable criminal background check. In fact, Congress has often expressly granted

authorization to employers in selected industries to receive criminal history records from the FBI. Additionally, background screeners, through the Fair Credit Reporting Act, and employers, through the Equal Opportunity Employment Commission, are currently subject to strict regulation regarding the use of this information.

Finally, I look forward to examining any potential reforms in the area of collateral consequences with an eye towards addressing a problem that I am particularly concerned with, the growth of the federal prison population. It is possible that responsible reforms in the area of collateral consequences combined with effective education, rehabilitation and recidivism reduction programs while in prison could lead to reduced incarceration rates while

simultaneously increasing public safety through lower crime rates.

I thank our distinguished panel of witnesses, and look forward to their testimony.

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[Word count: 538]

Mr. SENSENBRENNER. It is now my pleasure to introduce the two witnesses this morning.

Mr. Rick Jones is the executive and a founding member of the Neighborhood Defender Service of Harlem. Mr. Jones is a lecturer at Columbia Law School where he teaches criminal defense externship and a trial practice course. He is also on the faculty of the National Criminal Defense College, in Macon, Georgia, and is frequently invited to lecture on criminal justice issues throughout the country.

He currently serves as Secretary of the National Association of Criminal Defense Lawyers and previously served that organization as a two-term member of the board of directors, parliamentarian, co-chair of both the Indigent Defense Committee and the special task force on Problem Solving Courts, and is currently co-chair of the task force on the restoration of rights and status after conviction.

Mr. Mathias Heck is a prosecuting attorney for Montgomery County, Ohio. He previously served Montgomery County as a law clerk and then as assistant prosecuting attorney. He received his undergraduate degree from Marquette University, which was a very wise choice, and his J.D. Degree from the Georgetown University Law Center.

I would ask all of you to limit your opening remarks to 5 minutes. I think you are all aware of what red, yellow and green means in the timer before you and even though I introduced you second, the prosecution always puts their case in first, so Mr. Heck, the floor is yours.

TESTIMONY OF MATHIAS H. HECK, JR., MONTGOMERY COUNTY PROSECUTING ATTORNEY, MONTGOMERY COUNTY, DAYTON, OHIO

Mr. HECK. Good morning, Mr. Chairman, Members of the Task Force. Thank you very much. I appreciate your comment about Marquette—Okay? Thank you.

Again, good morning, I appreciate your comments about Marquette University, and I know it is very dear to your heart.

In addition to being the prosecuting attorney from Montgomery County, Dayton, Ohio, I am also honored to be the chair of the Criminal Justice Section of the American Bar Association which is a section of about 20,000 members which include the whole array of the partners of the criminal justice section and the criminal justice process in the American system, and that is judges, defense lawyers, prosecutors, law professors, and other law enforcement personnel.

I appear today to talk about the ABA's view of collateral sanctions and how it relates to convictions and also highlight some of the things that the American Bar Association has done. As many of you know, the American legal system has long recognized that certain legal disabilities or collateral sanctions result from a criminal conviction in addition to a sentence, so, there may be a prescribed sentence relating to a crime, but attached thereto may be collateral sanctions or disabilities that are also imposed in addition to the sentence.

That sentence could be probation, could be to the penitentiary, or a combination of both. These collateral consequences of conviction include such familiar penalties of disfranchisement, deportation, loss of professional licenses, felon registration, ineligibility for certain public welfare benefits, even loss of a driver's license, and many more.

Over the last number of years, collateral consequences have been increasing steadily in variety and severity throughout the country, and they have been accumulated with little coordination in State and Federal laws, making it almost impossible to determine all of the penalties and disabilities applicable to a particular offense.

Now, some collateral sanctions or consequences do serve an important and legitimate public purpose. As the Chairman has already mentioned, keeping firearms out of the hands of persons convicted of crimes of violence, or barring persons who have been convicted of embezzlement from holding certain public interest jobs, or denying driving privileges to those convicted of aggravated vehicular homicide. Other collateral sanctions are more difficult to justify, particularly when applied automatically across the board to a complete category of convicted persons, and the reason is, it results in serious implications not only in terms of fairness, and as a prosecutor I can say this, not only as in regards to fairness to the individual charged, but also to the resulting burdens on the community, on the citizens.

Collateral consequences can also present challenges to the issue of reentry, and reentry is very important. It may become a surprise to many of you, but local prosecutors throughout the country have very spearheaded, reentry programs because we see this as a public safety issue. Nonetheless, not all collateral consequences of conviction are affected. Many have no relationship to public safety and prevent a former offender from doing productive work in order to support a family and contribute to the community. This effect to employment results and represents one of the more difficult issues facing, I think, our justice system and our Nation. The reality is that ex-offenders who cannot find jobs that provide sufficient income to support themselves and their families are more likely to commit more criminal acts and find themselves again back in prison.

Now, the American Bar Association has adopted a comprehensive set of principles regarding collateral sanctions, and they have two primary goals, one to encourage awareness of all involved in the justice system process of the full legal consequences of a conviction, so when someone is convicted they know what's going to happen.

And, secondly, to focus attention on the impact of collateral consequences on the process by which a convicted person can get into reentry and come back into the community and be a productive member of the community.

They also call for a significant number of reforms to the law. Number one, the law should identify with particularity the type, severity, and duration of the collateral sanctions, so if there is a collateral sanction to a particular crime, everyone knows what it is.

Now, the Collateral Consequences of Conviction Project, which is funded by the National Institute of Justice and completed just recently by the American Bar Association is something that was au-

thorized by Congress. We started it in 2009, we just completed it, and we have adopted and found 45,000 collateral consequences.

And, again, the hope is that we can categorize these and that everyone knows, it is open to the public, to defense lawyers, to prosecutors, and that way everyone can understand what the collateral consequences are. They are readily available, and they know what's involved. Thank you very much, and I appreciate it, and I will be glad to answer any questions.

[The prepared statement of Mr. Heck follows:]

Testimony of

MATHIAS H. HECK, Jr.

on behalf of the

AMERICAN BAR ASSOCIATION

for the hearing on

COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS AND THE PROBLEM OF OVER-CRIMINALIZATION OF FEDERAL LAW

before the

Committee on the Judiciary
Task Force on Over-Criminalization

of the

UNITED STATES HOUSE OF REPRESENTATIVES

June 26, 2014

1050 Connecticut Ave. NW, Suite 400 • Washington, DC 20036
www.americanbar.org

Chairman Sensenbrenner, Ranking Member Scott and Members of the Task Force on Over-Criminalization:

Good morning. My name is Mathias H. Heck, Jr. I am the Prosecuting Attorney for Montgomery County, Ohio. I serve as the current Chair of the American Bar Association's Criminal Justice Section which has over 20,000 members including prosecutors, private defense counsel, appellate and trial judges, law professors, correction and law enforcement personnel, public defenders and other criminal justice professionals.

I appear today at the request of ABA President James R. Silkenat to present the views of the ABA concerning the status of the law regarding collateral consequences of criminal conviction and its relationship to over-criminalization of federal criminal law. The American Bar Association, with a membership of nearly 400,000 lawyers worldwide, continuously works to improve the American system of justice and to advance the rule of law in the world.

The American legal system has long recognized that certain legal disabilities flow from a criminal conviction in addition to the sentence imposed by the court. These collateral consequences of conviction include such familiar penalties as disenfranchisement, deportation, and loss of professional licenses, as well as newer penalties such as felon registration and ineligibility for certain public welfare benefits.

Collateral consequences of conviction have been increasing steadily in variety and severity for the past 30 years, and it has become increasingly difficult to shake off their lingering effects. Collateral consequences have accumulated with little coordination in disparate provisions of state and federal codes, making it difficult to determine all of the penalties and disabilities applicable to a particular offense. As I will discuss later, our National Inventory Project has compiled and listed on its website over 45,000 such provisions nationwide.

Some collateral consequences serve an important and legitimate public purpose, such as keeping firearms out of the hands of persons convicted of crimes of violence, or barring persons recently convicted of fraud from positions of public trust. Others are more difficult to justify, particularly when applied automatically across the board to whole categories of convicted persons. Perhaps most problematic are laws that limit the exercise of fundamental rights of citizenship, or restrict access to otherwise generally available public benefits and services. The indiscriminate imposition of collateral penalties has serious implications, not only in terms of fairness to the individuals involved, but also in terms of the resulting burdens on the community.

Persons convicted of a crime ordinarily expect to be sentenced to a term of probation or confinement, and perhaps to a fine and court costs. What they often do not anticipate is that conviction will expose them to numerous additional legal penalties and disabilities, some of which may be far more onerous than the sentence imposed by the judge in open court.

Those sanctions may apply for a definite period of time, or indefinitely for the convicted person's lifetime. To the extent they occur outside the sentencing process, they often take effect without judicial consideration of their appropriateness in the particular case, without notice at sentencing that the individual's legal status has dramatically changed, and indeed without any requirement that the judge, prosecutor, defense attorney or defendant even be aware of them.

The unprecedented increase in the number of persons convicted and imprisoned over the past three decades in the United States means that this half-hidden network of legal barriers now affects a growing proportion of the populace. More people convicted inevitably means more people who will ultimately be released from prison or supervision, and who must either successfully reenter society or be a risk of reoffending.[1]

Collateral consequences of conviction contribute to the criminal justice system's reentry challenges. The ABA supports fair, efficient, and effective sentencing. The Association also supports reasonable restrictions on former offenders holding certain jobs where their records would raise genuine issues of public safety. Nonetheless, not all collateral consequences of conviction are fair or effective. Many have no relationship to public safety and prevent a former offender from doing productive work to support a family and contribute to the community. Moreover, some collateral sanctions remove potential employees and workers from the employment market when both they and employers would benefit from the removal of sanctions. In some instances, collateral bars on employment prevent someone who has been trained by the government at taxpayer expense from taking the very job for which he or she has been trained – which makes no sense at all.

The relationship between over-criminalization and unnecessary, ill-advised collateral consequences is clear, and both need to be addressed to promote fairness. If an appeal to fairness is not by itself sufficient to encourage attention to this public policy problem, perhaps an added concern for public safety and fiscal responsibility will.

Our criminal justice system faces daunting challenges. America has the highest rate of incarceration in the world and the concentration of those incarcerated relative to the rest of the population disproportionately includes men, the young, and racial and ethnic minorities. For example, one in 12 African American men currently reside behind bars contrasted with only one in 87 white men.[2] A limited education or a lack of employment characterizes a disproportionate portion of the prison population as well. An African American man between the ages of 20-34 years old without a high school diploma has a 37 percent likelihood of being in prison while only a 26 percent likelihood of being employed.[3]

Aside from the substantial economic burden to tax payers – over $65 billion a year – incarceration carries long lasting economic and social repercussions for ex-offenders, families, and communities. Ex-offenders fortunate enough to find employment can expect an 11 percent reduction in hourly wages and, at the age of 48, an ex-offender will have earned $179,000 less than if he had never served any time.[4] Moreover, 54% percent of inmates have juvenile children,

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[1] 729,295 persons were released from state and federal prisons in 2009. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in* 2009 (2010).
[2] "Collateral Costs: Incarcerations Impact on Economic Mobility" The Pew Center on the States *available at* http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653.
[3] "Collateral Costs: Incarcerations Impact on Economic Mobility" *see note 2.*
[4] "Collateral Costs: Incarcerations Impact on Economic Mobility" *see note 2.*

meaning that 2.7 million children have a parent behind bars.[5] These same children of ex-offenders have a 19% greater chance of expulsion or suspension than their classmates.[6]

The reality is that ex-offenders who cannot find jobs as well as those who cannot find jobs that provide sufficient income to support families and children who are excluded from school are more likely to commit criminal acts. Smart public policy would seek to confine the use of criminal penalties to behavior that cannot be adequately deterred by civil penalties or behavior so threatening to peace and order that a criminal sanction is the only appropriate response. And smart public policy would eliminate barriers to employment, education, housing and other benefits that are needed to enable individuals to be contributing members of their communities.

To promote smart public policy, the ABA and its Criminal Justice Section have made finding solutions to obstacles of reentry and reducing recidivism a top priority. We have accomplished these goals largely through studies and research that lead to the Section's recommending policies for adoption by the ABA House of Delegates, its policy making body.

I will briefly discuss some of the ABA's policy recommendations and our ongoing work.

ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons

The ABA House of Delegates approved in August 2003 a comprehensive set of principles regarding collateral sanctions. The final product, the ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons[7] was the result of careful drafting and meticulous and extensive review by representatives of all segments of the criminal justice system: judges, prosecutors, private defense counsel, public defenders, court personnel, corrections officers, and academics active in criminal justice teaching and research.

Under prevailing law and procedure, collateral sanctions are imposed on individuals upon conviction without notice or legal process. Judges are ordinarily not required to advise defendants of collateral consequences at plea or sentence, and defense counsel ordinarily need not inform their clients about collateral consequences when advising about the appropriate course of action.[8] Because judges and defense lawyers need not consider them, there is no compelling reason for prosecutors to educate themselves about them either.

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[5] "Collateral Costs: Incarcerations Impact on Economic Mobility" *see note 1.*

[6] "Collateral Costs: Incarcerations Impact on Economic Mobility" *see note 1.*

[7] *See* ABA Standards for Criminal Justice, Third Edition: *Collateral Sanctions and Discretionary Disqualification of Convicted Persons available at:* http://www.americanbar.org/groups/criminal_justice/policy/index_aba_criminal_justice_policies_by_meeting.html#am03101a.

[8] A few courts require that a defendant be advised of particular collateral consequences at plea or sentence. *See, e.g., Barkley v. State*, 724 A.2d 558 (Del. 1999) (failure to inform defendant that his driver's license would automatically be revoked upon conviction, as required by applicable court rules, rendered guilty plea invalid); *Skok v. State*, 760 A.2d 647 (Md. 2000) (noncitizen permitted to challenge guilty plea by writ of coram nobis where he was not advised of immigration consequences as required by court rule). The most significant context where statutes, court rules or constitutional duties require advisement of potential collateral consequences is with respect to deportation. *See Padilla v. Kentucky*, 559 U.S. 356 (2010)(failure by defense attorney to advise non-citizen client about deportation risks of a guilty plea violate Sixth Amendment right to counsel to immigration consequences).

As a result, all those present at a sentencing may later be surprised to learn the full extent of the offender's changed legal status. Indeed, many collateral consequences are under-enforced simply because the convicted person is unaware of them. An offender's failure to appreciate how his legal situation has changed as a result of his conviction may have far-reaching consequences for his own ability to conform his conduct to the law.

One goal of the ABA in promulgating and disseminating the Standards has been to encourage awareness of the full legal consequences of a criminal conviction, particularly those that are mandatory upon conviction. There is no justification for participants in the legal system to operate in ignorance of the effects of its actions. Prosecutors when deciding how to charge, defendants when deciding how to plead, defense lawyers when advising their clients and judges when sentencing should be aware, at least, of the legal ramifications of the decisions they are making or advice they are giving.

A second goal of the ABA has been to focus attention on the impact of collateral consequences on the process by which a convicted person re-enters the free community, and is encouraged and supported in his efforts to become a law-abiding and productive member of society. As our prison population has grown dramatically in recent years, the concern for offender reentry has grown correspondingly. The criminal justice system aims at avoiding recidivism and promoting rehabilitation, yet collateral sanctions and discretionary barriers to reentry may severely impede an offender's ability for self-support in the legitimate economy, and perpetuate his alienation from the community. As the laws restricting convicted persons in their ordinary life activities have multiplied, they have discouraged rehabilitation of offenders and created a class of people who live permanently at the margin of the law.

The ABA Standards on Collateral Sanctions call for a number of significant reforms to current law. Among them are:

1. A directive that at both the federal and state level, the legislature should set out or reference all collateral consequences in a single chapter or section of the jurisdiction's criminal code. The chapter or section should identify with particularity the type, severity and duration of collateral sanctions applicable to each offense.
2. Collateral sanctions should be considered by the court at the time of sentencing. Rules of procedure should require that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under state and federal law.
3. The legislature should authorize a court or specified administrative body to enter orders waiving, modifying, or granting timely and effective relief from any collateral sanction imposed by the law of that jurisdiction, and should establish a process by which a convicted person may obtain an order relieving the person of all collateral sanctions imposed by the law of that jurisdiction.
4. Jurisdictions should not impose the following collateral sanctions:
   (a) Deprivation of the right to vote, except during actual confinement;
   (b) Deprivation of judicial rights, including the right to initiate or defend a suit, be eligible for jury service, except during actual confinement or under court supervision; or execute judicially enforceable documents and agreements;
   (c) Deprivation of legally recognized domestic relationships and rights other than in accordance with rules applicable to the general public;

(d) Ineligibility to participate in government programs providing the necessities of life, including food, clothing, housing, medical care, disability pay, and Social Security;
(e) Ineligibility for governmental benefits relevant to successful reentry into society, such as educational and job training programs.

Justice Kennedy Commission

In 2003, Justice Kennedy addressed the American Bar Association's House of Delegates regarding the "hidden world of punishment," and called on the legal profession to direct the "energies . . . of the entire Bar. . ." to issue of collateral consequences.[9] In response, the ABA President convened a commission of ABA members with diverse criminal justice backgrounds and substantial experience in the criminal justice system to undertake a study on a broad number of criminal justice issues including mandatory minimum sentencing schemes, disparate sentencing rates among racial and ethnic groups, and the objectives of incarceration.

The ABA Justice Kennedy Commission undertook a comprehensive national examination of federal and state justice policies that have led the Nation to the current state of mass incarceration, with minorities bearing the brunt of the increased prison and jail populations.

The Kennedy Commission made a number of important recommendations, all of which were adopted by the ABA.[10] One finding of particular importance today was that the most significant predictor of recidivism was employment. Based on this finding, the Kennedy Commission recommended that "barriers to employment, housing, treatment, and general public benefits must be eliminated to the greatest possible extent in order to have greater opportunity for successful reentry for those with a criminal conviction."[11] The finding and the recommendation should not be a surprise to anyone who has studied recidivism. If a former offender cannot support himself or herself with honest employment, criminal activity is the unfortunate, likely alternative. That is why reentry (the effort to enable a former offender to return successfully to the community and to be a contributing member) is at the top of the list of criminal justice reforms that so many seasoned prosecutors, judges and defense counsel support.

Second Chances in the Criminal Justice System

Following the success of the Justice Kennedy Commission Report, the American Bar Association's Commission on Effective Criminal Sanctions (CECS) expanded upon the work of the Justice Kennedy Commission to create a compendium on the topic of reentry that focused on the fairness and proportionality of punishment and on ways in which criminal offenders may avoid or escape the permanent legal disabilities and stigma of a criminal record. The CECS

[9] Justice Kennedy Commission: Report and Recommendations, American Bar Association (2004), p. 2.
[10] The full Justice Kennedy Commission Report and Recommendations is available at the following site, beginning at p. 58: http://www.americanbar.org/content/dam/aba/migrated/cecs/secondchances.authcheckdam.pdf.
[11] Justice Kennedy Commission, *see note 13*, at p. 7.

report and its recommendations looked at the relationship between those with criminal records and opportunities for employment. [12]

Most people would agree that those who have committed a crime should be entitled to a second chance after paying their debt to society. Very few jurisdictions have figured out how to accomplish this successfully, however. The statute books in every state are filled with laws that disqualify people from jobs and licenses based on a criminal record. Even where it does not mandate exclusion, the law generally allows rejection of applicants for employment (and termination of existing employees) based solely on the fact of a criminal record. Some private employers have adopted sweeping policies against employing people with criminal records, including those who were arrested and never convicted. The increased reliance since 9/11 on criminal records checks as a screening mechanism makes it much more difficult for the millions of Americans who have a criminal record to find employment and become productive citizens in our society.

The CECS report showed that ex-offenders who were jobless after reentry were three times more likely to return to prison; furthermore, the report also noted that 60% of former prisoners were unemployed a year after release from prison.[13]

The report examined the impact of a reliance on criminal background checks on the hiring process. It found that increases in the exchange of information due to technology have made it easier for employers to access background information on applicants, but the information generated is not necessarily accurate. Criminal background checks can contain inaccurate information, perhaps due to identity theft, or incomplete information, such as information on arrests that did not lead to criminal convictions.[14] Moreover, many employers have little knowledge of how the criminal justice system works and what a particular record actually represents, so even when completely accurate information is provided, employers can misinterpret the information contained in a background check.

The CECS report recommended limiting access to criminal background information for purposes other than law enforcement.[15] The report also recommended that employers and credit reporting agencies ensure that the information on a criminal history is accurate and that the information does not contain sealed or expunged records.[16]

The CECS recognized that offenders' lack of vocational skills often result in an ancillary barrier to employment that places them at a significant disadvantage in a competitive job market, [17] and without the opportunity to develop marketable vocational skills while incarcerated, overcoming all of the barriers to employment becomes unlikely at best. The report offered several recommendations. First, and perhaps most important, was the recommendation that disqualifications for employment should only be applied when the crime is *substantially* related

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[12] Second Chances in the Criminal Justice System. American Bar Association (2007), *available at*: http://www.americanbar.org/content/dam/aba/migrated/cecs/secondchances.authcheckdam.pdf.
[13] Second Chances, p. 27.
[14] Second Chances, p. 36.
[15] Second Chances, p. 8.
[16] Second Chances, p. 38.
[17] Second Chances, p. 27.

to the job opportunity or where serious public safety concerns exist.[18] The CECS also recommended that, when there is a finding that a crime is substantially related to the job opportunity, there should be some process for relief, such as allowing the applicant to demonstrate his or her fitness of character.[19]

It recommended the adoption of federal and state laws that would provide for a case-by-case exemption or waiver process to give persons with a criminal record an opportunity to make a showing of their fitness for the employment or license at issue, and require a statement of reasons in writing if the opportunity is denied because of the conviction. Federal and state law should also provide for judicial or administrative review of a decision to deny employment or licensure based upon a person's criminal record. The CECS favorably noted New York law in this regard. New York's fair employment practices law extends its protections to people with a criminal record, and prohibits public and private employers and occupational licensing agencies from discriminating against employees based upon convictions and arrests that did not result in a conviction, unless disqualification is mandated by law.[20]

Further, the CECS recommended against automatic barriers to employment and favored discretionary factors that should be handled on a case-by-case basis.[21] Moreover, the CECS recommended that the barriers should expire after a reasonable period of time. Its report noted that a person who has not committed a crime in seven years is no more likely to commit a crime than a person who has never committed a crime.[22]

It complemented the work of the Kennedy Commission, built upon that work, and added to the realistic chance that criminal justice reform might actually be undertaken and might work both (a) to reduce recidivism, reduce the number of crime victims, eliminate wasteful expenditures on jails and prison, reform the ways in which probation and parole are handled, and improve public safety; and (b) simultaneously to reduce the number of people incarcerated in United States jails and prisons, improve the prospects of former offenders to achieve successful reentry, break the cycle of recidivism, and ameliorate the impact of the criminal justice system on minority communities.

The collateral consequences of criminal records to employment represents one of the more difficult issues facing our justice system and our nation. Without question, if the substantial barriers to employment for ex-offenders continue to exist, the United States will remain on top of the world in recidivism rates. Unfortunately, the solution is not as simple as removing the statutory barriers and the background check requirements. Many small businesses across America cannot afford a hiring mistake; a business that hires an ex-offender immediately increases its exposure to liability because of civil suits for negligent hiring. States like Illinois have tried to find a middle ground in the form of certificates of rehabilitation.[23] Ex-offenders can apply for a certificate and, if they meet a set of factors, they are awarded a certificate that

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[18] Second Chances, p. 29.
[19] Second Chances, p. 31.
[20] N.Y.S. Human Rights Law, N.Y.Exec. Law § 296(16).
[21] Second Chances, p. 29.
[22] Second Chances, p. 27.
[23] Second Chances, p. 32.

immunizes employers from negligent hiring law suits. Factors that are considered are length of time that has passed since release, age at the time of the offense, nature of the offense and any actions the offender can report regarding their good conduct and rehabilitation. Without this middle ground approach, the few employers that do have discretion to hire ex-offenders without statutory licensing barriers will continue to eliminate ex-offenders from their hiring pool.

Coincidental with the barriers to employment for persons with criminal conviction records, is the related problem of the unreliability of the data base most commonly used by employers for job-related background checks, the FBI criminal records database. The FBI maintains criminal history records on more than 75 million individual, one in every four Americans. According to the Department of Justice – the custodian of the records at issue – roughly 50 percent of the FBI criminal records are incomplete or inaccurate.[24] The most common inaccuracy is omission of information on final disposition after arrest, including dismissals and other exculpatory information. Despite its acknowledged shortcomings, the use of FBI background checks for employment purposes has grown at a phenomenal rate, estimated at 17 million employment-related FBI checks in 2012, six times the number conducted a decade ago.[25] An estimated 1.8 million workers a year are subject to background checks that include faulty or incomplete information, and 600,000 may be prejudiced in seeking employment by FBI reports that do not include accurate or up-to-date information that would benefit them.[26]

Despite significant federal funding over many years to improve the FBI criminal records database, little progress has been made since the 2006 DOJ Report to Congress. We support Congressional action to require implementation of accuracy standards for this most important database and commend Representatives Bobby Scott and Steve Cohen for introducing the Fairness and Accuracy in Criminal Background Checks Act.

Collateral Consequences of Conviction Grant

The Collateral Consequences of Conviction Project funded by the National Institute of Justice recently has completed developing a state-by-state database of all collateral consequences of criminal convictions that exist in every jurisdiction's code of laws and regulations. The project was authorized by Congress in 2008 in large part due to the leadership of Senator Patrick Leahy. This monumental project has identified about 45,000 collateral consequences. [27] The expectation is that this resource can be used, without cost, by everyone – the public, attorneys, prosecutors and defense attorneys, judges, and policy makers – to reveal all of the repercussions attendant to a conviction. Knowledge of these consequences can only lead to a more fair and accurate discussion of plea bargains, decisions to charge and prosecute, sentencing decisions, and lawmaking.

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[24] U.S. Dept. of Justice, Office of the Attorney General, *The Attorney General's Report on Criminal History Background Checks* (June 2006) pg. 3, *available at* http://www.justice.gov/olp/ag_bgchecks_report.pdf.

[25] *Wanted: Accurate FBI Background Checks for Employment*. The National Employment Law Center (2013) pg. 5, *available at* http://www.nelp.org/page/-/SCLP/2013/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf?nocdn=1.

[26] *Wanted: Accurate FBI Background Checks for Employment*, p. 13.

[27] *See* National Inventory of the Collateral Consequences of Conviction website *at*: http://www.abacollateralconsequences.org/.

ABA attorneys working with the Project have reviewed hundreds of thousands of statutes and regulations, identifying and cataloguing each of the collateral consequences that they have found. In particular, the attorneys determine: (1) whether a consequence applies automatically by operation of law or if there is a discretionary component to the statute; (2) the type of benefit affected[28] (*i.e.*, employment and licensing); (3) the duration of the consequence; (4) whether there is any relief specified within the statute; and (5) what crime triggers each consequence.

The vast majority of collateral consequences identified by the project are employment-related. These are specific provisions that may prohibit employment generally in a field or have a subsidiary effect on employment by limiting professional, occupational, and business licensing. License applicants – ranging from a cosmetology license to a license to practice law – can be denied because of a previous criminal conviction, regardless of how long ago the incident occurred. This is true despite the fact that state correctional systems spends millions of dollars on job training programs in prison, only to then bar re-entering individuals from obtaining licenses that would allow them to work in the fields for which they were trained in prison. While there are a countable number of identified employment-related consequences, it does not begin to address the discrimination based on criminal history in unregulated private enterprise, where a criminal history will preclude hiring for most any job.

Furthermore, like considerations of criminal histories, many collateral consequences act as permanent disqualifications. Although some permanent disqualifications represent a considered legislative or administrative judgment, many more simply fail to specify an end date for the disqualification, most likely because no one focused on the appropriate length of the disqualification. Thus, a crime committed at age 18 can ostensibly be used to deny a former offender the ability to become a licensed barber or stylist when he or she is 65 years old.

The collateral consequences of greatest concern, however, affect offenders' ability to live and provide for themselves – for instance, collateral consequences that deny welfare benefits or housing assistance. These consequences can put the offender's family in a double bind: where they must choose between providing for themselves or helping their loved one or fellow man; whether to continue to receive public benefits against helping a brother, a father, a friend, a recent offender have a safe place to sleep. The irony is that a stable support structure is crucial to reduce recidivism. When offenders leave prison, if they have no place to live and no way to earn money, is it any wonder that they may reoffend?

Finally, the mechanisms for relief of particular collateral consequences are for the most part non-existent and traditional relief mechanisms – like executive pardons, expungements, sealing provisions, and set-asides – do less in our internet age, where criminal searches will always document a criminal past. In effect, a criminal history becomes a seemingly insurmountable barrier to successful reentry.

While this is a bleak picture of collateral consequences, there is a growing awareness of the impact these laws are having and signs a consensus may be forming toward action to rationalize

[28] Collateral consequence categories include employment, public benefits, civic participation, family rights, individual rights, military, immigration, and those crimes subject to the Sex Offender Registration and Notification Act

the law in this area. The hope is that this project will provide everyone a readily accessible resource and tool to assist all stakeholders in the criminal justice system and the general public that has an interest in reducing crime to finally begin to know the full scope of and the actual number of collateral consequences. Armed with knowledge, they can propose and deliver on appropriate reform of unfair and unjust collateral consequences. Until there is reform, at least practitioners, judges, prosecutors, and defense attorneys will be better able to provide more informed assistance and counsel to any American who has or may have a criminal history or is facing criminal charges.

Thank you for the opportunity to appear before the Task Force today to share the views of the American Bar Association.

Mr. SENSENBRENNER. Thank you very much, Mr. Heck.
Mr. Jones.

TESTIMONY OF RICK JONES, EXECUTIVE DIRECTOR, NEIGHBORHOOD DEFENDER SERVICE OF HARLEM

Mr. JONES. Thank you for the invitation to appear before you this morning.

We have a lot of ground to cover and a little time. I am going to get right into it. Sixty eight million people in this country are living with a criminal record. That is one in every four adults. Twenty million people with felony convictions, 14 million new arrests every year, 2.2 million people residing in jail or prison, that is more than anywhere else in the world.

As a member of the NACDL task force that produced this collateral damage report, I had the opportunity to travel to every region of the country and listen to the testimony of people living with convictions as well as to the testimony of many other stakeholders in the criminal justice system.

In Northern California, we heard from a chief of police who is dealing with a significant crime problem, a rising murder rate, and widespread community distrust. As he searched for solutions, he realized that he was policing from a place of fear. That was his term, policing from a place of fear. He was not serving or protecting the community. He was at war with the community. His officers did not really know the citizens they were policing. Distrust and fear was the order of the day. It wasn't until he took the time to get to know the people he was charged with protecting, that he recognized and appreciated their humanity. Trust and understanding improved, and his crime problem began to decline.

Sixty eight million people living with convictions, more than the entire population of France. We are in danger of becoming a nation of criminals because we are policing from a place of fear. Fourteen million new arrests every year. We are prosecuting from a place of fear. Forty five thousand, collateral consequences on the books in this country, 45,000 road blocks to the restoration of rights and status after conviction. We are legislating from a place of fear. The time has come for change in our national mind set. We must move from penalty, prosecution and endless punishment to forgiveness, redemption and restoration.

A great way for this Task Force to begin the healing process is to implement the first recommendation in our report, a call for a national restoration of rights day, a day every year where we can celebrate redemption and restoration with educational programs for employers, skills training workshops for the affected community, job fairs, certificate of relief programs, at no cost and no cost opportunities, no cost opportunities to clean up your rap sheet.

More concretely, there are four steps this Task Force can take that will have an immediate impact on the collateral damage of collateral consequences. First, you must repeal Federal mandatory collateral consequences. Fourteen million new arrests each year, 68 million people living with convictions, mandatory, automatic, across-the-board collateral consequences make no sense. You cannot paint with that broad a brush. There is no public safety benefit

in stripping people of their right to vote. Eliminate mandatory collateral consequences and stop creating new ones.

Second, you must provide meaningful Federal relief mechanisms for those people living with Federal convictions. First and foremost 14 million new arrests each year is indicative of the problem. We must create avenues for avoidance and diversion in the Federal criminal justice system. Defense attorneys, prosecutors and judges must be cognizant of diversion opportunities and promote them. Judges have to be empowered with relief at sentencing, individualized relief, tailored to the individual and unique circumstances.

The Federal pardon process must be reinvigorated and meaningfully carried out. Pardons should be routinely granted in the ordinary course of business. The process must be transparent and accessible to all. The media must be informed and aware of the process, and there should be dedicated staff committed to the regularized review of pardon applications.

Third, for those discretionary consequences that remain, there must be clearly established guidelines for decisionmakers to follow, guidelines with respect to relevancy, passage of time and evidence of rehabilitation. There should be a presumption of irrelevance for any conviction beyond a certain number of years and for anyone who has shown evidence of rehabilitation.

Finally, consumer reporting agencies and background check companies must be regulated. Rap sheets are not a commodity. We should not be creating a market in the buying and selling of people's conviction records. There are some law enforcement agencies in this country that sell rap sheets. That must stop. Any records disclosed must be accurate. The FBI Web site, which is the main source of criminal record acquisition, is wrong 50 percent of the time. It must be cleaned up and maintained, and there must be an easily accessible, no-cost method for individuals to check their rap sheets and make corrections or updates.

The time has come to end the economic drain of collateral consequences, the endless Government intrusion into the lives of our citizens, and the social and moral havoc they wreak on individuals, on families and entire communities. We need a coherent national approach to forgiveness, to redemption, to the restoration of rights and status after conviction.

Thank you. I look forward to your questions.

[The prepared statement of Mr. Jones follows:]

Written Statement of
Rick Jones, Executive Director
Neighborhood Defender Service of Harlem

On behalf of the
National Association of Criminal Defense Lawyers

Before the
House Committee on the Judiciary
Over-Criminalization Task Force

Re: "Collateral Consequences"

June 26, 2014

Introduction

Rick Jones is the Executive Director of the Neighborhood Defender Service of Harlem, Secretary for the National Association of Criminal Defense Lawyers (NACDL) and Co-Chair of NACDL's Task Force on Restoration of Rights and Status After Conviction. NACDL is the nation's leading organization devoted to ensuring justice and due process for persons accused of crime; fostering the integrity, independence and expertise of the criminal defense profession; and promoting the proper and fair administration of criminal justice. NACDL's Task Force on Restoration of Rights and Status After Conviction was assembled to evaluate legal mechanisms available for relief from the collateral consequences of conviction and develop comprehensive proposals for reform. The Task Force aims to encourage actors in the justice system to foster an appreciation for the importance of functional restoration mechanisms. NACDL and members of this Task Force seek to dismantle the functional exile to which convicted persons are now consigned. NACDL commends the House Judiciary Committee for considering the effects of overcriminalization in our society.

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Jessica Chiappone could not volunteer at her children's school because of a conviction that was 15 years in her past. Darrell Langdon needed a dedicated attorney, a sympathetic judge, and media attention to persuade school officials, 25 years after his drug possession conviction, to let him return to his longtime work as a boiler room engineer. Mr. C, a business executive who learned crisis management during his military service, was turned away from volunteer work with the American Red Cross because of a minor fraud conviction. Brenda Aldana trained as a dental assistant while in federal prison for a drug crime but abandoned her hopes of pursuing this work, knowing the licensing board would likely deny the exemption she would need based on her criminal record. Jennifer Smith received a deferred adjudication on a shoplifting charge in New York and lost out on a job offer from a bank as a result — under federal law, the bank could not hire her, even though the charges against her were eventually dismissed.

Currently there are approximately 45,000 laws and rules in U.S. jurisdictions that restrict opportunities and benefits in one way or another based upon a conviction or arrest.[1]

Jessica Chiappone, Darrell Langdon, Mr. C., Brenda Aldana, Jennifer Smith, and millions of other Americans are at the mercy of these institutionalized restrictions. More than one in four adults in the United States — some 65 million people — have a criminal record.[2] And this is a conservative estimate. There are 14 million new arrests every year.[3] More than 19 million people have felony convictions, and millions more have been convicted of less serious crimes. The nation's incarceration rate — 2.2 million adults currently in jail or prison — is the highest in the world. In the last half-decade, prison release rates have increased, making reentry a critical point on the national radar. In 2012, 637,400 individuals were released from state/federal prisons, exceeding the number of those admitted.[4] The need to address prisoner reentry and restoration of rights must be a central concern of the US justice system.

The collateral consequences of conviction — specific legal restrictions, generalized discrimination and social stigma — have become more severe, more public and more permanent. Formal and informal collateral consequences are deeply embedded in the nation's laws, regulations, policies, and culture. These consequences affect virtually every aspect of human endeavor, including employment and licensing, housing, education, public benefits, credit and loans, immigration status, parental rights, interstate travel, and even volunteer opportunities. Collateral consequences can be a criminal defendant's most serious punishment, permanently

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[1] NAT'L INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, available at http://www.abacollateralconsequences.org.

[2] THE NAT'L EMP'T LAW PROJECT, 65 MILLION NEED NOT APPLY: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT at 27 n.2 (March 2011), *available at* http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1.

[3] *Drug and Crime Facts*, BUREAU OF JUSTICE STATISTICS, *available at* http://www.bjs.gov/content/dcf/enforce.cfm.

[4] Carson, E. Ann, *Prisoners in 2012: Trends in Admissions and Releases, 1991-2012*. U.S. Department of Justice, Bureau of Justice Statistics, December 2013.

relegating a person to second-class status. The primary legal mechanisms put in place to restore rights and status— executive pardon and judicial expungement — have atrophied or become less effective.

Branding so many millions of people with this "Mark of Cain" takes on a dangerous meaning in the electronic age. Arrest and conviction records are no longer paper documents that sit in court clerks' files, accessible only by a trip to the local courthouse. Instead, they are often publically available on websites, open to all viewers who care to search. These technological advances have led to widespread background checking by employers, landlords, and others, even when not required by law. A recent survey showed that 92 percent of responding employers perform criminal background checks on at least some job candidates, and 73 percent perform checks on all job candidates.[5] This means that a minor marijuana possession conviction, one of the most common misdemeanors, can follow a person for the rest of their life.

The recent obsession with background checks has made it all but impossible for a person with a criminal record to leave the past behind. An arrest alone can lead to permanent loss of opportunity; charges that are never prosecuted, or are eventually dismissed, live on in the digital world.

Some law enforcement agencies actually sell arrest records to private data companies. These companies have proliferated, profiting from the misfortune of innocent and convicted people. **Even with conviction records, the well-documented failure of states to record when charges are dismissed or records sealed, and the failure of private data companies to keep accurate records, hurt millions of individuals.**

In 2011, NACDL established a Task Force on Restoration of Rights and Status After Conviction. The Task Force heard testimony from more than 150 witnesses at hearings in Chicago, Miami, Cleveland, San Francisco, New York, and Washington, DC. Witnesses included individuals with criminal records, defense attorneys, state and federal judges, prosecutors, social scientists, re-entry professionals, probation and correctional personnel, employers, background screening companies, a congressman, a former governor, and local, state and federal officials. The Task Force also conducted site visits and reviewed a wide range of studies, reports, and articles on various restoration and relief mechanisms, and on collateral consequences more generally. NACDL's report, *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime: A Roadmap to Restore Rights and Status After Arrest of*

[5] See SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (Jan. 22, 2010), http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx.

Conviction, lays out the results of this investigation and the steps needed to set our nation on the right path (available at: www.nacdl.org/restoration/roadmapreport).

The comprehensive recommendations articulated in the report are distilled into 10 overarching principles. Some recommendations require federal action, others state and local action, and still others are directed at various players in the criminal justice system, including the criminal defense bar. My testimony today will focus primarily on actions that should be undertaken at the federal level.

To lay the groundwork for the recommendations set forth below, government entities, the legal profession, the media and the business community must promote a change in the national mindset to embrace the concepts of redemption and forgiveness, including a public education campaign to combat erroneous and harmful stereotypes and labels applied to individuals who have had an encounter with law enforcement and the criminal justice system. As a cornerstone of this movement, the United States should establish a "National Restoration of Rights Day" to recognize the need to give individuals who have successfully fulfilled the terms of a criminal sentence the opportunity to move on with their lives.

Relief from the consequences of a criminal record is currently made up of a patchwork of approaches that are sometimes inconsistent and often irrational, with wide variations between states and even within a particular state. The United States desperately needs, and NACDL urges the nation to adopt, a coherent national approach to the restoration of rights and status after a conviction. At the federal level, five general approaches should be pursued:

- Mandatory consequences must be repealed, and discretionary disqualifications should be limited based on relevancy and risk factors;
- Existing legal mechanisms that restore rights and opportunities must be reinvigorated and new ones established;
- Non-conviction dispositions must be expanded and utilized;
- Incentives must be created to encourage employers, landlords and other decision-makers to consider individuals with convictions for certain opportunities; and
- Access to criminal history records for non-law enforcement purposes must be subject to reasonable limitations.

I. Congress should repeal or limit existing collateral consequences.

A. Mandatory collateral consequences are rarely appropriate.

Most mandatory collateral consequences need to be repealed. Legislatures should not impose a mandatory collateral consequence unless it has a proven, evidence-based public safety benefit that substantially outweighs any burden it places on an individual's ability to reintegrate into the community. Because the loss of voting rights serves no public safety purpose at all, Congress should pass the Democracy Restoration Act (H.R. 4459), which would allow individuals who have been convicted of a criminal offense to vote in federal elections.

So too, Congress must reconsider federal law's mandatory, lifetime disqualification from public housing for any person subject to lifetime inclusion in a sex offense registry. This mandatory federal consequence depends on the vagaries of state registration law and is unduly harsh in states with indiscriminate lifetime registration. In California, for example, every person on the registry is on for life, meaning that those convicted of public urination in California are barred for life from public housing while those convicted of more serious violent offenses are not.

The mandatory loss of the right to bear arms should be circumscribed. Under federal law and the laws of most states, a felony conviction results in the mandatory loss of an individual's right to possess a firearm and ammunition. While there are surely circumstances when someone otherwise entitled to possess a firearm should lose that right for at least some period of time, the current approach sweeps far too broadly. As with other mandatory bars, the dissociation between the prior criminal conduct and the risk of harm frequently renders the blanket firearm ban senselessly unjust. For example, there is no evidence that prohibiting an individual with a fraud conviction from possessing a firearm advances public safety. Firearm consequences are particularly severe because under federal law, so-called felon in possession violations are punishable by up to 10 years in prison.

More generally, Congress must pass relief-at-sentencing laws, as contained in the Uniform Collateral Consequences of Conviction Act and the model penal code. Relief at sentencing laws would give the sentencing judge authority to remove any mandatory collateral consequence. Any mandatory consequence that is not relieved should automatically terminate upon completion of an individual's court-imposed sentence unless the government can prove a public safety need for its continued application.

B. Discretionary collateral consequences must be repealed. Any that remain should be subject to strictly established guidelines with respect to relevancy and the passage of time.

Discretionary collateral consequences should be imposed only when the offense conduct is recent and directly related to a particular benefit or opportunity. The federal government needs to develop and enforce clear relevancy standards for use by discretionary decision-makers when evaluating an individual's criminal record. The standards must require decision-makers to consider the nature and gravity of the conduct underlying the conviction, the passage of time since the conviction and any evidence of post-conviction rehabilitation. Administrative agencies must be required to specify and justify convictions that may be relevant in their particular context, and to publish standards that they will apply in determining whether to grant a benefit or opportunity. Benefits and opportunities must never be denied based upon a criminal record that did not result in conviction, and there should be a presumption of irrelevance for any offense committed in excess of 3.8 years.[6]

Pursuant to federal regulations, Public Housing Authorities (PHAs) have broad discretion to bar entire households even when no one in the household has been convicted of a crime, making standards for and limits on discretion particularly important. HUD should issue uniform national standards to PHAs about how to weigh a conviction record, and the importance of evidence of rehabilitation, in order to allow greater access to public housing. HUD should end its "One Strike Policy," which gives PHAs discretion to evict or deny housing to an entire household if any household member or guest engages in criminal behavior, even if completely unknown to the rest of the household.

The above recommendations are critical because an individual may avoid mandatory consequences yet remain subject to discretionary penalties that dramatically limit their mobility when reentering society. These consequences affect critical areas such as housing opportunities and seriously compromise an individual's ability to provide for themselves and their families.

II. Congress should provide individuals with federal convictions with meaningful opportunities to regain rights and status. Congress should also provide individuals with state convictions the effective mechanisms needed to avoid collateral consequences imposed by federal law.

The federal criminal justice system lacks viable mechanisms for relief from a federal conviction. Individuals with federal, military and District of Columbia Code convictions have even more severely limited access to relief from collateral consequences than do individuals with state convictions. Unlike many state systems, there is no expungement, sealing, or certificate of

[6] Alfred Blumstein & Kiminori Nakamura, *'Redemption' in an Era of Widespread Criminal Background Checks*, NAT'L INST. OF JUSTICE (June 1, 2010), *available at* http://www.nij.gov/journals/263/pages/redemption.aspx

relief from disabilities for federal convictions, or even for non-conviction records. The only avenue for someone with a federal conviction, a petition for presidential pardon, unfortunately, rarely leads to relief.

Countering this deficit of federal relief options requires a two-pronged approach. First, the pardon process must be reinvigorated. Pardons should be considered an integral part of the criminal justice system and should be used to offer relief and restoration of rights to deserving individuals. Former Maryland Governor Robert Ehrlich adopted this view, held monthly meetings to review 30-40 petitions, and granted 227 pardons during his four years in office. NACDL recommends that the federal pardon process become more transparent and accountable and that grants be made generously according to clear standards. Connecticut, for example, has established a process wherein pardons are routinely handled by an independent executive office and staffed by attorneys with diverse background and professional experience.

Although the pardon power clearly needs reform and reinvigoration, it is unrealistic to expect pardons to function as a primary avenue of relief from a conviction. Congress can expand opportunities for relief and restoration by giving sentencing judges the power to relieve collateral consequences at sentencing. Additionally, Congress should create a federal certificate of relief from disabilities. Several states have recently joined New York in enacting certificates of relief, including Illinois, North Carolina and Ohio. Certificates should be available for all federal convictions pursuant to clear, objective eligibility standards, and funding should be available for representation by defense counsel.

Passing the Fresh Start Act (H.R. 3014) would go a long way towards implementing this recommendation. That legislation, introduced by your fellow Task Force member Mr. Cohen, would allow certain nonviolent offenders who have completed their sentences to petition for expungement. I ask that this sub-committee direct resources to getting this bill through Congress. The Fresh Start Act does not compromise public safety – it merely gives individuals with a conviction the opportunity to wipe the slate clean after a demonstrated rehabilitation effort.

III. Congress should expand non-conviction dispositions for federal crimes, and federal prosecutors should be encouraged to offer them wherever appropriate.

Unlike most states, the federal system has no real form of diversion or deferred adjudication, other than for a first misdemeanor drug possession. To avoid harmful and unnecessary collateral consequences, diversion and deferred adjudication should be available for all but the most serious crimes, and prosecutors and courts should be encouraged to use these alternatives. Non-conviction dispositions should be sealed or expunged and should never trigger collateral consequences, and decision-makers should be barred from asking about or considering

such dispositions. The Federal First Offender Improvement Act (H.R. 2576), introduced in the last Congress, was a step in the right direction. H.R. 2576 sought to amend the federal criminal code to offer pre-judgment probation and expungement procedures for a greater number of nonviolent controlled substance offenses. The principles motivating that legislation should either be translated to new legislation or proposed again in a revised Federal First Offender Improvement Act.

IV. The federal government must expand its efforts to provide employers, landlords, and other decision-makers affirmative incentives to offer opportunities to those with criminal records.

The federal government currently offers the Work Opportunity Tax Credit, up to $2,400 per employee, to employers hiring a person convicted of a felony who is recently released from prison. A federal bond program also provides insurance for employee dishonesty, similarly encouraging employers to offer opportunities. The federal government must extend these incentives to private landlords who offer housing to individuals with convictions. Additionally, decision-makers should be eligible for immunity from civil liability relating to an opportunity or benefit given to an individual with a criminal record if they are in compliance with federal, state and local laws and policies limiting the use of criminal records and with standards governing the exercise of discretion in decision-making.

We recommend that Congress enact clear laws prohibiting unwarranted discrimination based upon an individual's criminal record, with the EEOC responsible for effective enforcement and meaningful review of discrimination claims. In particular, the EEOC and other federal agencies should prohibit employers and other decision-makers from asking about or considering a criminal record to which access has been limited by law or court order. A strict prohibition must be put in place against employers inquiring about an applicant's criminal record before a contingent offer of employment has been made. These provisions are colloquially known as "Ban the Box."

V. The federal government must limit access to and use of criminal records for non-law enforcement purposes and should ensure that records are complete and accurate.

Government entities that collect criminal records should have set mechanisms for ensuring that official records are complete and accurate and must facilitate opportunities for individuals to correct any inaccuracies or omissions in their own records. Records that indicate no final disposition one year after charges are filed should be purged from all records systems. Criminal records that do not result in a conviction should be automatically sealed or expunged, at no cost to their subject.

The FBI's criminal record repository, with 70 million unique sets of fingerprint files, is "the largest biometric database in the world . . . and is the most comprehensive single source of criminal history data in the United States." It is also notoriously inaccurate and incomplete. About half of the records in the FBI database "are incomplete and fail to provide information on the final outcome of an arrest."[7] The FBI must correct these flaws and also ensure that information relating to state relief, such as expunged and sealed records, is reflected in its criminal record repository.

Two bills introduced in Congress in 2013 seek to reform how the FBI collects and shares criminal record information, recognizing the major problems caused when employers doing background checks get inaccurate or overbroad information. The Fairness and Accuracy in Employment Background Checks Act (H.R. 2865), introduced by Task Force Ranking Member Mr. Scott, aims to clean up incomplete FBI background checks for employment. Also introduced in 2013, the Accurate Background Check Act (H.R. 2999) would require the FBI to find missing information on past arrests for individuals applying to work in the federal government. Both of these bills should be enacted immediately.

Jurisdictions must develop policies that limit access to and use of criminal history records for non-law enforcement purposes in a manner that balances the public's right of access to information against the government's interest in encouraging successful reintegration of individuals with records and privacy interests. Striking the proper balance requires that access to online court system databases be strictly limited and court records be available only to those who inquire in person. The federal government should prohibit non-law enforcement access to conviction records after the passage of a specified period of time. There should be a presumption of irrelevance with respect to criminal records after 3.8 years.

The federal and state systems must never sell criminal records, and the federal government should strictly regulate private companies that collect and sell records. The Fair Credit Reporting Act, which regulates Consumer Reporting Agencies (CRAs) that sell criminal records, must reinstate a bar on reporting convictions that are more than seven years old; delete the provision allowing CRAs to report arrest records within seven years; and prohibit CRAs from reporting any conviction that lacks a final disposition. The Federal Trade Commission and the Consumer Financial Protection Bureau, which both enforce the FCRA, must strengthen their enforcement efforts.

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[7] Madeline Neighly & Maurice Emsellem, THE NAT'L EMP'T LAW PROJECT, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT 6 (July 2013) [hereinafter Wanted report], available at http://www.nelp.org/page/-/SCLP/2013/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf?nocdn=1.

It is clear that all stakeholders in the criminal justice system must collaborate to effectuate the institutional changes needed to restore rights to those with a criminal record. Collateral consequences permeate every facet of life; from privacy rights to employment discrimination, an individual can never escape the past even when they've fulfilled their retributive duty to society.

Conclusion

Witness after witness at the Task Force hearings — from law enforcement officials and legislators to employment specialists and individuals with criminal records — testified about how restoring a person's rights and status and letting a person move beyond a conviction will reduce recidivism, increase public safety and bolster economic activity. **Consistent research shows that the ability to earn a living is the best way to keep someone from committing another crime.[8] Setting up never ending barriers for those with convictions undermines public safety and hurts the economy**.

Addressing this problem calls for a fundamental shift in the national mindset. It calls for society to once and for all reject the wholesale demonization of every person who has a brush with the criminal law. It calls on Congress to lead – as with the Second Chance Act – with a bipartisan effort to ensure that persons released from prison are given a second chance to become contributing members of society. It points toward a new age of restoration and redemption, one that recognizes the principle that the low point in people's lives should not define the rest of their lives.

[8] OFFICE OF THE DEPUTY MAYOR FOR PUB. SAFETY, CITY OF PHILADELPHIA, ECONOMIC BENEFITS OF EMPLOYING FORMERLY INCARCERATED INDIVIDUALS IN PHILADELPHIA 5 (September 2011), *available at* http://economyleague.org/files/ExOffenders_-_Full_Report_FINAL_revised.pdf; *see also* John H. Laud & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 17–24 (2001), *available at* http://www.ncjrs.gov/pdffiles1/Digitization/192542-192549NCJRS.pdf (finding correlation between factors such as stable employment, family and community involvement, and substance abuse treatment, and a decreased risk of recidivism).

Mr. SENSENBRENNER. Thank you, Mr. Jones.

The Chair is going to put himself at the end of the questioning queue, just so in case we run out of time, all of the other Members will be able to ask questions.

And at this time, well, before recognizing the gentleman from Virginia, Mr. Scott, let me say that the Chair is going to be especially vigilant in enforcing the 5-minute rule so that everybody has a chance. I do have a reputation of looking at the red light.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you. Mr. Heck, Ban the Box has been mentioned. Is banning the box where you have to check off on your application that you have been convicted of a felony, does that prohibit an employer from considering on an individualized basis your criminal record?

Mr. HECK. First of all, on behalf of the American Bar Association, the American Bar Association has not taken a position on that. I think there are discussions that have to be had on that. I think we are seeing a lot of problems that are associated with that particular issue.

Mr. SCOTT. The point is, if you don't check off the box, it does not subsequently eliminate the employer's consideration of your record, but only on an individualized basis and whether or not the record is relevant to the job.

Mr. Jones, are you familiar with the EEOC guidance? Can you say a word about that?

Mr. JONES. Ban the Box, you are absolutely correct, Congressman Scott. Ban the Box does not prevent an employer from having an opportunity to review and determine relevancy of a person's criminal record or criminal conviction. All Ban the Box does is get the person's foot in the door initially. It allows them to have an opportunity to prove their credentials, to prove their ability to do a job.

And once an employer is in a position to think that this individual is able to do the job and is someone who we would like to employ, they then have the opportunity to review the person's criminal record and decide whether it is relevant, whether they are rehabilitated, whether there has been enough passage of time so that it is not a factor. But they do at the end of the process have the opportunity to know and evaluate the person's record. So Ban the Box is not a wholesale preclusion.

Mr. SCOTT. But you never would have gotten to that point where you would have been considered if you had checked the box. The application would have been thrown in the trash.

Mr. JONES. That is right.

Mr. SCOTT. When you talk about collateral consequences, a couple things that haven't been mentioned is the total waste of money. I know California many years ago spent a lot more money on higher education than prisons. Now prisons have exceeded by large margin what they are spending on higher education. So the waste of money crowds out things, and that is a collateral consequence of over incarceration, and children with parents in prison are also at high risk.

Just very briefly, Mr. Heck, can you tell me whether the automatic, across the board collateral consequences help keep people

from coming to jail or add to coming back to jail? For example, a collateral consequence of unemployment making it more difficult to get a job, does that help or hurt in terms of recidivism?

Mr. HECK. I think it is counterproductive to what we are trying to do. I think any type of across the board sanction, without looking at the particular offense and the particular offender is counterproductive.

Mr. SCOTT. What about education?

Mr. HECK. Well, education is the same way. It is interesting in Ohio, we have dealt with that and the legislature has over the last year. There are a number of alternatives that we now offer to prison, and I mean, a number of different alternatives that they have to try because, again, it makes no sense. When we are talking about reentry, most of the individuals who go to the penitentiary are going to be released, and so I think we have to look at that on the front end rather than saying what are we going to do after they are released.

Mr. SCOTT. Well and if you cut back on your right to get an education, education has been studied over and over again. That actually the more education you get the less likely you are to come back. Denying somebody an education seems to be clearly counterproductive.

Mr. HECK. Absolutely.

Mr. SCOTT. What about, have you studied the implications of the right to vote in terms of recidivism?

Mr. HECK. Again, the project that the American Bar Association has just completed looked into that as a collateral consequence. Again, I see no reason why someone is not restored to the right to vote. That is to me a fundamental right, personally as well as the American Bar Association, that should be respected, and I think they should be restored.

Mr. SCOTT. Mr. Jones, have you done any studies to show the impact on recidivism for any of these things I have mentioned?

Mr. JONES. Well, certainly when you disenfranchise, you are disenfranchised. You want to enfranchise people. So you certainly don't want to take way their right to vote or their sense of participation in the Democratic process.

With respect to the money that the Government spends on educating people to hold any kind of license to be a barber, for example, it makes no sense to educate someone and to give them a license to be a barber, to pay for that, and then when they get out, tell them that they can't do that job. It is counterproductive, and it absolutely leads to frustration and recidivism.

Mr. SENSENBRENNER. The time of the gentleman has expired.

The gentleman from Alabama, Mr. Bachus.

Mr. BACHUS. Thank you, Mr. Chairman.

One statement here in Mr. Jones' testimony is, even with conviction records the well-documented failure States record when charges are dismissed or records sealed and the failure of private data companies to keep accurate records hurts millions of individuals. That is a little separate situation, but is that a big problem, too?

Mr. JONES. That is a big problem, particularly when people are being denied opportunities without even having a conviction, but

merely the arrest is enough in many cases to deny a person the opportunity.

Certainly when records are not updated, someone has received a certificate of relief from disability, someone has been pardoned, those things are not added to the record and are not known, it hurts the person right off the bat because all we are seeing is an arrest and many times not even an arrest that leads to a conviction that is denying people opportunities.

Mr. BACHUS. What, if you know, the FACT Act has certain strict regulations on what can be reported in a background check. Is that violated, and what is the process for combatting that? Do you know, or under the EEOC?

Mr. JONES. It is frequently violated, particularly in an age where you can get almost anything with a mouse click or a keystroke. So frequently employers and other decision makers, landlords, are making decisions on less than accurate information and often inaccurate information.

And really there needs to be much greater limited access to these records, much greater regulation over the records, opportunities for people to update and correct inaccurate information in their rap sheets. All of these things need much stricter guidelines, limited access, and an opportunity at no cost for people to correct mistakes in their conviction records or their rap sheets.

Mr. BACHUS. Well, do employers actually get the criminal record or criminal history, or are they told whether or not the person meets a certain criteria? Do you know?

Mr. JONES. Employers are actually given a person's rap sheet. They can actually, they can buy them from consumer reporting agencies. In some cases they can get them directly for a fee or not from law enforcement agencies.

So the access an employer or other decisionmaker has to a person's complete criminal rap sheet is far too loose and easily available, and they have them.

Mr. BACHUS. All right. I am the co-sponsor for legislation with Mr. Sensenbrenner and others, Mr. Scott, I think, of the Second Chance Act, which helps State and local government agencies and community organizations improve prisoner reentry nationwide. Do any of you have comments on the Second Chance Act and how it might help?

Mr. HECK. Well, again, I think with comments that have already been made, prosecutors around the country are certainly supporting and have started reentry programs. I think it is so important. Without looking up front at what is going to happen to an individual who is sentenced to the penitentiary, knowing that that individual is going to come back into the community, is just very, it misses the entire point of what we are trying to do.

We are trying to make productive citizens out of these individuals and to help them, and to just warehouse individuals, as a prosecutor I can tell you just warehousing individuals in the penitentiary makes no sense at all, and I think we have to be smarter on crimes, smarter on who is sentenced to the penitentiary, and also to help whether it is education, whether its having someone to be helped get job, have employment, have housing when they are released. So I commend all of you for supporting that.

Mr. JONES. And NACDL certainly supports the Second Chance Act. Thank you.

Mr. SENSENBRENNER. The gentleman's time is expired.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I just want you to know that I think this over-criminalization panel is one of the most important in the House Judiciary Committee, and what we are doing is working on ways to get this as much into the legislative mainstream as possible, so we would welcome any thoughts that you have now or in the future about this, it is that critical.

And after the votes this morning, in 2226 Rayburn, right down the hall, we are going to have personal narratives of witnesses that have experienced some negative collateral consequences. So, we wanted to invite not only you two distinguished lawyers, but everyone here to join us if you can.

My first question to both of you is, how can we ramp this subject up as effectively and as thoughtfully as possible without overdoing it or creating a backlash or anything like that? Do you have any thoughts on that, gentlemen?

Mr. HECK. I do. Thank you for the question.

First of all, the Collateral Consequences of Conviction Project that was funded by the NIJ and just completed by the American Bar Association, this is a grant we got and many reasons because of Senator Lahey from Vermont, although it was a $750,000 grant. The American Bar Association, because of the immense and the depth of this project, invested another $750,000 of its own money and it was just completed.

Again, recognizing about 40,000 to 45,000 collateral consequences. What we would hope, what the American Bar Association hopes, is that Congress and the States use this database that we have to identify all the different collateral sanctions or consequences throughout the country in the Federal system, all right, and to look at them say how effective are they? How relevant are they? Retool some. Limit some. Some have just been overbroad, or they have applied forever.

And so they need to limit some of them. So we are hoping again that Congress will take advantage of this monumental project that we have just completed and maybe use it, and we'll be glad to assist in any way possible.

Mr. CONYERS. Well, we intend to.

Now, what about going beyond the American Bar Association. You know that there are dozens of law organizations and associations across the country. I am thinking about widening our approach so that we can begin this discussion with them working off of the good initial work that you have started.

Mr. HECK. I appreciate the question. And, again, I think your point is well taken. As a former president of the National District Attorneys Association, I know that district attorneys across the country are very concerned about this project and are very interested in what the results are that we just finished, and I know we are going to be having conversations about this.

I know State prosecutor's associations are going to have and are always concerned about collateral sanctions and the effect it has on not only the offender, but on the community.

Mr. CONYERS. You are giving prosecutors a great new description here. I always think of prosecutors as the bad guys that are trying to rack up as many convictions with as many severe penalties as possible. I mean, I think this is an incredible—has there been some kind of turnaround on the—have we been making progress that we didn't know about or what?

Mr. HECK. Congressman, let me assure you that I really believe I can speak, not on behalf of the NDAA, because I am not the president. Henry Garza from Texas is now. But what I am saying is I think most of the prosecutors realize that.

This idea of just putting people away, that may have been the thought of some prosecutors many years ago, but that is really not the thought today. The thought today is be smarter on crime and to identify those individuals who must be prosecuted.

Mr. CONYERS. How refreshing. Can I get just a——

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

The gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you and I appreciate your being here. Sorry I was late.

This is a project that is near and dear to my heart, and when Ed Mace called and asked if I would participate in something that dealt with a problem that I saw as a massive problem, over-criminalization, something that as a formal prosecutor, judge, chief justice, has driven me crazy because I had seen when people want to beat their chests and show how tough they are, well, let's slap a criminal penalty on something.

And so, as you know, as we talked about there are maybe 5,000 or so crimes that are not in 18 U.S. Code where they ought to be as a criminal code, and I had wondered why in the world have we not been able to clean this mess up before? And what I heard is it seems like every time a project gets fired up to try to clean up the criminal code, that it ends up being a big Santa Claus Christmas bag, and people start trying to throw more and more in it, and then overall you lose too many votes and people go, I can't agree to that, wait a minute I loved the idea, I was on board, but now you have thrown that in the bag I can't agree to that; and then it loses the impetus and nothing gets done over and over.

And so that is one of my concerns as we go here. I hear from people going, yeah, you are right. We got to stop this over-criminalization, and also we got to stop the militarization of some of these Federal Departments. And you know, the EPA doesn't need a SWAT team and neither does the Department of Education for heavens sake and we should never have, as we heard in this room, testimony about a poor little nerd that was trying to develop a new battery, and he gets pulled over by three Suburbans, run off the road, yanked out of his car, thrown down, boot in his back, handcuffed, and drug off because he didn't put a sticker on a thing he mailed to Alaska with an airplane with a line through it. He put ground only, checked that, but he didn't put the sticker. I mean, we need to stop that.

And so people are getting that and they are getting all on board, and then when we start saying, well, we are also looking into whether or not maybe employers shouldn't be able to find out if you committed a crime before they hire you. Oh, wait a minute now, wait a minute. This is a very sensitive industry, and you are telling me I don't get to know if he has been stealing from his last job, or in this daycare job I don't get to know that this person has actually molested people in the past.

And I can tell you as a judge, had a case where because of the law trying to protect people, protected a child molester; and it wasn't until he molested and destroyed other lives that he got stopped, and because of the way the law was, the juvenile probation department didn't even get to know that he had had these other incidences just because of the way he was protected.

So I am really concerned that we may be getting into an area where we are going too far if we are not too careful. We lose the steam because, let me just ask you guys. Why would it be appropriate for Congress to force private businesses to ignore somebody's criminal history?

Mr. JONES. Thank you for the question. I just want to be crystal clear about Ban the Box, right, because Ban the Box does not prevent an employer or other decisionmaker from knowing about a person's criminal record. There need to be clear relevancy guidelines that adhere across the board so that decisionmakers understand what is relevant and what is not when looking at a person's criminal record.

And there also needs to be an opportunity for the individual to get his foot in the door to be able to present his credentials and his employability. But once those things are done, once there are clear relevancy guidelines and decisionmakers know, and once a person has his foot in the door then he——

Mr. GOHMERT. Well my time is about to expire, and I want to get this question in. Isn't it true that those who access individual criminal histories are already subject to strict regulation regarding the use of that information under Fair Credit Reporting Act and Equal Employment Opportunity Commission; isn't that true?

Mr. HECK. That is correct.

Mr. GOHMERT. So it is not just wide open already.

Mr. HECK. And I think there are safeguards. I think there are some abuses to it. No question about it. I understand what he is saying, but I do think that there are collateral consequences that are appropriate.

Mr. GOHMERT. Okay, thank you very much.

I yield back.

Mr. SENSENBRENNER. The gentlewoman from California, Ms. Bass.

Ms. BASS. Thank you very much, Mr. Chair, and the Ranking Member, for holding this hearing. I think this is such a critical issue for our Nation.

And earlier this year in my district I had a town hall and we had several hundred people come talking about this very subject and it seems like in our society we used to have a belief that if you paid your debt to society, that you could be reintegrated; and it seems like part of what has happened over the last couple of decades is

that we no longer have that belief and in fact you can spend some time in prison, but then you can spend the rest of your life with the stigma and not being able to appropriately reintegrate.

In California when I was in the State legislature we had a law that said if you were a felon, you could not get a license to be a barber. At the same time in our State prison system, we had a barbering program where we taught felons how to be barbers and then didn't allow them to have the license when they left, and so we had to change that law and we had over 54 occupations that you couldn't do if you had been a felon.

Mr. Jones, you mentioned that there should be a presumption of irrelevance. And you know, the experience about Ban the Box, I completely understand what you mean in terms of getting your foot in the door to even say that it was a conviction from 30 years ago, and it was when I was a college student or something like that. Because if you don't check that box and then you find out, then you are subject to immediate termination because you have lied.

So when you were talking about a presumption of irrelevance, I wasn't sure if you were really talking about that rhetorically, or if you actually meant that that is what we should do and then I wanted to know how we would go about that?

Mr. JONES. Well, thank you for the question. There are studies that suggest that after a certain number of years a person's conviction is—a person is less likely—is no more likely and in some cases less likely to reoffend than anybody in the general society.

So when we are talking about evaluating a person's criminal record for whether or not they should be accessible to an opportunity or benefit, then what we really need to do is we really need to look at whether or not there is any relevance to the opportunity, what the passage of time has been, and whether or not there is any evidence of rehabilitation.

And when the passage of time has been such and there is evidence of rehabilitation, there really ought to be a presumption of irrelevance, that the conviction is no longer relevant to whether or not this person ought to have that opportunity.

Ms. BASS. So, and I agree with you, but how do we do that? Is it a law? Do we pass a law that says that? And then I am assuming that you would exempt certain times of crimes?

Mr. JONES. Exactly. And I think that there have to be guidelines that are set out clearly for decisionmakers, for employers and landlords and others, there have to be guidelines that clearly instruct individuals as to what is relevant and what is not and what the passage of time is and what the evidence of rehabilitation might be so that people understand and know we are all playing by the same rules.

But once we have those guidelines and we are all playing by the same rules, then there ought to be a presumption of irrelevance.

Ms. BASS. And one of you, and I am not sure which one, made reference to the fact that the FBI Web site is wrong a significant amount of time. I wanted to know how it is wrong? Is it the wrong people are listed, wrong charges are listed?

Mr. HECK. Well, I am not sure exactly what you are referring to, ma'am, except to say that so many times when we have the silver streaks or we have the histories of convictions, that many times

that people who input that data, that it is incorrect. And I think, that not only saying the FBI——

Ms. BASS. So it could be both, the wrong charges and the wrong people?

Mr. HECK. Exactly. I think it is incumbent, I mean I find out when we are looking at defendants who we have charged in my office and my assistant prosecutors will try to get a record check, we have to make sure that we confirm that, to make sure it is accurate, because many times the inputting of that data and the way it goes through our Bureau of Criminal Investigation and Identification is wrong.

Ms. BASS. I have a piece of legislation that I have introduced called the Success Act which is looking at you know, a piece of collateral damage which says that young people who have a certain crime cannot get financial aid, and I am wondering if in the tens of thousands of collateral damage examples that you two talked about, are there a number of them that relate to education?

Mr. HECK. Well, I think a lot of them do relate to education, either directly or indirectly and I think the idea of preventing young people who may have made a mistake, from making amends, from doing what they were supposed to do and then later in life restricting them from having the education that benefits not only them but you know, society, makes no sense at all.

Mr. JONES. It is very difficult to make the argument that there is a public safety benefit from allowing young people to get an education.

Mr. SENSENBRENNER. The gentlewoman's time is expired.

The gentleman from New York, Mr. Jeffries.

Mr. JEFFRIES. Thank you, Mr. Chair.

And let me thank both of the witnesses for your testimony and for your work on this very important issue.

Let me start with Mr. Heck. You testified earlier today, I believe appropriately, that automatic blanket, across the board imposition of collateral consequences is counterproductive. In that regard, how would you suggest the Committee look at or the Task Force look at, how the collateral consequences that you believe may be appropriate in certain circumstances are narrowly tailored to fit the severity of the crime so that we don't broadly sweep individuals into this blanket fashion.

Mr. HECK. And I appreciate the question.

And I do think that some collateral consequences if they are applied so broadly across the board are not relevant to that individual case or that individual offender. That is what I don't think the law has been looking at, the offender, not just the offense.

For example, in Ohio if someone owes child support and they are not paying their child support, their driver's license is suspended. It is so ridiculous and I have told my prosecutors who handle those kinds of cases, we are not going to ask for that. In fact, we are going to say it shouldn't be done because we are asking the person to pay child support and saying you can't have a job to pay it. So I think we have to have a look what the collateral consequence is because some are appropriate.

Mr. JEFFRIES. And when we craft the law, who should be given the discretion to make the determination as to the appropriate ap-

plication of a collateral consequence if one is appropriate under limited circumstances? Should that be the court? Should that be built into the law in some way?

Should the prosecutor have in the first instance have that opportunity? I don't know that everyone is as enlightened as you are or the prosecutors in your office. Who should have that opportunity to make that determination?

Mr. HECK. There have been a lot of suggestions made on that. I believe, not the ABA, I believe that it should be the court. I think the judges are in a unique position to see both sides of the denominator, to see what is going on, and that they should make the judgment.

Mr. JEFFRIES. Mr. Jones, do you have thoughts on that?

Mr. JONES. Yes, I think that everybody in the system needs to be aware, updated. Prosecutors, defense counsel, everybody needs to understand at every step of the process the implication of collateral consequences as we go through the process.

I do think that relief at sentencing by the judges who are able to tailor to the individual and remove and repeal consequences that are of no moment and are irrelevant is a good thing, so I believe that relief at sentencing is important, but I think all the players in the system ought to know and be aware at every step of the way, of the collateral consequences and their impact.

Mr. JEFFRIES. Now on that point, you mentioned that there were 45,000—I think both of you in your testimony, 45,000 collateral consequences, which is a staggering number.

So that is a difficult undertaking but one that obviously is necessary, and I think we as a Task Force are going to have to think through how to create greater transparency as it relates to those consequences and obviously take steps, in my opinion, to reduce many of them.

But you mentioned that 68 million people in America, I guess, are living with convictions. Is that right?

Mr. JONES. That is right. And that number is growing.

Mr. JEFFRIES. And that 20 million of those individuals have felony convictions, which mathematically I gather would leave 48 million with misdemeanor convictions or criminal violations in some way, shape or form.

Now, if we are to look at this issue in terms of collateral consequences, has any work been done to look at the consequences associated to those convicted of felonies versus the consequences associated with those convicted of misdemeanors, and is it relevant for us to think through this issue in that fashion?

Mr. JONES. Well, I think that even just looking at some of the legislation that is proposed, certainly there always is this notion that first time offenders, non-violent misdemeanants, are more often the subject of legislation. But the fact of the matter is that at some point everybody's coming home. Right? The vast majority of these folks are coming home, and we need to think about and incorporating and be prepared to embrace all of these folks because nobody is merely the product of the worst thing that they've ever done, and we all deserve a second chance.

So I would strongly suggest that as you think about how to set these guidelines and evaluate relevance, that you include every-

body, including those 20 million folks who are living with a felony conviction.

Mr. JEFFRIES. Thank you.

Mr. SENSENBRENNER. Gentleman's time is expired.

The gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

We need to reject wholesale demonization of every person who has a brush with the criminal law. Persons who are released from prison should be given a second chance, and we need to enter into a new age of restoration and redemption. These are things that are listed in your conclusion, Mr. Jones, and I think that those are very important ideals that we should seek to live up to.

Oftentimes, it is we ourselves that are the perpetrators of overcriminalization. It is certainly the legislators are responsible and certainly judges and prosecutors who both are elected are responsible for getting tough on crime and throwing the book at people and implementing the policies that we enshrine into law.

But I will ask you both. You are both members of the bar. You are both attorneys. You are licensed to practice law, and you know that when a person suffers a felony conviction and even misdemeanor convictions in many States, they are barred from being able to be licensed to practice law. Do you believe that those types of barriers, which are collateral consequences, do you believe that those should be removed from a person's ability to practice law, to get a law license? Mr. Heck?

Mr. HECK. I think like in any other collateral sanction, I think they have to be looked at the offense and the offender and I think there are cases. We have seen it in Ohio, where thoseimpediments have been removed and someone who was convicted, say, for example, of voluntary manslaughter or murder have become lawyers. We have seen it with a lot lesser offenses.

And yet at the same time we have seen cases where someone who was convicted of a theft or a fraud was not given the license to practice law in Ohio. So there has to be some type of parity also. There has to be some type of fairness and equity if we are going to have any collateral sanctions at all.

Mr. JOHNSON. So you would be against blanket bans on all who have been convicted being ineligible to receive a license to practice law?

Mr. HECK. I would think blanket bans do not serve any public purpose, blanket bans; correct.

Mr. JOHNSON. I think that means what I asked.

Mr. HECK. I agree with you.

Mr. JOHNSON. Okay, all right, thank you.

And Mr. Jones?

Mr. JONES. I would agree. I mean, unless you can show me that there is some public safety benefit, that outweighs the individual right for a person to you know, get a law license after they have gone to law school and passed the bar and practice law, unless you can show me that there is some public safety benefit that outweighs that individual being able to practice law, then I would certainly say that you should not have that restriction, and you should not have any automatic mandatory ban.

Mr. JOHNSON. Do you know of any initiatives by the ABA or by any State bar association to address that particular issue, either one of you?

Mr. HECK. No. I know the project of the Collateral Consequences of Conviction Project did not entail that. It had to do with cataloging and just assembling and identifying all the collateral consequences, which was again a monumental task. But as far as the particular issue that you are talking about, I do not know of any State or the American bar tackling that yet.

Mr. JOHNSON. All right. Thank you.

And how do collateral consequences disproportionately impact communities of color and the poor?

Mr. HECK. I think that just like we see a disproportionate as far as imprisonment is concerned, I think that goes along with that, because so many times the collateral sanctions are attached to a conviction.

So I think that once you see the effect it has on the incarceration and imprisonment, you are going to see the thing on collateral sanctions and I think collateral sanctions especially as it relates to employment, as it relates to having an income and housing, really has an effect in that regard. Thank you.

Mr. JONES. The answer is profoundly. There are studies that show that African American men who have never had any trouble with the law at all are less likely to get a job than similarly situated White men with a felony conviction.

There are studies that show that African American men are seven times more likely to be arrested for crimes, particularly drug possession crimes, when the usage of drugs in those community is the same. So the impact of its collateral consequences on African American individuals, their families and society is profound.

Mr. JOHNSON. Thank you.

Mr. SENSENBRENNER. The gentleman's time is expired.

The gentleman from Tennessee, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chair.

These issues affect my constituents in a major way. Second chance opportunities for employment is one of the things I hear most from constituents. If somebody has had a conviction at some time in the past, they can't get a job, the continuing cycle. But more fundamental is the loss of the right to vote.

And I don't know if this has been addressed extensively by you all, but do either of you all know the history of those particular laws? I was reading about civil death or however it is called, yeah, civil death, and that seemed to take away your right to vote and everything else and being described as barbarism condemned by justice by reason and by morality, et cetera. But, we have these laws.

Does Maryland have a law like that, Mr. Heck.

Mr. HECK. Maryland?

Mr. COHEN. Yeah.

Mr. HECK. I have to be honest with you. I am not familiar with the Maryland law, sir.

Mr. COHEN. Which State are you from?

Mr. HECK. I am from Ohio.

Mr. COHEN. I am sorry. I was thinking it was Maryland. They joined the Big Ten, and I am all confused.

Mr. HECK. I appreciate that.

Mr. COHEN. Ohio doesn't have such a law, does it?

Mr. HECK. No.

Mr. COHEN. It is mostly southern States; right?

Mr. HECK. That is my understanding. I have not done a study of that, but that is my understanding. You know, there is a history of what you say that disfranchisement of the right to vote, which again to me is so important it trumps everything.

And so I think when you take someone's right to vote away and with the idea of never giving it back, I just think that should never be.

Mr. COHEN. Mr. Jones, are you familiar with any history on these laws?

Mr. JONES. You know, I have my own thoughts, but they would be conjecture. I don't know, but I will tell you this. By the history disfranchisement, by the time I get back to New York this afternoon I will know, and I will get that to you.

Mr. COHEN. I think the history goes back to Jim Crowe, and I think it was kind of a southern thing and really if you look at the States that have those laws and/or had those laws, they are generally the same States that Justice Roberts said no longer have to have preclearance because it is a wonderful world, according to Justice Roberts.

It is hard to fathom when you look at the history of discrimination in this country and look at it in voting areas where you had preclearance, and those are the same States that put a scarlet letter on individuals that says thou shalt not vote. Voting, in my district we had an election in May, a primary election for county offices, very important and about 10 percent of the people who were registered voted.

And so my theory is if people who had convictions in the past were allowed to vote, if they voted, by their simple action of voting they would show they were in the upper 10 percent of the citizenry. You know so, to say that they could——

We do in Tennessee, have a law which I was happy to have sponsored and passed that allows you to get your right to vote restored without going to court and without having the D.A. Come and bless you, et cetera. But, a guy in the House, kind of a Neanderthal-type character, put an amendment on the bill which passed, and it said that if you were behind in your child support you couldn't get your right to vote back and it is not something that is pretty clearly intended to have a disparate impact.

Mr. JONES. Well there are two States I believe, that this Task Force ought look at, that allow individuals to vote while they are in prison. I think that is Maine and Vermont, and you can conjecture and speculate as to why those two States allow that, but I do believe that Maine and Vermont, but somebody can correct me if that is wrong.

Those two States allow you to vote while you are in prison, and I think that everybody, that is right.

Mr. COHEN. It is Vermont, and which is the other State?

Mr. JONES. Maine.

Mr. COHEN. Maine. But you have to be eating lobster or cheese or something at the same time.

I yield the balance of my time. Thank you.

Mr. SENSENBRENNER. Thank you.

Well, we still have some time left, so I will now recognize myself for 5 minutes.

Both Mr. Jones and Mr. Heck have said that we should repeal all mandatory collateral consequences that apply across the board. Now, one part of Federal law prohibits anyone who has been convicted of a misdemeanor crime of domestic violence from possessing a firearm. Do you believe that Congress should repeal this law?

Mr. HECK. As far as my position is concerned, again the ABA has not taken a position on that. I think we have to look again at the individual involved and the individual crime. So for example, we have had cases and domestic violence is something that is certainly on my radar screen personally and my office, and something just like child abuse that we take very seriously.

And when we have a domestic violence case, I think we have to look, is that person an owner of guns, or did that person use a gun? And I think those are the distinctions that have to be made. So I think a broad, simply designation of someone who owns a gun should never be able to own a gun again, I think has to be looked at very seriously, as opposed to using a gun again in domestic violence and I have no problem with that person not being allowed to own a gun.

Mr. SENSENBRENNER. So do you think the current law which applies to misdemeanors as well as felonies is a good law?

Mr. HECK. Depending on the circumstance.

Mr. SENSENBRENNER. Okay.

Mr. HECK. Again, depending on the circumstance, I think——

Mr. SENSENBRENNER. It shouldn't be across the board? Mr. Jones?

Mr. HECK. I don't think it should be across the board.

Mr. SENSENBRENNER. Mr. Jones?

Mr. JONES. Mandatory, automatic, across the board consequences ought be repealed, and we ought to be looking at individual tailoring the denial of opportunities to individual circumstances and individuals and individual people. They should not be across the board automatic mandatory.

Mr. SENSENBRENNER. I am kind of surprised. I think the NRA would agree with both of you on this.

Let me ask you another question in the time that I have left. When I first was elected to Congress, my wife and I owned a two-family House that was across the street from an elementary school, and we lived in one half of it, and I rented out the other half. Say somebody came and applied and was a person who was a recognized minority, applied to live in the other half, and I found out before leasing it to them that they were registered sex offenders. Could my denial of housing because they were registered sex offenders, not because they were persons of color or a protected minority, be a defense in a fair housing complaint?

Mr. HECK. Not in Ohio, because they would not be allowed to live there in Ohio. You are saying you lived right across the street from a school; correct?

Mr. SENSENBRENNER. I did.

Mr. HECK. Right, no. In Ohio, and that has been going on and increasing the number of feet as well as the number of instances where a convicted sex offender may live. It started out within so many feet of a school, so many feet of a bus stop, so many feet of a daycare, so many feet from where children will be. So many—so that has become more broad.

However, in the specific instance that you mentioned, no because under Ohio law they would not be permitted to live there anyway and we have had cases like that, my office has on the civil side, which we also represent, have actually ordered people to move and have got eviction notices for people and orders to have them move out because of the close proximity to schools.

Mr. SENSENBRENNER. So if I was accused of denying housing under the State or Federal Fair Housing Law because I denied them the lease because I lived across the street from the school, in Ohio I could go to the district attorney and have him represent me against the Fair Housing complaint?

Mr. HECK. Well, under Ohio law we cannot represent an individual interest, but I can assure you that we would stand right next to you from the standpoint that that convicted sex offender should not live there.

Mr. SENSENBRENNER. Mr. Jones?

Mr. JONES. Let me say two things about the sex offender issue and if you look in our report, you will see that not only prosecuting attorneys who work in this area but also individuals who are responsible for administering State sex offender registries say the same thing.

Two points. The first is that anyone is more likely to be abused in that manner by someone within the four walls of their home, than they are by someone who is either delivering their mail or cutting their grass. You are much more likely to be molested or abused in some way by someone who is under your roof.

And secondly, the overwhelming majority of arrests in these types of cases are by first offenders. The number of people who are sexual predators who are serial offenders is very small.

So that these prosecutors and these people who run these sexual registries, what they say is the residency restrictions that we have placed on these folks are wrong-headed and don't make sense and are actually counterproductive because you are more likely to have a problem with Uncle Sam than you are with the guy who is delivering your mail.

Mr. SENSENBRENNER. Well, my time is expired.

I want to thank all of the witnesses for your testimony and good answers to questions.

Thank the Members for participating. Does anybody wish to put printed material into the record?

The gentleman from Alabama.

Mr. BACHUS. I thank the, Chairman.

I ask permission to——

Mr. SENSENBRENNER. Microphone please.

Mr. BACHUS [continuing]. Submit testimony in the record from Mr. Jessie Wiehl on behalf of Justice Fellowship, which is an independent prison fellowship ministry, which offers his perspective on

the challenge of reentering society after he served a sentence for a criminal offense.

Mr. SENSENBRENNER. Without objection.

Mr. BACHUS. Thank you.

Mr. SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

I ask unanimous consent that the testimony from the Robert F. Kennedy Center for Justice and Human Rights; Bernard Kerik; Piper Kerman; Lamont Kerry; Anthony Pleasant; and reports from The Sentencing Project, "State-Level Estimates of Felon Disenfranchisement in the United States 2010" and "A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits," all be placed on the record.

Mr. SENSENBRENNER. Without objection.

And, if there is no further business to come before the Task Force, without objection the Task Force stands adjourned.

[Whereupon, at 10:42 a.m., the Task Force was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Material submitted by the Honorable Spencer Bachus, a Representative in Congress from the State of Alabama, and Member, Over-Criminalization Task Force of 2014

Testimony of Jesse Wiese
Justice Fellowship
Before the House Judiciary Over-Criminalization Task Force
Collateral Consequences
June 26, 2014

Dear Chairman Sensenbrenner, Ranking Member Scott, and Members of the Overcriminalization Task Force, thank you for taking the time to discuss this important topic.

The overuse and general acceptance of collateral consequences is cause for genuine concern. Taxpayers and victims of crime count on a return for our investment in the criminal justice system and imposing arbitrary and perpetual civil punishments as a result of a criminal conviction greatly diminishes that return. As a conservative, I believe we should apply serious scrutiny to processes that restrict "life, liberty, and the pursuit of happiness."[1] As a Christian, I believe that humanity ascribes its value and dignity from its Creator, and it is from that basis that the concepts of proportionality and finality in criminal punishment have their root. As a person who was formerly incarcerated, I advocate for the value of criminal punishment[2] and for a system that comprehensively advances the principles of restorative justice.[3]

PERSONAL BACKGROUND

When I was twenty-one years old, I robbed a bank at gunpoint and was sentenced to fifteen years in the Iowa penal system. My actions were a result of personal despair and hopelessness and caused great harm to my victim, myself, the community, and my family and friends. Through some providential relationships and participating in a faith-based program, I began to find purpose, value, and hope and quickly realized that actions do not take place in a vacuum and that crime harms people, breaks relationships, and has lifelong consequences. I deeply regretted my actions and looked forward to satisfying the debt that I owed.

During my incarceration, I did my best to prepare for my opportunity at a second chance. I had confronted my actions, reconciled with my victim, obtained an undergraduate degree and graduated with honors, helped other men in prison obtain their GED, participated in and volunteered with a values-based reentry program, spent time speaking with youthful offenders, and spent the last three months of my sentence studying for the law school admission test.

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[1] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[2] See, e.g., Jeffrey C. Tuomala, *The Value of Punishment: A Response to Judge Richard L. Nygaard*, 5 REGENT L. REV. 13 (1995) ("[P]unishment is often excessive or imposed with improper motives or for improper ends, but that does not mean punishment is not a legitimate value.").

[3] See Justice Fellowship, http://justicefellowship.org/building-restorative-justice (advocating for a restorative justice approach to criminal justice reform and policy).

I walked out of the Iowa prison system thinking two things: I wasn't the same man walking out that I was walking in, and I wanted to make a positive difference. I deeply wanted to expiate my guilt and prove to society that I could once again be a trusted and valued citizen.

When I was released, I began to put into practice what I had been taught. I sought out mentors, attended a local church, developed a new social network, got a job, and encouraged others to do the same. Those practices and relationships led to other opportunities. I was accepted to law school, interned with a state juvenile court judge, served as president of the Honor Council, drafted statutory reforms to eradicate domestic child-sex trafficking, graduated *magna cum laude*, passed the Virginia bar exam, and joined Justice Fellowship to work with legislators across the country on criminal justice reforms, including collateral consequences.

Though my name may be attached to these minor achievements, a very small amount of the recognition, if any, should be attributed to me. The accolades belong to those along the way that sowed into the soil of my life and believed that I could "make good" on my second chance. These are much-deserved dividends earned on the thousands of dollars Iowa taxpayers paid for my very bad decision and the countless hours and resources several mentors gave to me along the way.

The truth is, however, that achieving these successes was not an easy task and there are still obstacles that will need to be overcome. I had to fight every step of the way to get where I am today. This is not to say that it should be easy, but it is an arduous and continual process convincing landlords, universities, the Virginia Character and Fitness Committee, churches, and even criminal justice officials that the system can actually work and that men and women can change. I learned early that my voice and accomplishments were not enough to erase the vestiges of a felony conviction. I pursued relationships with judges, lawyers, pastors, and other upstanding members of the community who often advocated on my behalf. Even with their voices, however, my inability to obtain a license to practice law remains a struggle for myself and my family. Despite these obstacles, I challenge men and women in our prisons to reach for the stars and take hold of the American dream. Many have never envisioned themselves beyond government subsidies or a minimum-wage job. Unfortunately, even when given the tools and vision to achieve personal success, we often remain relegated to places of continual failure or hit a glass ceiling because of arbitrary collateral consequences.[4]

After my release, I had the opportunity to work with men who were transitioning back into society from a period of incarceration as a Reentry Specialist for Prison Fellowship Ministries. Time and time again I witnessed the majority of these men give up on their dreams of success because of the barriers to societal reintegration. The goals that we encourage men and women to set and work towards during their incarceration quickly become shattered when faced with the uphill battles of housing, employment, and social stigma. In most cases, giving up on these

[4] See, e.g., Alfred Blumstein and Kiminori Nakamura, *'Redemption' in an Era of Widespread Background Checks*, NAT'L INST. JUST. J. No. 263 (June 2009) (stating that after a certain time period, the likelihood that a person with a prior conviction will commit another crime will diminish to that of society, thus limiting the risk of recidivism and the need for some collateral consequences), *available at* https://www.ncjrs.gov/pdffiles1/nij/226872.pdf.

dreams did not result in recidivism, but it did result in them accepting their place in society as citizens who are unworthy of achieving certain levels of success or even representation.

Earning back the public's trust after committing a crime should not be an easy task, but it must be a realistic and attainable one if we want to increase public safety. President Bush recognized this in his 2004 State of the Union address when he stated, "America is the land of second chance[s], and when the gates of the prison open, the path ahead should lead to a better life."[5] The billions of taxpayer dollars poured into rehabilitation programs every year amount to nothing more than a colossal waste, if we as a society don't allow the men and women walking out of prison doors to practice the rehabilitation we are preaching. In effect, we spend billions of dollars teaching incarcerated men and women how to build a new car (i.e., a new life), provide the appropriate parts, and give them the keys, but when the prison doors open, there are no roads.

COLLATERAL CONSEQUENCES ARE ON THE RISE

The term "collateral consequences" is a fairly new term referring to the "wide-range of status-related penalties, sanctions, and restrictions that are permitted or required by law because of a criminal conviction even if not included in the court's sentence."[6] As this task force is aware, collateral consequences include, among other limitations, the loss or restriction of employment or professional license, eviction from public housing, ineligibility for welfare benefits, loss of right to hold public office, serve in the military, volunteer, or sit on a jury. Collateral consequences may also include the loss of parental rights, exclusion from government contracts, and the inability to live in certain areas. Practically, the stigma associated with a criminal conviction almost always results in the permanent loss of standing within the community.

Collateral consequences have been a familiar feature in the American justice system since Colonial times and garnered some reform interest among legal scholars in the 1970s.[7] Recently, however, there has been an increasing awareness on the issue of collateral consequences.[8] The reasons for this increased concern are likely related to the rising prison population, the ballooning of the criminal justice system, and technological advances in providing background searches. Today, approximately sixty-five million (1 in 4) adults in the United States have a criminal conviction.[9] Additionally, the expanse of the administrative governmental agency has

[5] George W. Bush, President, Address Before a Joint Session of the Cong. on the State of the Union (Jan. 20, 2004).
[6] MARGARET COLGATE LOVE, JENNY ROBERTS, & CECELIA KLINGELE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE 25.
[7] See, e.g., Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705 (2002) (discussing the history and reform trends of collateral consequences), *available at* http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1880&context=ulj.
[8] E.g., NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, COLLATERAL DAMAGE: AMERICA'S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME (2013); Memorandum from Att'y Gen. Eric Holder on Consideration of Collateral Consequences in Rulemaking (Aug. 12, 2013); National Inventory of the Collateral Consequences of Conviction, http://www.abacollateralconsequences.org/.
[9] See U.S. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 51 (2006), *available at* http://www.justice.gov/olp/ag_bgchecks_report.pdf; U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2010 3 (2011), *available at* https://www.ncjrs.gov/pdffiles1/bjs/grants/237253.pdf; MICHELLE RODRIGUEZ AND MAURICE EMSELLEM, THE NATIONAL EMPLOYMENT LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING

created a beaurocratic web making the reprieve from collateral consequences much more difficult to successfully navigate. In fact, one of the most misunderstood aspects of collateral consequences is that the majority of them are not legally or statutorily imposed. Those that are enforced legally are typically the most commonly known and include prohibitions on firearms, voting, serving on a jury, and holding public office. The majority of collateral consequences are imposed through administrative agencies that classify a criminal conviction as the means for disqualification from some type of governmental assistance or benefit or demonstrating a lack of "moral character." In addition, there is a powerful cultural element to the stigma of a criminal conviction, which is mostly seen in the form of background checks conducted for employment, housing, and volunteer opportunities.

Additionally, the internet has increased access to criminal record information and the ease at which background checks can be conducted. This has extended collateral consequences to simple arrests, even in instances where the case is dismissed or there is a not-guilty verdict. States have begun to reconcile this unjust outcome by attempting to keep arrest records confidential from public purview,[10] but that effort has proven difficult.

FEDERAL INCENTIVES AND COLLATERAL CONSEQUENCES

In certain instances, the federal government has incentivized states to adopt collateral consequences by withholding federal dollars if those collateral consequences are not properly implemented. For example, states face a reduction of federal transportation funding if they do not revoke or suspend "for at least 6 months, [] the driver's license of any individual who is convicted . . . of any violation of the Controlled Substances Act, or any drug offense."[11] This restriction is not directly related to any driving offense and is a great example of a collateral consequence that does not have a nexus to the criminal conduct.

Additionally, as a result of the "War on Drugs," the federal government began to implement "user accountability" provisions that precluded men and women with a drug conviction from certain federal benefits. Under the Anti-Drug Abuse Act,[12] these provisions denied certain federal benefits such as access to grants, federal student loans, and professional licenses to people convicted of drug offenses. In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act[13] (the Welfare Reform Act) instituted a lifelong ban on Supplemental Nutrition Assistance Program (SNAP, formerly Food Stamps) for people convicted of drug crimes. Realizing that these post-conviction sanctions did not address the drug issue, Congress eventually lessened the rigid restrictions under the Drug Abuse Act, but the lifelong restrictions related to SNAP benefits remain in force.[14] Punishing men and women by refusing to allow them

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CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 27, note 2 (2011), *available at* http://nelp.3cdn.net/c1696a4161be2c85dd_t0m62vj76.pdf.

[10] E.g., S.B. 108, 28th Leg., 2d Sess. (Alaska 2014).

[11] 23 U.S.C. § 159(3)(A)(i) (2012). The Governor of the state can opt-out of the requirement by sending a letter to the Secretary of Transportation certifying "that the legislature (including both Houses where applicable) has adopted a resolution expressing its opposition to [the] law . . . ." 23 U.S.C. § 159(3)(B)(ii) (2012).

[12] 21 U.S.C. § 1501 (1988).

[13] 42 U.S.C.A. § 1305 (1996).

[14] See MARK MAUER & VIRGINIA MCCALMONT, THE SENTENCING PROJECT, A LIFETIME OF PUNISHMENT: THE IMPACT OF THE FELONY DRUG BAN ON WELFARE BENEFITS (2013) (discussing SNAP and TANF benefit restrictions

life-sustaining benefits is an immoral and regressive approach to criminal punishment. Again, instituting consequences that are not rationally related to the crime impedes public safety and is a disproportionate response to criminal behavior.

These federal examples highlight the fact that several, if not most, of collateral consequences are not rationally related to the criminal conduct. One of the strongest examples of that disconnect involves victim compensation funds. State victim compensation funds are funded by criminal fines and taxpayer dollars and offer monetary assistance to victims and survivors of violent crime. Unfortunately, thirteen states disqualify a victim's ability to receive compensation if that person has a felony conviction.[15]

The encouraging news is that both Republicans and Democrats are beginning to see the hypocrisy in spending millions of taxpayer dollars on reentry services in one bill, but creating overwhelming obstacles with another. An example of this realization was seen during the recent defusing of an amendment to the omnibus Farm Bill which would have expanded the lifelong ban on food stamps to include people with certain violent convictions.[16] This victory came about because people on both sides of the aisle acknowledged the importance of not just reentry, but restoration. As former Virginia Attorney General Ken Cuccinelli stated, "If we really believe no one is beyond redemption we need to stop throwing away that key."[17] Refraining from the arbitrary expansion of collateral consequences is a good step in that direction.

RECOMMENDATIONS

Though there are many non-legislative layers to alleviating collateral consequences, there are several actions Congress can take that will help alleviate the practice of arbitrary collateral consequences. First, Congress can create some guidelines for agencies regarding the administration and relief requirements for collateral consequences. Providing clear definitions for phrases such as "crime of moral turpitude" as well as requiring that all collateral consequences be "substantially related to the criminal conduct" are small first steps that can have a big impact.

Second, Congress can implement a "collateral consequences impact statement" that would provide necessary scrutiny to any new collateral consequence. This would provide a check against the growth of collateral consequences as well as reinforce their proper role within the law.

Third, Congress should pass bipartisan legislation such as the Second Chance Reauthorization Act (H.R.3465) that Chairman Sensenbrenner has introduced to counter the proposition that men and women with a criminal conviction cannot become good citizens and to engage churches and communities in assisting with their full integration into society.

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for people convicted of a drug offense), *available at* http://sentencingproject.org/doc/publications/cc A%20Lifetime %20of%20Punishment.pdf.

[15] DOUGLAS EVANS, COMPENSATING VICTIMS OF CRIME 25 (2014), *available at* http://justicefellowship.org/sites/default/files/Compensating%20Victims%20of%20Crime_John%20Jay_June%202014.pdf.

[16] S. 954, 113th Cong. amend. 1056 (2013).

[17] Beth Reinhard, At CPAC, Ken Cuccinelli Moves to the Center, National Journal (Mar. 14, 2013), http://www.nationaljournal.com/politics/at-cpac-ken-cuccinelli-moves-to-the-center-20130314.

Lastly, in order for there to be a shift in how our society views men and women with a criminal conviction, there must be a cultural transformation that extends beyond the halls of Congress and into our places of worship and communities. Examining the issue from a moral lens is necessary to achieve the desired change. Excluding someone from a clear and just path to restoration takes away that person's incentive to transform their life, take responsibility for their own affairs, and provide for their own family. Countries including Singapore[18] and Fiji[19] have taken on the cultural aspects of collateral consequences and have had striking results. Justice Fellowship is currently inviting federal and state legislators to identify themselves as values-based leaders on justice issues by joining our Legislator Network. The Network is a fellowship of federal and state leaders committed to transforming the way we think and talk about crime and punishment through a biblically-based restorative justice approach that recognizes and advances the dignity of human life. It prioritizes victim participation, promotes offender responsibility, and cultivates community engagement.[20]

CONCLUSION

"There is a latent, pervasive attitude in our society which stresses the generic unworthiness of the criminal—his permanent unfitness to line in 'decent society.' He is seen as an unredeemable, permanently flawed, ever-threatening deviant. Proper citizens are felt to be menaced or degraded by consorting with him whether or not he has 'paid his debt.'"[21] And though the notion of second chances is a concept deeply rooted within the fabric of American society, extending this hope to the sixty-five million adults with a criminal conviction in this country remains a work in progress. Arbitrary collateral consequences place irrational limitations on the ability of men and women to give back to society at their highest potential and relegate millions of Americans to second class citizenship. I am committed to the presupposition that all men have intrinsic value and are salvageable and I am committed to paving the road of reconciliation from our prisons into our communities. I hope to see you on that road.

Respectfully submitted,

Jesse Wiese, J.D.
Formerly Incarcerated Person

[18] Yellow Ribbon Project, http://www.yellowribbon.org.sg/.
[19] Fiji Corrections Service, http://www.corrections.org.fj/pages.cfm/yellow-ribbon/communities/giving-offenders-second-chance.html.
[20] Building Restorative Justice, http://justicefellowship.org/building-restorative-justice. For more information about Justice Fellowship's Legislator Network, contact Chris Shank at Chris_Shank@justicefellowship.org.
[21] BERNARD COGAN & DONALD L. JR. LOUGHERY, SEALING AND EXPUNGEMENT OF CRIMINAL RECORDS—THE BIG LIE, 61 J. CRIM. L. & CRIMINOLOGY 389 (1971).

Material submitted by the Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Over-Criminalization Task Force of 2014

Statement to the House Judiciary Committee Task Force on Over-Criminalization for its Hearing on Collateral Consequences and Barriers to Reentry
Submitted by the Robert F. Kennedy Juvenile Justice Collaborative:
A Project of the Robert F. Kennedy Center for Justice and Human Rights and the Robert F. Kennedy Children's Action Corps
June 26, 2014

The Robert F. Kennedy Juvenile Justice Collaborative, a project of the Robert F. Kennedy Center for Justice and Human Rights and the Robert F. Kennedy Children's Action Corps that focuses on improving reentry policy and services for young people in the justice system, appreciates the opportunity to provide input about the importance of supporting reentry programs and reducing collateral consequences for young people returning to their families and communities from the juvenile and criminal justice systems.

Each year, 100,000 youth (under 18) leave secure residential facilities, including juvenile justice facilities, jails, and prisons following adjudication. Without careful planning, young people exiting confinement or placement often are discharged to families struggling with domestic violence, drug and alcohol abuse, and unresolved mental health disabilities. Young people often return to neighborhoods with few supportive programs, high crime rates, poverty, and poor performing schools.

To improve public safety and reduce recidivism, all young people need ready access to effective reentry services, such as safe housing and appropriate educational programing. Young people have specific needs and require improved reentry services that help to achieve key youth reentry goals, including school reenrollment, family reunification, mastery of independent life skills, and attachment to pro-social peers. Access to effective reentry services that promote such achievement greatly improves the likelihood that young people will have successful, law-abiding, and productive lives.

Anthony Pleasant, a Poet Ambassador and spokesperson for the Free Minds Book Club & Writing Workshop and a returning citizen after serving ten years in federal prison for a crime he committed at the age of 16, demonstrates these challenges with his story of return. In an excerpt from his record testimony to the House Judiciary Committee's Overcriminalization Task Force, Anthony states,

> In early 2013, before I was released from my last federal prison to Hope Village, a halfway house in DC, I was required to attend one two hour class that addressed general themes related to prison reentry. This class was not personalized in any way, and I wasn't given any specific resources to help ensure that my reentry would be a success and to help put my life back together. I was a teenager when I went to prison, and then I spent the next 45 percent of my life incarcerated – so without help, I didn't know how to live a productive life on the outside. During the last four months of my sentence, which I served at Hope Village, I was given a place to sleep and eat, I had a curfew, and I was told to get a job. However, there was no help or guidance provided for the job search – this was for each person to do on his own, without any support, resources, references, or suggestions.
>
> Finally, once I was discharged from Hope Village, I went to live with my father and we could not get along because of the past negativity between us and so I went to live with my mother. She has multiple sclerosis and is wheelchair bound. Living with her allows me to help take care of her needs. However, my mother lives in public housing – in a single room occupancy facility. Because they know I help take care of her, the managers of her building allow me to stay there – but that could change at any minute. I know that I am lucky because many public housing authorities often over broadly say that all felons are not allowed in public housing.

> These types of policies prevent many ... [young people]... from staying with their families and many are left with no reliable housing option. I am trying to get my own place so that I can feel more secure, but that has not been easy since it will take both money and for a landlord to accept me as a tenant, even with my criminal record.
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> Currently, I am enrolled in a workforce training program at the University of the District of Columbia Community College. I am lucky to be in the program, but I worry that my record will still prevent me from getting a job when I finish training.... I am taking classes in property management and I hope to find a property management job once I complete the program. I want to go on to get my bachelor's degree, and I have heard about scholarships that UDC offers to people who complete these training programs. I really want to do that, but I am worried that my conviction record may get in the way of that opportunity.... [Many youth] have been denied scholarships on the basis of their criminal backgrounds....
>
> In the meantime, I have been trying to find a job.... I was working as a day laborer on a recycling truck, but when I got injured on the job, the company fired me. I have taken my carpentry certification and applied for many construction jobs, but even with my expertise I haven't gotten any calls back, in part because they often ask about criminal records.... With the help of Free Minds [a DC reentry program] and their professional network, I've even gotten so far as the interview stage. Once, I was interviewing for a dish washer position at a restaurant. They told me they loved me and wanted to offer me the job, but they just couldn't because of their company's policy against hiring people with convictions.... Even when we [returning citizens] are doing everything right and people want to hire us, we still don't end up getting the job.

The federal government has taken a significant step to help reduce reentry barriers for all returning citizens, including young people, through Congress' passage and President George W. Bush's signing into law the Second Chance Act in 2008. For youth, the program has helped to provide mentoring and other critical reentry services, as well as supported essential research on best reentry practices for young people. The continuation of this program, including robust funding for it, is critical to help improve the success and reach of effective youth reentry.

However, young people face many barriers that make their successful reentry much more difficult to achieve. For example, access to safe and supportive housing is often unavailable. A 2009 report by the Youth Reentry Task Force of the National Juvenile Justice and Delinquency Prevention Coalition, *Back on Track: Supporting Youth Reentry from Out-of-Home Placement to the Community*, states that,

> Studies of homeless youth demonstrate the connection between youth homelessness and contacts with the juvenile and criminal justice systems. In a recent survey of homeless youth between the ages of 10 and 17, the Wilder Research Center found that 46% had been in a correctional facility, and of those, 44% exited into an unstable housing situation.[1] The Covenant House in New York offers emergency shelter to homeless youth and reports that 30% of the youth they serve have a history of incarceration or detention. The Covenant House data also indicates that 68% of the youth had been living with their families or guardians prior to being incarcerated.[2] A

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[1] Owen, H. and Decker, *G., Overview of Homelessness*; Owen Heineman and Decker Gerrard, *Homeless Youth in Minnesota: 2003 Statewide Survey*.

[2] *State of the city's homeless youth report* (New York: New York City Association of Homeless and Street-Involved Youth Organizations, 2005).

study of youth in runaway shelters in the state of Washington found that 28% were currently involved with the juvenile justice system.[3]

The report also discusses two separate studies that found that one in four youth (25%) released from foster care, a group home, or juvenile detention center spent their first night either in a shelter or on the street.[4] In DC, programs working with returning youth express difficulty in finding appropriate housing for young people, especially in such an expensive city that has a significant public and affordable housing shortage.

Additionally, access to education and career and technical training programs is insufficient. Over the past few years, an increasing number of researchers and policymakers have identified access to education as one of the most important factors in determining successful youth reentry from correctional settings back into the community. Unfortunately, many young people are not able to return to school or continue their education or technical/career training upon reentry without support during this critical transition. Data on this population underscores the problem: in one study, over half of youth in juvenile detention had not completed the eighth grade and two-thirds of those leaving formal custody did not return to school.[5]

Last year, the Robert F. Kennedy Juvenile Justice Collaborative, along with the Juvenile Law Center and other partner organizations, co-convened stakeholders in eight listening sessions across the country to learn more about the challenges of providing quality correctional and reentry education and career/technical training for young people. These listening sessions convened over 100 community leaders and experts from the education, justice, and youth advocacy fields, at meetings held in Los Angeles, Boston, Atlanta, Washington, DC, and Chicago, as well as at the Correctional Education Association Director's Forum, and a conference call for participants who could not attend in person. These discussions provided rich information about frontline barriers to correctional and re-entry education, promising practices, and supportive policies. Please find recommendations -- signed on by 128 organizations, including the National Education Association, the Leadership Conference on Civil and Human Rights, and the American Probation and Parole Association -- that stem from these listening sessions and describe how the federal government can support the prompt connection of youth to the education, training programs and supports needed for successful reentry at:

http://rfkcenter.org/recommendations-juvenile-justice-education?lang=en

Thank you so much for your leadership on and time and consideration of the important issue of reentry and the collateral consequences that impact youth, communities, and families nationwide. We look forward to working with you to ensure accessibility to effective youth reentry programs and a reduction of collateral consequences and other barriers that hinder successful youth reentry. If there is additional information that the RFK Juvenile Justice Collaborative can provide, please do not hesitate to contact Jenny Collier, Collaborative Project Director, at jennycollierjd@yahoo.com or 202-295-7188.

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[3] R.J. Estes and N.A. Weiner, *The commercial sexual exploitation of children in U.S., Canada, and Mexico* (Philadelphia, PA: University of Pennsylvania, 2001). http://www.ssw.upenn.edu/~restes/CSEC.htm.

[4] R. Clark and M.J. Robertson, *Surviving for the Moment: A Report on Homeless Youth in San Francisco* (Berkeley: Alcohol Research Group, 1996); M.J. Robertson, *Homeless youth in Hollywood: Patterns of alcohol use. Report to the National Institute on Alcohol Abuse and Alcoholism (No C51)* (Berkeley: Alcohol Research Group, 1989).

[5] Roy-Stevens, Cory. "Overcoming Barriers to School Reentry." National Criminal Justice Reference Service, U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention. Oct. 2004.

Testimony of Bernard Kerik
At the "Collateral Consequences" Hearing
June 26, 2014
Of the Overcriminalization Task Force
Subcommittee on Crime, Terrorism, Homeland Security, and Investigations
Committee on the Judiciary
U.S. House of Representatives

Mr. Chairman and Members of the Committee:

I would first like to thank you for the opportunity to submit these remarks to the committee today. It is an honor.

When I began my career in law enforcement 35-years ago, I never imagined I would be sitting before you today under these circumstances. While unfortunate events prompt my testimony, what I have to tell you has ramifications for everyone in this room, everyone in our government, and, without exaggeration, everyone in this country, a country I still believe in and love so much.

As someone who has dedicated my entire life to fighting crime, I have had the privilege of running two of the largest law enforcement organizations in the world and have had many unparalleled achievements in policing as well as jail and prison reform, I once believed that I knew and understood our criminal justice system better than just about anyone. But I was wrong.

My law enforcement career began two years after I dropped out of high school at the age of 16, when I joined the U.S. Army,

earned my GED, and served in the Military Police Corps in Korea and at Fort Bragg, North Carolina. I was a member of the Army's Tae Kwon Do Competition Team. I had the honor of teaching defensive tactics at the John F. Kennedy Unconventional Warfare Center to U.S. Special Forces and special operations personnel.

After my military service, I spent four years in various security assignments in the Kingdom of Saudi Arabia. In 1981, I joined the Passaic County Sheriff's Department in New Jersey, where I served as the Commander of Special Weapons and Operations and as Warden of the Passaic County Jail.

In 1986, I joined the New York City Police Department. Following uniformed patrol and plain-clothes assignments in Times Square, I was promoted to detective and assigned to the narcotics division's major case unit. There I earned one of the department's highest honors, the Medal for Valor, for a gun battle with a drug dealer who had shot and wounded my partner. In 1991 I was transferred to the U.S. Justice Department's New York Drug Enforcement Task Force, responsible for overseeing one of the most far-reaching drug investigations in New York history.

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For nearly six years, I served as First Deputy and later Commissioner of the New York City Department of Correction, responsible for overseeing the New York City jail system, including Rikers Island, one of the largest and most violent jail systems in the country. Under my command, the department achieved historic reductions in violence and earned international recognition for violence reduction, efficiency, accountability, and correctional excellence.

In August 2000, I was appointed the 40th Police Commissioner of the City of New York, responsible for 55,000 civilian and uniform personnel and a $3.2 billion budget. My term was marked by dramatic reductions in crime, enhanced community relations, and my leadership of the rescue, recovery and investigation of the attacks on the World Trade Center on 9/11/2001.

In May 2003, following the fall of Saddam Hussein, I accepted a request by the White House to lead Iraq's provisional government's efforts to reconstitute the Iraqi Interior Ministry.

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In the private sector, I have served as a national security advisor to His Majesty King Abdullah II of Jordan and President Bharrat Jagdeo of the Republic of Guyana. I have conducted threat and vulnerability assessments for other heads of state, led crime reduction, national security, and management accountability assessments for the U.S. Justice Department, Trinidad and Tobago as well as Mexico City. I also oversaw the design and building of a super-maximum prison in the Arab region, designed to hold the most deadly and dangerous of the region's radical extremist prisoners.

Then in December 2004, I was nominated by President George W. Bush for Secretary of the U.S. Department of Homeland Security, one of the highest cabinet posts in the nation. One week later, after admitting that I failed to pay payroll taxes on my children's nanny, I withdrew my name from consideration.

After five years of state and federal investigations, on November 5, 2009, I pled guilty to tax and false statement counts, a substantial part of which had to do with my children's nanny. I

was sentenced to 48 months in federal prison and three years probation. I spent three years and 11 days in a federal minimum-security prison camp and five months on home confinement before being released from custody.

When Judge Stephen C. Robinson announced my sentence on February 18, 2010, he left out the most important fact: **a felony conviction carries life-long consequences**. Yes, life-long consequences… no matter how long one's prison stay actually is. The collateral consequences of my conviction, which began within days after my guilty plea, will last until the day I die. And that's not just true for me; that's true for every person labeled a "convicted felon" as our federal criminal justice system stands today. That is a reality that can only change with your courageous leadership and dogged intervention.

Let me paint a picture for you of why this needs your attention, dedication and immediate assistance.

Imagine for a moment an Assistant United States Attorney chooses to investigate and prosecute you, or a member of your

staff, for perhaps using your government cell phone, car, or laptop for personal use…or enhancing your income on a mortgage application…or failing to pay payroll tax on your children's nanny…or missing an income tax filing…or any ethical issue that they could turn into criminal conduct simply because they choose to. Imagine you are driven by addiction or a desperate desire to be united with your family. Imagine you find yourself convicted of a crime, a felony. It would be a first-time offense, a non-violent offense. Not a sexual offense. No guns are involved; no one is kidnapped or even injured. Nevertheless, you are a convicted felon. Would it bother you to be told by your children's school that you could not chaperone them on a class trip or school event because of you are a convicted felon? I know good and decent men, and great fathers that it has happened to. They've also been denied the right to coach their child's sports team… soccer, baseball and football.

Imagine opening your mail to find a notification from your insurance carrier that your homeowner's policy was being cancelled due to your conviction. And also receiving written notice from the U.S. Government's Contracting Office that your are no longer eligible for government work, can never again get a

security clearance, and can't even consult with the government through a DOD contractor, for example.

Then imagine learning that, should your life insurance policy lapse – a policy you, like me, may have had for more than ten years – you will be prevented from obtaining another, as a result of your conviction. How does it benefit society to force your spouse and children to fend for themselves once you are dead and gone?

Maybe you, like me, have served on the board of a non-profit organization. In the aftermath of 9/11, I was one of the founding members of the Board of Trustees of the Twin Towers Fund, a non-profit which raised and distributed more than $216 million to over 600 families related the emergency service workers killed on 9/11. However today, as a convicted felon, I cannot be the head of my own non-profit for helping restore people's rights with convictions because of my own conviction. You could not either.

Do you know that it is nearly impossible for a convicted felon to rent an apartment? This is because most landlords and leasing companies run criminal background checks on applicants

and use information about prior arrests or convictions as a basis for denying housing, even if it is out dated or erroneous. I know of a man with a 30 year old, non-violent and non-sexual crime conviction, who attempted to rent an apartment and was denied five times, losing a total of $1,100 in "application fees" before he could no longer afford to apply for leases.

Congress, the courts, and our prison systems urge former offenders transitioning back into their communities to obtain successful employment, but our laws operate as obstacles that prevent felons from getting jobs. Are you aware that should you apply for a U.S. Small Business Administration (SBA) loan in an attempt to work and take care of your family, your loan will be denied? I know someone that had already been approved for a $500,000 unsecured SBA-backed loan, that was subsequently denied once they become aware of his prior conviction. You, too, could not get a loan.

Given that more than half of those incarcerated in the U.S. prison system are uneducated and many are illiterate, they need all the help they can get upon release from prison, but obtaining

student loans for a convicted felon is close to impossible. No matter who you are, as a convicted felon, you seldom qualify for student loans.

And imagine this: If you and your spouse want to adopt a child, forget it. Convicted felons are excluded from being adoptive parents. I personally know a couple who cannot have children, and I can't think of anyone better to be a parent, but they cannot adopt due to a felony DWI conviction 12 years ago.

In many states, you can forget about obtaining a real estate license, barber's license, EMT certification, law license, or CPA certification. I would not be allowed to do so, and if you were a convicted felon, you would be denied also. In fact, in just about any job regulated by the government, a convicted felon should not apply. Surprisingly, do you know that if you are convicted of a felony, you cannot be a garbage collector in many cities around the country?

Like you, I have served my country. I have nearly died more times that I can count, protecting the American people and

defending our Constitution, yet today, I do not have the right to vote, and will not for at least another two years, even after already serving three years and eleven days in prison. In some states, a convicted offender is prevented from voting forever. This was started after the Civil War to disenfranchise blacks, and I can assure you today that this works really well. Black and Hispanic felons are discriminated against even more than White felons. Ask them. They will tell you their story.

Over the course of my 35-year career, I have rescued people from burning buildings, been stabbed, shot at, and saved my partner in a gun battle. I have survived the terror attacks on 9/11, and a bombing plot in Iraq. I have been the target of numerous death threats, seized tons of cocaine and millions in drugs proceeds from the Cali Cartel, and brought cop killers, Colombian drug lords and Iraqi terrorists to justice. I have received more than 100 awards for public and extremely heroic service, including the New York City Police Department's Medal for Valor, plus 29 other medals for excellent, meritorious and heroic service. I have also been commended for heroism by President Ronald Reagan, and received the DEA Administrator's Award from the U.S. Justice

Department, two Distinguished Service Awards from the U.S. Department of Homeland Security, The Ellis Island Medal of Honor, and an honorary appointment as Commander of the Most Excellent Order of the British Empire by Her Majesty Queen Elizabeth II.

I have carried a firearm in the service of my country since I was 18 years old. I have actually used that weapon to save the lives of others. However, I can no longer possess or even have access to a firearm of any kind, hunting or otherwise, for the rest of my life, even though my conviction had nothing to do with violence and was non-violent!

Lastly and undeniably, the most devastating, embarrassing and heartbreaking of any other collateral consequence, is one that is so repugnant that it defies description.

We often talk about the collateral cost of a conviction, as it relates to the offender, and their inability to obtain work, or how they are negatively impacted on so many levels as a result of their conviction. However, I believe the ones who get punished the

most are the silent, out of the spotlight ones--the children of those incarcerated and ex-offenders.

Despite those who are incarcerated being encouraged to stay close to their families, to parent their children, to be a father or mother, it is nearly impossible to do so. And even when they are released and face all these barriers, it is difficult for families to rebuild, to reconnect, to gain the ground they lost.

Does the punishment imposed on convicted felons and, more so, their children fit the crime? I would hope you would agree that it does not.

The system today insures personal, professional, and family disconnection and possibly dissolution. Is that the purpose of our justice system? I didn't think so, but the reality is that a felony conviction is just that.

There are 2.5 million people in prison today, about 70% of which are in for drug related crimes, and many are uneducated…and many illiterate. About 40% of the prison

population prior to incarceration worked, paid taxes and took care of their families like I did. But because of collateral consequences, they cannot.

In my case, the cost to the American taxpayer for my three-year incarceration was not just $28,000 a year as the Bureau of Prisons reports. The cost to the American taxpayer was in the millions because I was not working, paying taxes, supporting my family, putting money into the economy…and there are thousands just like me. Worse than that, that cost continues today, more than a year after I was released from prison, and in all probability will continue for years to come.

I cannot find work, and if I cannot, those who are not left with the privileges that I have been blessed with, hundreds of thousands a year – will face even greater odds of remaining unemployed, guaranteeing higher recidivism and destroyed families.

If I can't rebound with any sort of success, then those less fortunate most likely never will either.

And for many, their only hope for survival--to live, to support their families, to simply have a life has been dramatically taken away from them.

Is that how the system is supposed to work? I think not and hope you will side with me and millions of other Americans who are being crippled by this archaic system.

For any American that believes that once you've paid your debt to society after a felony conviction, you are made whole, or given a second chance in life, they are dreadfully wrong.

The truth is that your debt is never paid, no matter how honorable a life you lead afterwards. No matter what steps you take to be better than your past, you cannot escape it.

The collateral consequences of a felony conviction are grave. They have and continue to erode the very fabric of our society. Every day we prove we are not a country of "second chances" or "rehabilitation" or "forgiveness" as we are fond of

saying.

Those are empty words.

If we truly want to better society, to reduce recidivism, to strengthen families, to have a foundation of justice instead of injustice, we must act. And act with courage and conviction... no matter what. Self-interest or political gamesmanship cannot be more important than our families, our society, our country. America is a country we all love. Let's show her that, not by empty words and platitudes, but by our actions.

Distinguished men and women of this committee, you have the power to lead Congress in replacing injustice with justice. In closing, I ask you to work with me to help the millions of non violent felons, who have served their time yet continue to be unjustly punished by the system.

Let's join together to right this wrong, to bring justice to injustice and to stop the erosion of our families, our communities, and the very fabric of our society.

Let's do this not for our legacies or ourselves. Let's do this because it is the right thing to do. Let's do this for our children. Let's do this for our future. Let's do this for the United States of America.

Thank you.

Testimony of Piper Kerman
Hearing before the Overcriminalization Task Force Subcommittee on Crime, Terrorism, Homeland Security, and Investigations

Committee on the Judiciary
"Collateral Consequences"
Thursday, June 26, 2014

Chairmen Goodlatte and Sensenbrenner, Ranking Members Conyers and Scott, and distinguished members of the Task Force, I want to thank you all for convening this important hearing.

I spent 13 months as a prisoner in the Federal Bureau of Prisons system from 2004-2005, with most of my time served at the Federal Correctional Institution in Danbury, Connecticut. If you are familiar with my book, *Orange is the New Black*, you know I'm the first to acknowledge that unlike many prisoners, I have the resources and support to take my own experiences in prison and use them to try to make critical improvements to this country's criminal justice system. Since my release, I have worked with many women who are involved in the criminal justice-involved system and need help advocating for changes to our criminal justice system they need to be safe and to get back on their feet upon their release from prison or jail. This has included advocacy against displacing more than a thousand female federal prisoners in the Northeast to BOP prisons far from their children, testifying before the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights on the misuse of solitary confinement on women prisoners, promotion of alternatives to incarceration for low-level female

offenders, and visiting prisoners in facilities in many states, among other activities. I also serve on the board of the Women's Prison Association, the longest-serving community organization that works with criminal justice involved women in the United States, founded in 1845. I submit this testimony to the Task Force today in that capacity.

Although men are incarcerated at a much higher rate than women---almost 14 times higher, in 2012--- women are a much faster growing segment of the United States' incarcerated population.[1] The collateral consequences of incarceration have a disproportionately severe impact on female defendants and prisoners. Between 2000 and 2009, the number women in state or federal prison rose by 21.6%,[2] and by nearly 800% since 1980.[3] There are now more than 205,000 women in jails and prisons throughout the country, and over 1 million on probation. This has a distinctly destructive effect on these women's families and

[1] OLIVER ROEDER, *JUST FACTS: ACTUALLY, ORANGE REALLY IS THE NEW BLACK* at 2, BRENNAN CENTER FOR JUSTICE (June 16, 2014), http://www.brennancenter.org/blog/actually-orange-really-new-black.

[2] MARC MAUER, THE CHANGING RACIAL DYNAMICS OF WOMEN'S INCARCERATION, THE SENTENCING PROJECT 6 (FEB. 2013).

[3] JULIE AJINKYA, THE TOP 5 FACTS ABOUT WOMEN IN OUR CRIMINAL JUSTICE SYSTEM, CENTER FOR AMERICAN PROGRESS (MAR. 2012), *available at* http://americanprogress.org/issues/women/news/2012/03/07/11219/the-top-5-facts-about-women-in-our-criminal-justice-system/.

communities.[4] It is important to consider all the harms that result from the incarceration of women, particularly given that women are unlikely to commit crimes of violence; two-thirds of women in prison or jail are there for a non-violent offense, often a very low-level crime.[5]

When I work up at 6 A.M. March 4, 2005, I knew it was my release day even though the staff of the federal Metropolitan Correctional Center in Chicago where I was being held would not confirm that I would be freed that day. At 11:00 A.M. a correctional officer told me to pack out and he sent me down to receiving and disbursement to be processed out of federal custody. The facility had no women's clothes and instead gave me the smallest set of men's clothing that they had, a windbreaker to shield me from the Chicago winter, and $28. A guard escorted me down an elevator to the ground floor, showed me to an alleyway door, and told me I was free to go. I was 800 miles from my home in New York City.

I was exceptionally fortunate, because at the front door of that jail, my fiancé was waiting impatiently to take me home to New York, to a safe and stable place to live. I could only think about the sharp contrast of my good fortune to the

[4] JULIE AJINKYA, RETHINKING HOW TO ADDRESS THE GROWING FEMALE PRISON POPULATION, CENTER FOR AMERICAN PROGRESS (MAR. 2013), *available at* http://americanprogress.org/issues/women/news/2013/03/08/55787/rethinking-how-to-address-the-growing-female-prison-population/.

[5] WOMEN'S PRISON ASSOCIATION, INSTITUTE ON WOMEN & CRIMINAL JUSTICE, QUICK FACTS: WOMEN & CRIMINAL JUSTICE (2009), *available at* http://www.wpaonline.org/wpaassets/Quick_Facts_Women_and_CJ_Sept09.pdf.

situations of many of the women with whom I had lived for 13 months during my incarceration. Prisoners think and plan with great anxiety for their release to freedom. Many of the women who I served time with described their plans to head straight to a homeless shelter after their release in hopes of a bed and a roof over their heads. For some of them, this was their only option – their time served in the Bureau of Prisons had effectively severed their connections to their families, friends and communities.

For other women, however, entering the shelter system was the first step in a crucial journey to try to reunite with their children. The vast majority of women in prisons and jails are mothers, and most of those mothers have children under the age of 18. According to a United States Department of Justice Special Report in 2010, there are at least 1.7 million children with an incarcerated parent.[6] Incarcerated mothers are far more likely than incarcerated fathers to have lived with their children prior to incarceration by a rate of 55% to 36%.[7] More importantly, these incarcerated mothers are more likely to be the head of a single parent household, accounting for 42% of women in state prison and 52% in federal

[6] DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN at 1(Aug. 2008, rev. March 2010), *available at* http://www.bjs.gov/content/pub/pdf/pptmc.pdf.

[7] NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 260 (2014).

prison; fully 77% of them were their children's primary caregiver as well.[8] Half of the women in prison are housed more than 100 miles from their children and nearly 80,000 women will not see their children at any point during their incarceration.[9] Of minors with an incarcerated parent in 2013, more than 25%---over 400,000 children---were age 4 or younger.[10] Simply put, having a mother thrown in jail creates a significantly higher likelihood that the family unit will be thrown into utter disarray and have a direct, dire impact on these women's children.

If imprisoned women are fortunate enough to have family members who are willing to care for their children while they are incarcerated, they will take those steps. But even with familial support, children who have a mother in prison are more likely to be disadvantaged in terms of poor education and financial circumstances. They are also more likely to fall prey to domestic or substance

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[8] ID.

[9] THE SENTENCING PROJECT, TRENDS 1991-2007: D EP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INCARCERATED PARENTS AND THEIR CHILDREN at 8 (Feb. 2009), *available at* http://www.sentencingproject.org/doc/publications/publications/inc_incarceratedparents.pdf.

[10] OLIVER ROEDER, *JUST FACTS: ACTUALLY, ORANGE REALLY IS THE NEW BLACK* at 4, BRENNAN CENTER FOR JUSTICE (June 16, 2014), http://www.brennancenter.org/blog/actually-orange-really-new-black.

abuse and to develop behavioral problems or mental illness.[11] There are direct correlations between children who face these negative outcomes, especially educational deficiencies and the development of substance abuse or behavioral problems, and future risk of incarceration, perpetuating a generational cycle of poverty and incarceration.[12] Fragile families are too often decimated by a criminal justice system that fails to promote public safety in a thoughtful or meaningful way, and that failure comes at great cost to taxpayers.

Children who are able to stay with extended families are the lucky ones, even with the panoply of hurdles that they face with an incarcerated mother. Since mothers are more likely to be the sole parent, their children face a far greater likelihood of being ushered into the foster care system, with the possibility that these mothers may not regain custodial rights even after they have served their sentence. At this point, there is a threefold societal cost on maternal incarceration: the loss of the mother's economic output, the actual cost of incarceration, and the programmatic costs related to putting children in foster care. However, this pales in comparison to the emotional distress and other risks these children suffer.

When a mother is locked up, her children are five times more likely to enter

[11] ID. at 262-63, 274.

[12] ID. at 274.

into the foster care system than when a father is sent to prison or jail.[13] Youths in the foster care system are more likely to run away, become homeless, and remain homeless for long periods of time.[14] Additionally, children who age out of foster care have limited to no income or housing support and end up on the streets.[15] In this vein, one-in-three homeless teens will be lured into child sex trafficking within 48 hours of leaving home;[16] the Los Angeles Police Department estimate that 59% of juveniles arrested for prostitution come from the foster care system.[17]

Whether their children are in the care of family or wards of the state during their incarceration, many women enter the homeless shelter system as the first step in a long, torturous road to securing safe and stable housing that is necessary for them to resume responsibility for their children and regain their parental rights. The Women's Prison Association, where I serve on the board of directors, delivers a host of direct services and advocates for common sense criminal justice policy,

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[13] THE SENTENCING PROJECT, TRENDS 1991-2007: D EP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INCARCERATED PARENTS AND THEIR CHILDREN at 9 (Feb. 2009), *available at* http://www.sentencingproject.org/doc/publications/publications/inc_incarceratedparents.pdf.

[14] NAT'L CONF. OF STATE LEG., HOMELESS AND RUNAWAY YOUTH (OCT. 2013), *available at* http://www.ncsl.org/research/human-services/homeless-and-runaway-youth.aspx.

[15] NAT'L CONF. OF STATE LEG., HOMELESS AND RUNAWAY YOUTH (OCT. 2013), *available at* http://www.ncsl.org/research/human-services/homeless-and-runaway-youth.aspx.

[16] FAQS: HUMAN TRAFFICKING STATS, TRAFFIKCINGHOPE.ORG, *available at* *http://www.traffickinghope.org/faqsstats.php*.

[17] ABBY SEWELL, MOST L.A. COUNTY YOUTHS HELD FOR PROSTITUTION COME FROM FOSTER CARE, LOS ANGELES TIMES, Nov. 27, 2012.

and the program work that has been central for most of the organization's long history is providing safe and stable housing to women returning to the community from prison or jail. This is the essential starting point for successful reentry because absent a safe place to live, the other necessities for a return to citizenship – work, health, contribution to the community – are near-impossible.

For women returning home from prison or jail, attaining safe housing may prove particularly difficult, but is critical for these reasons: (1) 85-90% of women who enter the prison system have a history of being domestically or sexually abused;[18] (2) 59% of girls entering the juvenile penal system are runaways fleeing physically or sexually abusive home situations;[19] and (3) similarly---and akin to the statistics of male prisoners---upwards of 80% of female inmates suffer from substance abuse, mental illness, or both.[20] Further, women and girls in custody are at risk of being sexually victimized while in prison, most frequently by a prison staffer or contractor.[21] The violence and abuse that often contributes to women's crimes may be waiting for them upon release. Without a safe place to live, these

[18] PRISON RAPE ELIMINATION ACT OF 2003 (PREA), AMERICAN CIVIL LIBERTIES UNION (APR. 29, 2011), *available at* https://www.aclu.org/prisoners-rights-womens-rights/prison-rape-elimination-act-2003-prea.

[19] THE TOP 5 FACTS, *supra* at fn. 2.

[20] ID.

[21] ID.

women are at great personal risk, and also have an increased risk of re-offending.

Just as the policies of the Bureau of Prisons and other correctional system work to sever the ties that people in prison have to their families, friends and communities, after release a host of bad laws and policies affecting housing make the essential first step of securing safe and stable housing very difficult for most people coming out of the criminal justice system. Public housing is governed by federal law and regulation, but local Public Housing Authorities ("PHAs") administer these programs and enjoy enormous discretion to set policy and make decisions, including denying and evicting ***any*** household member based upon drug-related criminal activity, violent criminal activity, or the catch-all of "other" criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents, owners or others on or in the immediate vicinity of the premises.[22]These sweeping regulations grant PHAs broad discretion to bar entire households even when no one in the household has been convicted of a crime. In the private housing context, many landlords and rental agencies employ a variety of resources to aid them in screening housing applicants. However, there is no uniformity or guarantee of reliability among those services as they do not necessarily provide up-to-date or accurate data on arrests or convictions, nor are applicants ever notified by the landlord of any adverse action

[22] 24 C.F.R. § 960.204(a).

considered or taken as a result of this potentially inaccurate and incomplete data.

After a woman released from prison or jail finds a safe and stable place to live, she must immediately turn her attention toward finding legal, legitimate work that will pay her enough to support herself and any dependents. The more wages a person earns in her first job after release, the lower her chance of going back to jail or prison: re-incarceration is a mere 8 percent for former prisoners who earned more than $10 per hour. It climbs to 12 percent for those earning between $7 and $10 an hour and jumps to 23 percent for those who are unemployed.[23] For people with a felony conviction, securing the first good job after release is a profoundly difficult thing to do, regardless of their past work experience. In my public life as an author who has written about my own incarceration, this is overwhelmingly the primary thing I hear about from other people who have been incarcerated: their quest for work, the countless rejections, the despair over this limitation on being able to be productive and contributing members of their family and society.

While I was incarcerated, Dan Hoffman, a friend and president of a technology company in New York called M5 Networks, would visit me and say, "Hurry up and get out! The marketing department needs you!" Upon my release,

[23] URBAN INSTITUTE JUSTICE POLICY CENTER, EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASES IN THREE STATES at 8(Oct. 2008), *available at* http://www.urban.org/UploadedPDF/411778_employment_after_prison.pdf.

Dan offered me a job. I started one week later. He and my coworkers at M5 gave me a second chance. It is impossible to overstate how important his actions were to my subsequent success. In addition to an income and health care coverage, the job offered a sense of normalcy that I began to recover quickly after my incarceration – an experience that by design is deeply traumatizing. The opportunity to work and earn a living wage makes successful re-entry possible. My return to the workforce was an essential step in my transformation from a federal prisoner back to a citizen. But too often government policies and public biases make this step elusive for many people returning home from prison or jail.

Most of the women I served time with did not have the opportunities I enjoyed before prison – a stellar public education, a college degree, 10 years of professional experience in the mainstream economy before I was sent to prison. Most women in American prisons and jails lack a high school diploma and lived in poverty before their incarceration. Compounding the combined sexism and racism faced by all women of color when seeking employment, women leaving prison are disadvantaged by a variety of other factors when seeking employment, such as single status, having young children, mental health challenges and histories of substance abuse. One of the largest barriers to finding meaningful employment is the fact that many offenders have completed only low levels of education, with 51 percent of offenders having a high school diploma or GED compared to 76 percent

of the general population.[24]

Many women prisoners were involved in the underground economy prior to incarceration, including the drug trade, illegal labor, or too often in the network of sex trafficking of women and girls. Women who enter the prison system often have lower levels of education than are typically necessary in the current labor market, and many have little mainstream job experience prior to their incarceration. Women are more likely to report having no income in the 30 days prior to incarceration than male offenders.[25] After release, women seeking employment in order to become self-sufficient, contributing members of their communities have a difficult time overcoming their lack of education and job experience combined with the stigma attached to their offender status. Additionally, the training women gain through prison jobs and vocational programs, which are overwhelmingly geared towards male prisoners, often does not match with the skills needed for women's employment when they return to their communities from prison or jail. My experience as a prison electrician and construction worker has not transferred to my best opportunities for employment post-release.

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[24] S. LoBuglio, "Time to Reframe Politics and Practices in Correctional Education." *The Annual Review of Adult Learning and Literacy,* vol. 2. (2001). www.ncsall.net/?id=560.

[25] R.H. Peters, A.L. Strozier, M.R. Murrin, and W.D. Kearns. "Treatment of Substance Abusing Jail Inmates: Examination of Gender Differences." Journal of Substance Abuse Treatment 14(4). (1997).

Women offenders are both underemployed and unemployed, and their employment prospects usually include low-wage, entry-level occupations with little chance for advancement. Even those with the skills or education for a better job are often challenged by discrimination against those with a criminal record and responsibilities as the primary child caregiver.

I wish that I could report that I witnessed a substantive effort on the part of the BOP to rehabilitate its prisoners, to systemically take the time of their sentences and direct it towards productive efforts that are proven to reduce recidivism, like education and employment training. But that is simply not what I experienced during the year I spent as a federal prisoner. Opportunities for furthering education and substantive work experience with a clear connection to the outside economy are extremely limited, available to only a tiny fraction of the prison population. Most women worked on the maintenance of the prison facilities, as orderlies, groundskeepers, plumbers or similar laborers. I worked in the construction shop. Working while incarcerated is very important, but whenever possible, female prisoners should be directing their energy into developing skills that are directly tied to concrete job opportunities outside of prison.

Fortunately, there are remarkable organizations like the Center for Employment Opportunities (CEO) whose decades of experience and evidence-

based practice will get 3,000 former prisoners back to work this year, and helps them stay successful in the workforce. In the past decade, CEO has placed more than 10,000 formerly incarcerated individuals in full-time employment.[26] But with 700,000 people coming home from prison and jail every year in the United States, the government and private sector must take the proven work of groups like CEO to a much larger scale.

Even for women who successfully return to their communities in terms of establishing their families in safe and stable places and entering the workforce, they face formidable legal barriers to ever regaining their full rights of citizenship. In four states in this country, people with a felony record are never allowed to vote.[27] Eight other states disenfranchise certain categories of ex-offenders and/or permit application for the restoration of rights for specified offenses after a waiting period, for example, five years in Wyoming and two years in Nebraska.[28] Each state has its own process for restoration of voting rights. However, most of these procedures are so onerous and cumbersome that relatively few individuals avail

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[26] *See* http://ceoworks.org/services/job-placement-information/

[27] THE SENTENCING PROJECT , *FACT SHEET: FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* (Apr. 2014), http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf.

[28] ID.

themselves of them.[29] An estimated 5.85 million Americans, or one in 40 adults, have currently or permanently lost their voting rights as a result of a felony conviction.[30] This has had a racially disproportionate impact: nearly 8% of black adults (2.2 million) are disenfranchised as compared to less than 2% of the non-black population.[31] In Florida, Kentucky and Virginia, more than 1 in 5 blacks is disenfranchised.[32] Without a vote, that individual, that community and that viewpoint are without participation and power in the democratic process. Losing the right to vote is essentially a civil death. As a resident of the state of New York, I am allowed to vote, and do so at every opportunity. However, if my family moves to another state that has its own distinct laws and procedures, I will very likely lose that right and responsibility.

700,000 people are released from prison and jail every year in the United States.[33] 95% of all prisoners will eventually return to their communities.[34] If these

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[29] ID.

[30] ID.

[31] ID.

[32] ID.

[33] COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, REENTRY IN BRIEF (May 2011), *available at* http://csgjusticecenter.org/documents/0000/1059/Reentry_Brief.pdf.

[34] JEREMY TRAVIS, AMY L. SOLOMON & MICHELLE WAUL, URBAN INSTITUTE, FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY (2001), *available at* http://www.urban.org/pdfs/from_prison_to_home.pdf.

returns are to be safe and successful, the federal government must take every possible step to remove collateral consequences of a felony conviction for all people, and must urge state and local governments to do the same. Once a person has paid their debt to society, they must be able to regain their rights of citizenship and fulfill their human potential and their personal responsibilities. This is the only way for America to truly be a safe and just society.

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Testimony of Lamont Carey
Before the Overcriminalization Task Force
Hearing on Collateral Consequences
June 26, 2014

On behalf of all returning citizens and the millions of prisoners who will be released at some point in their lives, I thank you for this opportunity to address these critical collateral damage issues.

I am here to address this crisis and to inform you all on the collateral damage that has devastated the lives of millions of previously-incarcerated Americans. I am here seeking to join forces with you to end the collateral damages and its consequences that continue to devastate communities of color and the ripple effects it has on the quality of life and safety of all American communities.

Legislative solutions are necessary. Access to temporary housing, access to affordable housing, employment opportunities, quality education, the restoration of voting rights, child care, and child custody are what returning citizens need in order to successfully transition back into communities around this great nation as productive and contributing members of society.

I. CODES OF CONDUCT

I'd first like to briefly tell you about my incarceration and the collateral consequences I experienced before my release from prison.

I was a juvenile that was charged as an adult. I plead guilty to avoid being found guilty by a jury and receiving a life sentence. And yes I was guilty but I didn't realize that every aspect of my life would be torn apart.

Like so many other young men and women who become wards of the state, we have to learn to survive in predatory environments amongst some of the deadliest individuals housed in prisons all over the country. We had to learn to navigate two separate codes of conduct: The institution rules which if violated would result in us being sent to a segregation unit where we lose all contact with the general prison population; and the other rules were the convict rules. If these rules were violated, they resulted in extreme violence. It is almost impossible to not violate either set of rules because if you abide by one you are basically violating the other. Example: If you are assaulted by a prisoner and you inform a correctional officer you are adhering to the institution's rules but violating the prison code of conduct by betraying another inmate. Usually following the institution rules result in you being segregated "for your own protection" while the institution investigates the incident. You are then housed in another section of the prison where you will be labeled a "Snitch" by other prisoners for providing information to the correctional officers. Now your life is in jeopardy by other prisoners for violating the convict code of conduct. So most prisoners choose to abide by the convict code because the consequences of following the institution's code are deadlier.

I mention this not to excuse any behavior or shift accountability, but only as insight into the mindset of prisoners as they begin to serve out their sentence. We are in a constant state of

fear until we fully understand how each set of rules operate. Typically a new prisoner goes through a phase of violence, whether being assaulted or assaulting someone else in order to demonstrate a disregard for the institutional code of conduct and affirming their commitment to the convict code. For many this goes on for years and sometimes decades and becomes a way of life. But for those hundreds of thousands of men and women who learn to navigate without violating either set of rules, they can begin to focus on preparing for their reentry into society.

II. DISCONNECTION WITH LOVED ONES DURING INCARCERATION

Preparing for a successful reentry is one of the hardest goals that prisoners face. It seems almost impossible to do because you are doing it alone. We go through a period of anger, fear, rejection and depression because we feel we were abandoned by the people who loved us unconditionally. Imagine the people you love the most ending their relationship with you. You make attempts to call them but they have placed restrictions on their phones so you can't call. You write to them weekly and they never respond. They never visit you. I felt so lost.

Because of this you begin to build bonds with other prisoners and you all become a family unit, a support system. You talk about the additional burdens placed on your families with the high cost for accepting your phone calls. Many of our families were and remain on public assistance. They are living below the poverty level so they cannot financially afford the cost of paying a minimum of 50 cents a minute to talk to us. They don't want to answer the phone and have us hearing them telling the operator that they are refusing to accept the charges for this call or they may feel embarrassed to tell us they cannot afford the call so they make a request to the phone company to restrict prison phone calls. This is heartbreaking for both parties but our families do not have any other option. Some families go into debt and eventually their phones are disconnected as a result of them not having the money to pay the phone bill. No matter what, the prisoner still feels rejected.

We (the prisoners) talk about how being hundreds of miles away from home makes it impossible for family members to visit. It is impossible for many of our family members to afford a plane ticket or bus ticket to visit us when they are barely able to afford to get by financially themselves. We come to the realization that many of our relatives cannot read and write or can't afford to constantly purchase stamps. Once prisoners realize all of this, they begin to eradicate the anger and replace it with a determination to transform our lives. It inspires us to want to become providers and caretakers of our families. We become eager to reenter society. This is when we start to look at ways to get out of prison through appeals and petitioning the court to reduce our time. This is also when we begin to take advantage of the institutional programs, if any exist.

III. SECURING HOUSING AS A FIRST STEP TO REENTRY

Finding a place to call home is one of the most critical needs returning citizens have when preparing for release from prison. It is also our first experience with collateral consequences. In order for us to be released on parole (in the state system) or supervised release (in the federal system), we need to prove that we have somewhere to live.

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The majority of incarcerated men and women, especially those of color, come from urban environments with subsidized housing. It is a fact that many of us are denied the opportunity to return to the same communities where we were born and raised because of our criminal convictions due to bans from public housing authorities on those with prior convictions.

Where do we go when all of our families are living in these communities? How do we even get out of prison if we don't have a place to live? Are we to be released to join the ranks of the homeless? Shelters all over this country are full of men and women who are not permitted to live in communities they can afford nor are they permitted to receive subsidized housing because of a prior conviction, no matter how long ago that conviction was or what that conviction was for. There are thousands more who are finding a corner under a bridge, in an alley, or in an abandoned building to live. They are immediately in violation of the law because they are deemed trespassers and loitering. But where do they go when they cannot go back to the home where their families want them to be?

IV. THE NEED TO SECURE EMPLOYMENT TO SURVIVE

For those of us who are released from prison and eventually find housing, we face another challenge. We have to find a job. The truth is we have been out of work for the duration of our time in prison. To employers this absence of a work history is an immediate warning sign. Add to that the lack of a skill-set that can be applied to a job, which disqualifies many from apprenticeship and other vocational programs.

But before we even reach these barriers, we have to decide whether to truthfully answer the question on the job application that asks "have you ever been convicted of a felony?" Being truthful can keep us from getting past the application stage as it operates as an immediate disqualifier. I know many returning citizens who were committed to living a new and honest life. So they would truthfully answer that question with a "yes," which meant that, in most cases, they were never called in for a job interview. Those that were fortunate enough to be able to do an "on the spot" job interview find themselves explaining their conviction to the interviewer, who may appear eager to listen but ultimately explains that company policy prohibits them from hiring a convicted felon.

Experiencing these rejections enough times begins to destroy our commitment to honesty as it is replaced with a desperation to survive. We start to rationalize that we are not breaking any laws. We start telling ourselves that this little lie is to keep us from breaking laws or returning to our old criminal past. We are trying to remain law-abiding. So oftentimes when we reach that question on the application we check "no" in the hopes that they will not do a background check before they hire us, allowing us the opportunity to work long enough to get several paychecks so that we are able to take care of our families for a little while longer. Or we hope that maybe they will love our work so much that they won't fire us when they find out about our backgrounds.

With every denial of gainful employment, our hopes and our self-esteem decreases. We begin to feel rejected and like outcasts in our own community. This is even though we are not the

same individuals who committed those crimes years ago. It becomes harder to understand why employers cannot seem to recognize that by us being here applying for this job is the truest indicator that we are not that dated felony conviction.

How are we supposed to take care of ourselves? How do we provide for our families? How are we to continue to resist the temptation of going back to the criminal lifestyle where we know we can make some money? Most of us returning from prison want to live productive lives and be an asset to our families, communities and country but the collateral damage makes it such a depressing and almost impossible journey. Most returning citizens return back to prison within three years of their release. It is not because we are institutionalized. Rather, it is because we encounter so many hurdles, which we are unable to overcome, to the point we begin to believe we have no other options but to become criminals again in an effort to survive.

I eventually decided to become an entrepreneur and that allowed me to avoid many of those hardships that my peers face with employment. Entrepreneurship gave me an opportunity to invest in myself in the same way I would have dedicated myself to an employer. Entrepreneurship gave me the responsibility I desired. It also allowed me to become a taxpayer. Unfortunately, this option is not available to many of my peers. Many just want a job that they love doing or one that will hire them.

Removing the barriers to employment can help to improve so many communities and lives. "Banning the box" is good for the individual, and it is a good thing for the economy.

V. EDUCATION

One of my biggest accomplishments to date is when I successfully passed the G.E.D. test. That accomplishment shattered all negative perceptions I had about myself and what I could accomplish with the rest of my life. It built my confidence so high that I believed I could really make my dreams come true. I read my first novel from cover-to-cover after getting a G.E.D. I became hungry for knowledge and new experiences.

Compare this to how I grew up. I grew up believing that I wasn't good enough to compete or succeed in a racially biased society so I didn't try. I chose crime because it was instilled in me that it was my only way out of the projects.

Now I have this G.E.D. A high school diploma. It was not an equivalent to me. It was a high school diploma to me. I decided that I was going to enroll in the college program and earn me a degree. None of my friends or family members had a college degree. This was my opportunity to prove to myself and everyone else that I was special, smart, and ready to compete against anyone. So I signed up for the college program.

My hopes were dashed when I later learned that the government stopped the funding for prisoners to receive grants to attend college in prison. "Why would they do this," I asked myself. All of the prisoners I knew who earned degrees in prison became civilized. Their mannerisms were different. They spoke different. They interacted different. When they spoke about their future, I believed them. I wanted that level of confidence. They told me that the government

ended the funding because working families had to sacrifice to send their children to college while criminals like me were getting a free education. I understood their argument, but I was frustrated that they could not see the positive effect college and learning had on people like me who didn't previously have access to these opportunities when they were free men and women.

There is a lot of good that can come out of a prisoner getting an education. This education can transform individuals. This new understanding of life and how processes work can be a benefit to society. Every returning citizen that I know who has earned a college degree in prison has become a productive member of society. They are successful and adding value to their families, communities and the country as a whole. Those of us who wanted to pursue a college degree in prison are left wanting. The doors to those opportunities have closed.

VI. THE RIGHT TO PARTICIPATE AND BRING ABOUT CHANGE

As a juvenile, my peers and many of our relatives viewed voting as a waste of time. The impression that I was left with was that voting didn't help people of color advance. We were told politicians lie to us then betray us after they were elected. The examples that were given of this betrayal were the conditions of our neighborhoods, the deterioration of our schools, the neglect of our seniors, the lack of resources for our children, the abuse of authority we receive from the police and the biases people of color receive when it comes to employment.

This belief was adopted by me before I was even eligible to vote because I lived in the roach-infested apartments. I saw my mother and her friends desperately seeking employment only to return home after each failure. The times she secured employment it didn't last long because of termination or fear of losing government assistance. The jobs were minimum wage if not lower so she couldn't jeopardize the assistance she received from the government. She had five kids to feed. This kept us below the poverty line. These beliefs made it easy for me to embrace the views of the people in my community who felt trapped in hopelessness.

It wasn't until years later in prison that I began to understand that not voting made the inhumane conditions in our communities the norm. It was in prison that I realized if the members of my community participated in the voting process and demanded and supported our elected officials that we could have seen drastic improvements in our communities. My mother's peers didn't understand the power they possessed as a collective. They were lost in their individual issues and not recognizing it was the same issues as the others.

Fortunately, I live in Washington, DC where I have the right to vote immediately upon my release. Millions of returning citizens in many states will never have that right to cast a ballot. They will never have the right to be active in assisting a candidate win an election by casting their personal vote. There is power, responsibility and fulfillment in being able to help decide who creates the laws that govern our lives and the lives of our families. Being able to vote has made me truly feel American pride. Too many of my returning citizen peers will never know what it feels like to cast a vote unless the government gives them this right back.

I have never known a criminal looking forward to abusing his or her voting privileges. A democracy is what makes this nation so unique. The citizens come together as individuals to decide who will lead us into the future. Returning citizens in too many states are denied the right to vote as if we live in a dictatorship.

As a conscious prisoner, I was eagerly looking forward to casting my vote. To finding politicians who are committed to addressing the issues that affected my community. I have been actively using my right to vote for almost 13 years now. I have been using my voice to support officials, community organizations and representatives who want to create opportunities for communities of color.

VII. CHILDCARE

I have an amazing 7 year old son. At the moment he wants to make sure that animals are safe and able to comfortably live their lives. His goal is reflective of my lifetime commitment to him. I want to keep him safe from all harm and guide him in the fulfillment of all of his American dreams.

My reality is that his mother and I are no longer together so we are co-parenting. Well, most of the time I feel like he is on a play date with me verses co-parenting. I think this topic is relevant because it is one of the collateral consequences that many fathers with a criminal record, like myself, experience on a day-to-day basis. I live with the constant fear that she can have my visiting rights eliminated or shortened if she ever feels the need to use my criminal past against me in a court of law. My interactions with my son are based on her willingness to approve of them. I have never had my behavior questioned in connection with any child; I have never been accused of child abuse or child neglect. But I do have my felony convictions. Because of this fear of losing the access I have to my son, my participation and opinions regarding his health, schooling and activities have limitations.

Despite all of my accomplishments (which are listed below) and the fact that I have been out of prison for nearly 13 years, I am not allowed to accompany my child on a school trip because of my felony convictions. I can help save and inspire the rest of America's children but I can't go on a trip to the zoo with my own son. Collateral consequences have weakened my role as a father. It has made it complicated for mothers who lose time with their children due to their incarceration.

VIII. RESTRICTIONS ON AWARD CEREMONIES AT THE WHITE HOUSE AND CHAMPIONS OF CHANGE

Since my release from prison I have been mainly self-employed. I started a company called LaCarey Enterprises, LLC. Through this company I have been able to be featured on two HBO series (The Wire, Def Poetry Jam) and Centric televisions Lyric Cafe as a performing poet (spoken-word artist). I have also directed two stage-plays at the John F. Kennedy Center. In addition, I have written several books that are used to deter youth from committing crimes as well as being used as a tool to get students to express themselves creatively.

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As a result of my work, I have received the Visionary Award from the Congressional Black Caucus of State Legislators, a Senate achievement award, and various other awards for my dedication to bettering the lives of individuals across this great land. I have been hired as a motivational speaker, workshop facilitator, and professional development consultant for organizations that would not hire me as an employee because of my criminal record and their company policies.

There is no time limit on when we stop being ostracized. We should be able to prove, at a minimum, that we are fit to have all of our rights restored. At the moment collateral damages affects us for the duration of our lives. When we are sentenced to incarceration, the judge sentences us to a term the court sees fit for the crimes we committed. However we encounter lifelong collateral consequences. Where is the justice in that? Why are our rights to the American dream minimized?

To my disappointment, I have been invited to the White House a total of 5 times. 4 of those times I was denied the day before the event. The Secret Service never disclosed why I did not pass the security clearance, but I am sure it has something to do with my felony convictions. This is all it can be.

I have been an up standing, productive and contributing member of society for the past 13 years. I have been exercising my limited rights as an American citizen.

My recent invite to the White House is for an event that takes place June 30, 2014. I should know sometime today if I will be admitted.

IX. CONCLUSION

Regardless of all the challenges and collateral consequences I face, I still make the best of my life. But I know that if these collateral consequences were removed, that hundreds of thousands of returning citizens' lives would improve for the betterment of our great nation and for the world.

We are no longer those misguided, misinformed or angry youth. The majority of us have learned from our mistakes but it feels like we are still not welcomed back. Please help us to help ourselves.

I am not asking you to give us a hand out of any kind. I am asking you to allow us to earn the right to be the best of ourselves by removing the barriers that encourage individuals and entities to discriminate against us.

Let's work together to change how society views people with criminal backgrounds. There are plenty of us who have overcome the odds but are afraid to admit it because of the fear of retaliation. I'm not afraid and I know others who would be willing to join us to assist in

removing these stereotypes. We are Americans. We want to participate as full citizens in every way. Thank you.

Testimony Submitted by Anthony Pleasant,
Poet Ambassador, Free Minds Book Club & Writing Workshop,
to the House Judiciary Committee Over-Criminalization Task Force for its
Hearing on Collateral Consequences and Barriers to Reentry
June 26, 2014

My name is Anthony Pleasant. I am a returning citizen who served 10 years in federal prison for a crime I committed at the age of 16. I also work as a Poet Ambassador—or poetry spokesperson—for Free Minds Book Club & Writing Workshop, a community-based organization that provides mentorship and support for youth charged as adults in DC. I would like to share with you some of my experiences as well as the experiences of my fellow Free Minds brothers, all of whom were incarcerated as 16 and 17 year olds and yet have adult felony charges on their records when they return home to the community. I hope that my testimony will help you form a greater understanding of the collateral consequences that young people face when returning to their communities after incarceration, especially from adult federal prison.

First, I would like to start my testimony with a poem, "Man in the Mirror," that I wrote while I was a young person incarcerated in federal prison:

Have you ever been so alone that you could feel your bones?

An outcast, betrayed, unable to go home?

Have you ever been so sad that you couldn't even cry—

Eyes like the sands of barren land; hopeless desolate and dry?

Have you ever suffered a broken heart that has went years without its mending?

Knowing still that it may never heal—too fragile for future lending?

Have you ever experienced a depression so deep that it consumed your entire soul?

Have you ever been the owner of an anger so fierce that the burn of its fire was cold?

Have you ever wondered what your life would be like if the life that you lived weren't so sickening?

Or, have you ever attempted to express the pain that you feel, only to realize that no one was listening?

If not, then you don't know me—but if you'd like to, just ask...

For, my life is nothing more than a mirror-image of yours...

Given light by the reflection of glass

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I made a lot of mistakes as a young person growing up in Southeast DC. I did not have a lot of direction in my life, and I also did not have people around me who were able to show me how to do the right things. I suffered abuse and trauma and exposure to family members who were actively using drugs. At school, I wasn't taught how to read or write, and I was socially promoted through tenth grade. In my neighborhood, I was exposed to guns and violence at a young age.

When I committed my crime, the court did not look into my childhood to understand the root causes of my actions. Instead, my case resulted in me serving a 10 year sentence in the federal bureau of prisons – moving to three different prisons during the course of my incarceration – all far away from DC and far away from any friends or family.

I met Free Minds when I was in the juvenile unit at the DC jail and they helped me to learn how to read and write and I started to believe that I could have a different future. But the Free Minds staff and volunteers who had befriended me while I was serving time in the DC jail waiting for my trial and conviction could not visit me while I was incarcerated so far away, out of state. Because DC does not have its own prison, DC youth are sent all over the country in the Federal Bureau of Prisons. Currently Free Minds has members in 46 BOP facilities in 23 states, as far away as California and New Mexico. Free Minds stays in touch with all of our members by sending books, a newsletter, cards and letters and become our surrogate family. Many of our families don't write and almost none have the money necessary to travel so far to visit their loved ones. I didn't even like to call home and hear about what was going on, because it upset me to hear about the things I was missing.

By the time I got to federal prison, I was able to understand how words fit together, and so I took advantage of any educational opportunities that I could in order to get my GED. Once, I saw an inmate being killed, and his body was wheeled past my cell on a stretcher. At that moment, I vowed that I would educate myself as much as I could so that I could survive prison and live a better life. Although there was one prison education program that I would not attend because it was too dangerous – when you were in "school" they would lock you in the room and all of the participants in there had knives. It was not a safe place to study and I did not want to get hurt or get into trouble that would lengthen my sentence. I asked my case manager to excuse me from that program, which she did when she understood why I had asked. However, by the time I was incarcerated at Edgefield Federal Prison in South Carolina, I was able to study for and achieve a Level 1 Carpentry Certification so that I could try to get a job when I got out. And I was focused on getting out – I stayed away from trouble in prison and focused on returning to DC as soon as possible.

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In early 2013, before I was released from my last federal prison to Hope Village, a halfway house in DC, I was required to attend one two hour class that addressed general themes related to prison reentry. This class was not personalized in any way, and I wasn't given any specific resources to help ensure that my reentry would be a success and to help put my life back together. I was a teenager when I went to prison, and then I spent the next 45 percent of my life incarcerated – so without help, I didn't know how to live a productive life on the outside. During the last four months of my sentence, which I served at Hope Village, I was given a place to sleep and eat, I had a curfew, and I was told to get a job. However, there was no help or guidance provided for the job search – this was for each person to do on his own, without any support, resources, references, or suggestions.

Finally, once I was discharged from Hope Village, I went to live with my father and we could not get along because of the past negativity between us, and so I went to live with my mother. She has multiple sclerosis and is wheelchair bound. Living with her allows me to help take care of her needs. However, my mother lives in public housing – in a single room occupancy facility. Because they know I help take care of her, the managers of her building allow me to stay there – but that could change at any minute. I know that I am lucky because many public housing authorities often over broadly say that all felons are not allowed in public housing. These types of policies prevent many Free Minds members from staying with their families and many are left with no reliable housing option. I am trying to get my own place so that I can feel more secure, but that has not been easy since it will take both money and for a landlord to accept me as a tenant, even with my criminal record.

Currently, I am enrolled in a workforce training program at the University of the District of Columbia Community College. I am lucky to be in the program, but I worry that my record will still prevent me from getting a job when I finish training. I want to enroll in an employment program such as the Department of Labor's Job Corps, but because of my felony I have been told that I am not eligible. I am taking classes in property management and I hope to find a property management job once I complete the program. I want to go on to get my bachelor's degree, and I have heard about scholarships that UDC offers to people who complete these training programs. I really want to do that, but I am worried that my conviction record may get in the way of that opportunity. Several of my Free Minds brothers have been denied scholarships on the basis of their criminal backgrounds. One has given up on his dream of going to college altogether because it was so difficult for him to get federal financial aid due to his felony.

In the meantime, I have been trying to find a job so I can get enough money together to get my own place but even then I probably won't get past the apartment application process

because of my felony. I was working as a day laborer on a recycling truck, but when I got injured on the job, the company fired me. I have taken my carpentry certification and applied for many construction jobs, but even with my expertise I haven't gotten any calls back, in part because they often ask about criminal records.

But as my girlfriend suggested, even when I get turned down from a job, I write the employer to thank them for considering me. I am always looking for job interviews for different positions and internships. With the help of Free Minds and their professional network, I've even gotten so far as the interview stage. Once, I was interviewing for a dish washer position at a restaurant. They told me they loved me and wanted to offer me the job, but they just couldn't because of their company's policy against hiring people with convictions. I know other Free Minds members who even went so far as to work at new jobs for several months, until a background check came back and resulted in them losing their jobs on account of their convictions. This happens all the time to my fellow Free Minds members, and the shame and humiliation gets to them. I see so many of them get discouraged and give up. Even when we are doing everything right and people want to hire us, we still don't end up getting the job.

My girlfriend, who works and is continuing her education, along with the people I spend time with at Free Minds, have become the support and positive influences I need to get my life back together – my "second family." My girlfriend and I spend many Sundays kayaking on the Potomac River. Sometimes we just walk the mall and look at the monuments, or sit outside and read. These activities feel peaceful to me. I never used to spend time at the monuments like that. It's all a part of moving on from the negativity in my life. But even though I have changed my lifestyle and now only engage in positive activities, I am still permanently shut out from many housing, education, and employment opportunities, all because of a mistake I made when I was 16.

I am extremely motivated to give back to my community to repair the harm that I caused as a teenager. I speak to students and do poetry readings for Free Minds, where I talk about my youth violence and how to use writing to stay away from negative influences. Every week, I represent Free Minds as a writing coach for incarcerated youth at New Beginnings Juvenile Detention Center in Laurel, Maryland. Writing and reading my poetry and speaking about my experiences to young people has been therapeutic for me. It makes me feel like I am really helping someone else and stopping others from going down the same path I went down. I would love to get a job as a youth mentor or teacher in DC Public Schools, but my felony status is a problem for the DC school system, because it seems to restrict individuals with a broad range of felony records, not just felony records related to children, from participating in that system. I

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want to guide others where I failed, and I try to make sense of the decisions I have made as I move forward, but those decisions have left a lot of barriers in my path. I have a drive to make something of myself, and it would be easier if I were on a level playing field with everyone else – but I will jump over those barriers, no matter how many there are.

But there are many of my friends and Free Minds brothers who get discouraged, who have trouble dealing with what prison does to them – the confinement, violence, and lack of services – and with what they now face on the outside – lack of support and services, barriers, and stigma. It's especially difficult for young people who went into the adult system, like I did. It's hard for them to overcome all of the issues they have to overcome as well as make themselves better when they have to work twice as hard to get the basics – what most young people already have access to – basics such as housing, education, and employment.

So I am here with my fellow presenters today to ask that both the public as well as policy makers truly give people a second chance. Give people like me a second chance. We all should treat people coming home from prison as citizens and welcome them into our communities – treat them as individuals and not as statistics. Help them figure out who they are and what they want to be, what they want to achieve, and not just label them as what we think they are.

Thank you for your time and consideration of these important issues, it has been my honor and pleasure to share my story with you.

THE SENTENCING PROJECT

State-Level Estimates of Felon Disenfranchisement in the United States, 2010

Christopher Uggen and Sarah Shannon, University of Minnesota

Jeff Manza, New York University

July 2012

THE SENTENCING PROJECT
RESEARCH AND ADVOCACY FOR REFORM

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The United States is one of the world's strictest nations when it comes to denying the right to vote to citizens convicted of crimes. A remarkable 5.85 million Americans are forbidden to vote because of "felon disenfranchisement," or laws restricting voting rights for those convicted of felony-level crimes. In this election year, the question of voting restrictions is once again receiving great public attention. This report is intended to update and expand our previous work on the scope and distribution of felon disenfranchisement in the United States (see Uggen and Manza 2002; Manza and Uggen 2006). The numbers presented here represent our best assessment of the state of felon disenfranchisement as of December 31, 2010, the most recent year for which complete data are available. Our goal is to provide statistics that will help contextualize and anticipate the potential effects of felon disenfranchisement on elections in November 2012.

Our key findings include the following:

- Approximately 2.5 percent of the total U.S. voting age population – 1 of every 40 adults – is disenfranchised due to a current or previous felony conviction.
- Ex-felons in the eleven states that disenfranchise people after they have completed their sentences make up about 45 percent of the entire disenfranchised population, totaling over 2.6 million people.
- The number of people disenfranchised due to a felony conviction has escalated dramatically in recent decades as the population under criminal justice supervision has increased. There were an estimated 1.17 million people disenfranchised in 1976, 3.34 million in 1996, and over 5.85 million in 2010.
- Rates of disenfranchisement vary dramatically by state due to broad variations in voting prohibitions. In six states – Alabama, Florida, Kentucky, Mississippi, Tennessee, and Virginia – more than 7 percent of the adult population is disenfranchised.
- 1 of every 13 African Americans of voting age is disenfranchised, a rate more than four times greater than non-African Americans. Nearly 7.7 percent of

the adult African American population is disenfranchised compared to 1.8 percent of the non-African American population.

- African American disenfranchisement rates also vary significantly by state. In three states – Florida (23 percent), Kentucky (22 percent), and Virginia (20 percent) – more than one in five African Americans is disenfranchised.

STATE DISENFRANCHISEMENT LAW

To compile estimates of disenfranchised populations, we take into account new U.S. Census data on voting age populations and recent changes in state-level disenfranchisement policies, the latter reported in *Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2010* (Porter 2010). For example, in 2007, Maryland repealed its lifetime voting ban for all ex-felons. Several other states have revised their waiting periods and streamlined the process for regaining civil rights. As shown in the following table, Maine and Vermont remain the only states that allow prison inmates to vote. Thirty U.S. states deny voting rights to felony probationers, and thirty-five states disenfranchise parolees. In the most extreme cases, eleven states continue to deny voting rights to some or all of the "ex-felons" who have successfully fulfilled their prison, parole, or probation sentences (for details, see notes to Table 1).

Table 1. Summary of State Felon Disfranchisement Restrictions in 2010

No restriction (2)	Inmates only (13)	Inmates & Parolees (5)	Inmates, Parolees, & Probationers (19)	Inmates, Parolees, Probationers, & Ex-felons (11)
Maine	Hawaii	California	Alaska	Alabama
Vermont	Illinois	Colorado	Arkansas	Arizona[2]
	Indiana	Connecticut	Georgia	Delaware[3]
	Massachusetts	New York	Idaho	Florida
	Michigan	South Dakota*	Iowa*[,1]	Kentucky
	Montana		Kansas	Mississippi
	New Hampshire		Louisiana	Nebraska*[,4]
	North Dakota		Maryland[1]	Nevada[5]
	Ohio		Minnesota	Tennessee[6]
	Oregon		Missouri	Virginia
	Pennsylvania		New Jersey	Wyoming
	Rhode Island*		New Mexico	
	Utah		North Carolina	
			Oklahoma	
			South Carolina	
			Texas	
			Washington*	
			West Virginia	
			Wisconsin	

Notes: * Indicates a recent change (since 2004).

1 Governor Tom Vilsack restored voting rights to ex-felons via executive order on July 4, 2005. Governor Terry Branstad reversed this executive order on January 14, 2011.
2 State disenfranchises recidivists.
3 State requires a five-year waiting period.
4 Nebraska reduced its indefinite ban on ex-felon voting to a two-year waiting period in 2005.
5 State disenfranchises recidivists and those convicted of violent felonies.
6 State disenfranchises those convicted of felonies since 1981, in addition to those convicted of select crimes prior to 1973.

METHODOLOGY

We estimated the number of ex-prisoners and ex-felons based on demographic life tables for each state, as described in Uggen, Manza, and Thompson (2006) and Shannon et al. (2011). We modeled each state's disenfranchisement rate in accordance with its distinctive felon voting policies, as described in Table 1. For example, some states impose disenfranchisement for five years after release from

supervision, some states only disenfranchise recidivists, and some only disenfranchise those convicted of violent offenses.[1]

In brief, we compiled demographic life tables for the period 1948-2010 to determine the number of released felons lost to recidivism (and therefore already included in our annual head counts) and to mortality each year. This allows us to compute the number of ex-felons in a given state and year who are no longer under correctional supervision yet remain disenfranchised. Our duration-specific recidivism rate estimates are derived from large-scale national studies of recidivism for prison releasees and probationers. Based on these studies, we assume that most ex-prisoners will be re-incarcerated (66 percent) and a smaller percentage of ex-probationers and jail inmates (57 percent) will cycle back through the criminal justice system. We also assume a substantially higher mortality rate for felons relative to the non-felon population. Both recidivists and deaths are removed from the ex-felon pool to avoid overestimating the number of ex-felons in the population. Each release cohort is thus reduced each successive year – at a level commensurate with the age-adjusted hazard rate for mortality and duration-adjusted hazard rate for recidivism – and added to each new cohort of releases. Overall, we produced more than 200 spreadsheets covering 63 years of data.[2] These provide the figures needed to compile disenfranchisement rate estimates that are keyed to the appropriate correctional populations for each state and year.

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[1] In Florida, some can avoid a formal felony conviction by successfully completing a period of probation. According to the Florida Department of Law Enforcement, as much as 40 percent of the total probation population holds this "adjudication withheld" status. According to reports by the Bureau of Justice Statistics, only about 50 percent of Florida probationers successfully complete probation. In light of this, we reduce the annual current disenfranchised felony probation numbers by 40 percent and disenfranchised ex-felons by 20 percent (.4*.5=.20) in each year in the life tables.

[2] Our data sources include numerous United States Department of Justice (DOJ) publications, including the annual *Sourcebook of Criminal Justice Statistics*, *Probation and Parole in the United States*, as well as the *Prisoners and Jail Inmates at Midyear* series. Where available, we used data from state departments of corrections rather than national sources, as in the case of Minnesota. For early years, we also referenced *National Prisoner Statistics*, and *Race of Prisoners Admitted to State and Federal Institutions, 1926-1986*. We determined the median age of released prisoners based on annual data from the National Corrections Reporting Program. The recidivism rate we use to decrease the releasee population each year is based upon the Bureau of Justice Statistics (1989) "Recidivism of Prisoners Released in 1983" study and "Recidivism of Felons on Probation 1986-1989." For prisoners and parolees, we use a reincarceration rate of 18.6% at one year, 32.8% at two years, 41.4% at 3 years. Although rearrest rates have increased since 1983, the overall reconviction and reincarceration rates used for this study are much more stable (Langan and Levin 2002, p. 11). For probationers and jail inmates, the corresponding three-year failure rate is 36%, meaning that individuals are in prison or jail and therefore counted in a different population. To extend the analysis to subsequent years, we calculated a trend line using the ratio of increases provided by Hoffman and Stone-Meierhoefer (1980) on federal prisoners. By year 10, we estimate a 59.4% recidivism rate among released prisoners and parolees, which increases to 65.9% by year 62 (the longest observation period in this analysis). Because these estimates are higher than most long-term recidivism studies, they are likely to yield conservative estimates of the ex-felon population. We apply the same trend line to the 3-year probation and jail recidivism rate of 36%; by year 62, the recidivism rate is 57.3%. 1948 is the earliest year for which detailed data are available on releases from supervision.

DISENFRANCHISEMENT RATES IN 2010

Figure 1 shows the distribution of the 5.85 million disenfranchised felons across correctional populations. Current prison and jail inmates only represent about one-fourth of those disenfranchised. The remaining 75 percent are living in their communities, having fully completed their sentences or remaining supervised while on probation or parole.

Figure 1. Disenfranchisement Distribution across Correctional Populations, 2010

Variation across States

Due to differences in state laws and rates of criminal punishment, states vary widely in the practice of disenfranchisement. The maps and tables below represent the disenfranchised population as a percentage of the adult voting age population in each state. As noted above, we estimate that 5.85 million Americans are currently ineligible to vote by state law. As Figure 2 and the statistics in Table 3 show, state-level disenfranchisement rates in 2010 varied from less than .5 percent in Massachusetts, New Hampshire, North Dakota, and Utah (and zero in Maine and Vermont) to more than 7 percent in Alabama, Florida, Kentucky, Mississippi, Tennessee, and Virginia.

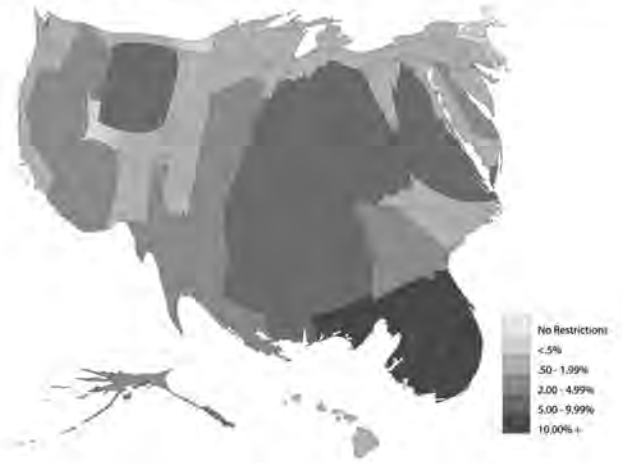
Figure 2. Total Felon Disenfranchisement Rates, 2010

These figures show significant growth in recent decades, even as many states began to dismantle voting restrictions for formerly disenfranchised populations. Figure 3 displays disenfranchisement rates in 1980, retaining the same scale as in Figure 2. At that time, far more of the nation had disenfranchisement rates below .5 percent and no state disenfranchised more than 5 percent of its adult citizens.

Figure 3. Total Felon Disenfranchisement Rates, 1980

The cartogram in Figure 4 provides another way to visualize the current state of American disenfranchisement. Cartograms distort the land area on the map according to an alternative statistic, in this case total felon disenfranchisement. States that disenfranchise hundreds of thousands of former felons, such as Florida, Kentucky, and Virginia appear bloated in the cartogram. In contrast, the many Northeastern and Midwestern states that only disenfranchise current prison inmates shrivel in size. This distorted map thus provides a clear visual representation of the great range of differences in the scope and impact of felon disenfranchisement across the 50 states.

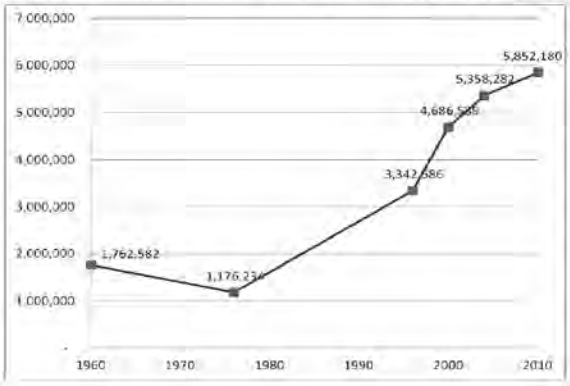
Figure 4. Cartogram of Total Disenfranchisement Rates by State, 2010



Variation over Time

Figure 5 illustrates the historical trend in U.S. disenfranchisement, showing growth in the disenfranchised population for selected years from 1960 to 2010. The number disenfranchised dropped between 1960 and 1976, as states began to expand voting rights in the civil rights era. Many states have continued to pare back their disenfranchisement provisions since the 1970s (see Behrens, Uggen, and Manza, 2003; Manza and Uggen, 2006). Nevertheless, the total number banned from voting continued to rise with the expansion in U.S. correctional populations. Today, we estimate that 5.85 million Americans are disenfranchised by virtue of a felony conviction.

Figure 5. Number Disenfranchised for Selected Years, 1960-2010



Variation by Race

Disenfranchisement rates vary tremendously across racial and ethnic groups, such that felon voting restrictions have an outsized impact on communities of color. Race and ethnicity have not been consistently reported in the data sources used to compile our estimates, so our ability to construct race-specific estimates is limited. This is especially problematic for Latinos, who now constitute a significant portion of the criminal justice population. Nevertheless, we developed a complete set of state-specific disenfranchisement estimates for the African American voting age population, as shown in Figures 6 and 7. We will first show a map of the African American disenfranchisement rate for 1980, and then show how the picture looks today. By 1980, the African American disenfranchisement rate already exceeded 10 percent of the adult population in states such as Arizona and Iowa, as shown in Figure 6. The figure also indicates that several Southeastern states disenfranchised more than 5 percent of their adult African American populations at that time.

Figure 6. African American Felon Disenfranchisement Rates, 1980

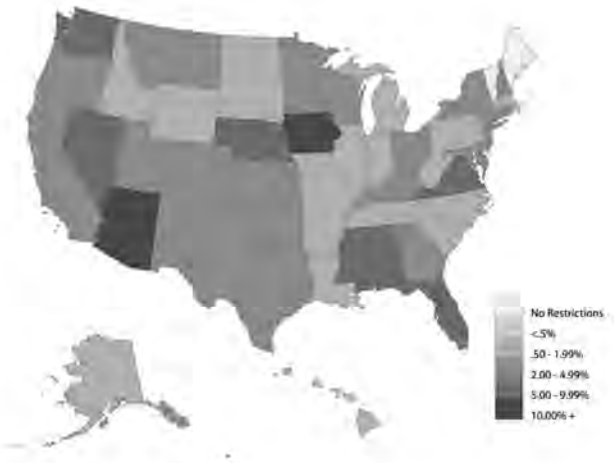


Figure 7 shows the corresponding rates for 2010, again retaining a common scale and shading to keep the map consistent with the 1980 map in Figure 6. African American disenfranchisement rates in Florida, Kentucky, and Virginia now exceed 20 percent of the adult voting age population. Much of the nation now disenfranchises at least 5 percent of its African American adult citizens.

Figure 7. African American Disenfranchisement Rates, 2010

RECENT CHANGES

The rate of total disenfranchised ex-felons in 2010 (2.50 percent) is quite similar to the 2004 figures reported by Manza and Uggen in 2006 (2.42 percent), despite state changes in disenfranchisement policy and population growth. Our estimates for African American disenfranchisement in 2010, however, are lower than those for 2004 – 7.66 percent versus 8.25 percent, respectively. For these estimates, we used the most inclusive denominator for the African American voting age population available from the 2010 Census to ensure that we do not overestimate the disenfranchisement rate for this population. While growth in the baseline population

for African Americans contributes to the decline in the disenfranchisement rate from previous estimates, the lion's share of the difference is due to an important refinement in our estimation procedures. For 2010, we used new race-specific recidivism rates (resulting in a higher rate for African Americans) that more accurately reflect current scholarship on recidivism. This results in a higher rate of attrition in our life tables, but produces a more conservative and, we believe, more accurate portrait of the number of disenfranchised African American felons. Though lower than in 2004, the 7.66 percent rate of disenfranchisement for African Americans remains more than four times greater than the non-African American rate of 1.77 percent.

Given the size of Florida's disenfranchised population, we also note a change in our estimation procedure for this state. Based on a state-specific recidivism report in 1999, our 2004 estimates included much higher recidivism rates for African Americans in Florida (up to 88% lifetime). A 2010 report from the Florida Department of Corrections shows that rates of recidivism for African Americans are now more closely in line with the national rates we apply to other states. In light of this more recent evidence, we begin applying our national rate of recidivism for African Americans (up to 73% lifetime) to Florida's African American ex-felons from 2005 onward. In 2010, more people were disenfranchised in Florida than in any other state and Florida's disenfranchisement rate remains highest among the 50 states.

As Table 1 noted, there have been several significant changes in state disenfranchisement policies since 2004. Most notably, Maryland and Washington eliminated disenfranchisement after the completion of sentence. Governor Tom Vilsack of Iowa re-enfranchised all of that state's ex-felons by executive order on July 4, 2005 – though that order was then reversed by his successor, Governor Terry Branstad, in January 2011. Other states have also reduced disenfranchisement through streamlining restoration of rights or re-enfranchising certain groups of felons. For example, Rhode Island now restricts voting rights only for prison inmates as opposed to all current felons, including those on probation and parole. Nebraska also instituted automatic restoration of voting rights after a two-year waiting period following sentence completion. In 2007, Florida Governor Charlie Crist enacted

procedures to restore voting rights to ex-felons more quickly. This process was later reversed by Governor Rick Scott in 2011 and replaced by a five-year waiting period before former felons can apply for restoration of civil rights.

Our intent here is to provide a portrait of disenfranchisement that would be accurate as of December 31, 2010. This provides a good basis for understanding the potential impact of disenfranchisement on turnout for elections in November, 2012, so long as there have not been significant legal changes or major shifts in correctional populations in the intervening two years.

DISENFRANCHISEMENT AND RESTORATION OF CIVIL RIGHTS

States typically provide some limited mechanism for disenfranchised felons and former felons to restore their right to vote. These vary greatly in scope, eligibility requirements, and reporting practices. It is thus difficult to obtain consistent information about the rate and number of disenfranchised Americans whose rights are restored through these procedures. Nevertheless, Table 2 provides some basic information about state restoration of rights policies in those states that disenfranchise beyond sentence completion. The table shows how many people were disenfranchised, the number of restorations reported by state officials in a given reporting period, and the number restored as a percentage of the total number of ex-felons disenfranchised. For comparative purposes, we also show the total number of felons *released* over that reporting period and the number restored as a percentage of those released. Because some of those whose rights were restored had been released in earlier years, this only provides a rough estimate of a state's re-enfranchisement rate. The percentages of felons and former felons whose rights were restored vary widely, from less than 1 percent of all ex-felons in several states to over 16 percent in Delaware.

Despite our best efforts, we were unable to obtain complete data for all states on restoration of civil rights. Nonetheless, we subtracted the available numbers granted restoration of civil rights or full pardon from each state's total disenfranchised ex-felons. Even accounting for these restorations, it is clear that the vast majority of ex-felons in these states remain disenfranchised. Indeed, some states have significantly curtailed restoration efforts since 2010, including Iowa and Florida.

Table 2 - Restoration of Voting Rights in States that Disenfranchise Ex-Felons

State	Disenfranchised Ex-Felons (2010)	Restorations	Period of Restoration Estimates	% of Total Ex-Felons[1]	Felons Released in Period[2]	% Restored
Alabama	198,031	8,466[3]	2004-2011	4.10%	113,778	7.44%
Arizona	95,893	N/A[4]	-	-	-	-
Delaware	14,032	2,242[5]	1988-2010	13.78%	89,245	2.51%
Florida	1,323,360	264,059[6]	1990-2011	16.63%	736,984	35.83%
Iowa	115,210	115,210[7]	2005-2010	100%	61,426	100%
Kentucky	180,984	4,260[8]	2008-2010	2.30%	73,770	5.77%
Mississippi	127,346	106[9]	2000-2010	.08%	37,754	.28%
Nebraska	7,819	N/A[10]	-	-	-	-
Nevada	59,919	281[11]	1990-2011	.47%	169,517	.17%
Tennessee	247,808	9,558[12]	1990-2011	3.71%	461,347	2.07%
Virginia	351,943	8,580[13]	2002-2010	2.38%	309,943	2.77%
Wyoming	19,470	48[14]	2003-2011	.25%	17,303	.28%

Notes.

1 Denominator is total ex-felons before reduction for restorations.
2 Release information compiled from annual Bureau of Justice Statistics sources (without reduction for recidivism or mortality).
3 Source: Sarah Still, Alabama Board of Pardons and Parole, email communication on December 7, 2011.
4 Voting rights in Arizona are restored on a county-level basis and no statewide records are kept. Email communication with Donna Kish, Maricopa County Elections.
5 In Delaware, most felons can apply for automatic restoration of voting rights after a five year wait period. Our life tables account for this process. However, people convicted of certain felonies (e.g. murder, sex offenses), must receive a pardon to have their voting rights restored. This number represents the total number of pardons for the time period, which is a conservative number for our purposes. Source: Judy Smith, Delaware Board of Pardons, email communication December 5, 2011.
6 Source: Tammy Salmon, Office of Communications/Legislative Affairs, Florida Parole Commission, email communication on December 29, 2011.
7 Governor Vilsack issued an Executive Order on July 4, 2005 ending Iowa's previous disenfranchisement practice. On January 14, 2011, Governor Branstad reversed Vilsack's order, reinstating disenfranchisement of felons post-sentence.
8 Source: Nicole D. Porter, October 2010, "Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2010." The Sentencing Project.
9 Voting rights in Mississippi can be restored through executive order from the governor or bills of suffrage in the legislature. By far, the most common route is via suffrage bill, as per email conversation with Phil Carter, Special Assistant Attorney General on December 6, 2011. Numbers here reflect successful suffrage bills in the Mississippi legislature. Source: Mississippi Legislative Bill Status System, accessed online: http://billstatus.ls.state.ms.us/sessions.htm.
10 Voting rights in Nebraska are automatically restored after a two-year waiting period. Our life table estimates have fully accounted for this process.
11 Source: Brian Campolieti, Nevada Parole Board, email communication December 5, 2011.
12 Source: Cara Harr, Division of Elections, Tennessee Department of State, email communication December 19, 2011.
13 See note 2.
14 Source: Joanne Struebing, Wyoming Board of Parole, email communication December 6, 2011.

SUMMARY

This report provides new state-level estimates on felon disenfranchisement for 2010 in the United States to update those provided by Uggen and Manza for previous years. In Tables 3 and 4, we provide state-specific point estimates of the disenfranchised population and African American disenfranchised population, subject to the caveats described below.

Despite significant legal changes in recent decades, over 5.85 million Americans remained disenfranchised in 2010. When we break these figures down by race, it is clear that disparities in the criminal justice system are linked to disparities in political representation. The distribution of disenfranchised felons shown in Figure 1 also bears repeating: only about one-fourth of this population is currently incarcerated, meaning that over 4 million of the adults who live, work, and pay taxes in their communities are banned from voting. Of this total, nearly one million are African American ex-felons alone. Public opinion research shows that a significant majority of Americans favor voting rights for probationers and parolees who are currently supervised in their communities, as well as for former felons who have completed their sentences (Manza, Brooks, and Uggen 2004). How much difference would it make if state laws were changed to reflect the principles most Americans endorse? The answer is straightforward: Voting rights would be restored to well over 4 million of the 5.85 million people currently disenfranchised.

CAVEATS

We have taken care to produce estimates of current populations and "ex-felon" populations that are reliable and valid by social science standards. Nevertheless, readers should bear in mind that our state-specific figures for the 11 states that bar ex-felons from voting remain point estimates rather than actual head counts. In other work, we have presented figures that adjust or "bound" these estimates by assuming different levels of recidivism, inter-state mobility, and state-specific variation. With these caveats in mind, the results reported here present our best account of the prevalence of U.S. disenfranchisement in 2010. These estimates will be adjusted if and when we discover errors or omissions in the data compiled from individual states, U.S. Census and Bureau of Justice Statistics sources, or in our own spreadsheets and estimation procedures.

Table 3. Estimates of Disenfranchised Felons, 2010

State	Prisoners	Parolees	Fel. Prob.	Jail Inmates	Ex-felons	Total	VAP	Dis. Rate
AK	5,597	2,089	6,959	7		14,652	522,853	2.80%
AL	31,764	9,006	22,017	1,536	198,031	262,354	3,647,277	7.19%
AR	16,204	21,106	27,250	633		65,193	2,204,443	2.96%
AZ	40,130	7,993	54,135	1,583	95,893	199,734	4,763,003	4.19%
CA	165,062	105,133		8,282		278,477	27,958,916	1.00%
CO	22,815	11,014		1,370		35,199	3,803,587	0.93%
CT	19,321	2,894				22,215	2,757,082	0.81%
DE	6,598	560	4,448		14,032	25,638	692,169	3.70%
FL	104,306	4,093	103,318	6,525	1,323,360	1,541,602	14,799,219	10.42%
GA	49,164	25,091	197,013	4,597		275,866	7,196,101	3.83%
HI	5,912					5,912	1,056,483	0.56%
IA	9,455	3,197	8,862	374		21,888	2,318,362	0.94%
ID	7,431	3,957	13,721	386		25,495	1,138,510	2.24%
IL	48,418			2,085		50,503	9,701,453	0.52%
IN	28,028			1,255		29,283	4,875,504	0.60%
KS	9,051	5,063	3,704	691		18,509	2,126,179	0.87%
KY	20,544	14,628	25,688	1,998	180,984	243,842	3,315,996	7.35%
LA	39,445	26,202	42,599	3,648		111,894	3,415,357	3.28%
MA	11,312			1,448		12,760	5,128,706	0.25%
MD	22,645	13,195	26,164	1,584		63,588	4,420,588	1.44%
ME							1,053,828	0.00%
MI	44,113			1,820		45,933	7,539,572	0.61%
MN	9,796	5,807	42,661	962		59,226	4,019,862	1.47%
MO	30,623	19,421	54,916	1,064		106,024	4,563,491	2.32%
MS	21,067	6,434	26,793	1,173	127,346	182,814	2,211,742	8.27%
MT	3,716			230		3,946	765,852	0.52%
NC	40,116	3,621	36,869	1,826		82,432	7,253,848	1.14%
ND	1,487			97		1,584	522,720	0.30%
NE	4,587	941	4,080	312	7,819	17,739	1,367,120	1.30%
NH	2,761			184		2,945	1,029,236	0.29%
NJ	25,007	15,563	57,517	2,289		100,376	6,726,680	1.49%
NM	6,659	3,146	17,781	781		28,367	1,540,507	1.84%
NV	12,653	4,964	8,067	717	59,919	86,321	2,035,543	4.24%
NY	56,656	48,542		2,935		108,133	15,053,173	0.72%
OH	51,712			2,130		53,842	8,805,753	0.61%
OK	26,252	2,627	21,642	970		51,491	2,821,685	1.82%
OR	14,014			683		14,697	2,964,621	0.50%
PA	51,264			3,608		54,872	9,910,224	0.55%
RI	3,357					3,357	828,611	0.41%
SC	23,578	6,412	11,739	1,427		43,156	3,544,890	1.22%
SD	3,434	2,843		145		6,422	611,383	1.05%
TN	27,451	12,157	52,178	2,221	247,808	341,815	4,850,104	7.05%
TX	173,649	104,763	247,136	6,939		532,487	18,279,737	2.91%
UT	6,807			672		7,479	1,892,858	0.40%
VT							496,508	0.00%
VA	37,410	2,624	56,654	2,840	351,943	451,471	6,147,347	7.34%
WA	18,235	6,956	26,785	1,114		53,090	5,143,186	1.03%
WI	22,724	19,572	22,602	1,361		66,259	4,347,494	1.52%
WV	6,681	1,796	6,876	288		15,640	1,465,576	1.07%
WY	2,112	682	3,236	157	19,470	25,657	428,224	5.99%
Total	**1,391,123**	**524,092**	**1,233,412**	**76,949**	**2,626,604**	**5,852,180**	**234,564,071**	**2.50%**

Table 4. Estimates of Disenfranchised African American Felons, 2010

State	AA Prisoners	AA Parolees	AA Fel. Prob.	AA Jail Inmates	AA Ex-felons	Total	AA VAP	AA Disf. Rate
AK	528	217	724	2		1,471	20,257	7.26%
AL	18,460	5,416	10,905	801	101,896	137,478	917,500	14.98%
AR	7,185	8,558	9,573	40		25,357	321,201	7.89%
AZ	5,301	1,051	5,960	426	10,345	23,083	206,087	11.20%
CA	47,775	29,179		1,210		78,164	1,896,556	4.12%
CO	4,409	1,828		411		6,648	164,797	4.03%
CT	8,054	1,246				9,300	281,143	3.31%
DE	3,762	310	2,041		5,718	11,831	143,062	8.27%
FL	50,966	2,264	31,225	3,227	432,839	520,521	2,232,437	23.32%
GA	30,729	14,842	114,300	71		159,942	2,140,789	7.47%
HI	250					250	24,540	1.02%
IA	2,425	555	1,348	145		4,473	64,856	6.90%
ID	181	82	287	94		645	8,267	7.80%
IL	27,798			135		27,933	1,378,729	2.03%
IN	10,280			29		10,309	430,526	2.39%
KS	2,993	1,465	1,104	291		5,853	129,082	4.53%
KY	5,438	3,841	4,708	382	42,552	56,920	254,797	22.34%
LA	27,521	16,899	24,626	1,255		70,301	1,040,701	6.76%
MA	3,206			94		3,300	354,452	0.93%
MD	16,624	9,738	14,583	617		41,562	1,293,821	3.21%
ME							11,442	0.00%
MI	23,798			775		24,573	1,046,127	2.35%
MN	3,474	1,512	9,034	201		14,221	195,676	7.27%
MO	11,969	6,602	16,367	235		35,172	511,505	6.88%
MS	14,029	4,035	17,014	433	72,248	107,758	773,869	13.92%
MT	103			68		171	4,133	4.14%
NC	22,823	2,068	18,529	201		43,621	1,536,233	2.84%
ND	105			27		132	6,302	2.10%
NE	1,205	223	500	94	1,346	3,368	60,954	5.52%
NH	171			29		200	12,839	1.55%
NJ	15,399	6,785	27,949	766		50,898	933,354	5.45%
NM	518	213	1,035	45		1,811	37,145	4.87%
NV	3,611	1,650	2,400	25	14,137	21,823	173,233	12.60%
NY	28,628	21,610		1,080		51,318	2,442,295	2.10%
OH	24,399			881		25,280	1,048,613	2.41%
OK	7,497	911	5,084	34		13,526	216,073	6.26%
OR	1,431			185		1,616	61,380	2.63%
PA	25,347			1,203		26,550	1,045,246	2.54%
RI	964					964	51,527	1.87%
SC	15,296	4,333	12,198	598		32,425	953,961	3.40%
SD	187	162		20		369	7,810	4.73%
TN	13,052	5,541	20,698	835	105,817	145,943	771,351	18.92%
TX	62,575	39,239	54,257	245		156,316	2,196,259	7.12%
UT	454			237		691	22,683	3.05%
VA	22,810	1,779	29,190	180	188,999	242,958	1,192,554	20.37%
VT							5,276	0.00%
WA	3,440	1,283	4,033	23		8,779	207,299	4.24%
WI	9,610	7,604	5,057	303		22,574	252,719	8.93%
WV	856	205	668	94		1,822	52,816	3.45%
WY	94	36	95	17	563	805	4,403	18.29%
Total	**587,730**	**203,282**	**445,493**	**18,059**	**976,458**	**2,231,022**	**29,138,677**	**7.66%**

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A LIFETIME OF PUNISHMENT:
THE IMPACT OF THE FELONY DRUG BAN ON WELFARE BENEFITS

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RESEARCH AND ADVOCACY FOR REFORM

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OVERVIEW

In his first State of the Union address, President Bill Clinton promised to "end welfare as we know it."[1] Nearly four years later, on August 22, 1996, President Clinton signed legislation to do exactly that: the *Personal Responsibility and Work Opportunity Reconciliation Act* (PRWORA).[2] PRWORA's reforms were expansive and controversial for several reasons, including its implementation of a revised cash assistance program—Temporary Assistance to Needy Families (TANF)—which limited the length of time eligible families could receive benefits[3] and established work requirements for recipients.[4] In addition, PRWORA made substantial changes to the operation of the federal food stamp program,[5] which has since been renamed the Supplemental Nutrition Assistance Program (SNAP).

Perhaps because of the general debate surrounding PRWORA's changes to cash assistance and food stamp programs, one significant provision of the law initially received little attention: along with other federal legislation related to the "war on drugs," PRWORA imposed a denial of federal benefits to people convicted in state or federal courts of felony drug offenses. The ban is imposed for no other offenses but drug crimes. Its provisions that subject individuals who are otherwise eligible for receipt of SNAP or TANF benefits to a lifetime disqualification applies to all states unless they act to opt out of the ban.[6]

Despite the magnitude of this change, the provision received only two minutes of debate after it was introduced on the Senate floor—one minute for Republicans and one minute for Democrats.[7] It was then unanimously adopted by a voice vote.[8] The brevity of Congressional discussion on the felony drug conviction ban makes it difficult to know the intent of Congress in adopting this policy, but the record that does exist suggests the provision was intended to be punitive and "tough on crime." As Senator Phil Gramm (R-TX), the sponsor of the amendment, argued, "if we are serious about our drug laws, we ought not to give people welfare benefits who are violating the Nation's drug laws."[9] Conspicuously absent from the brief debate over this provision was any discussion of whether the lifetime ban for individuals with felony drug offenses would advance the general objectives of welfare reform.

In an effort to assess the impact of this policy, this report provides an analysis of the ban on receipt of TANF benefits for individuals with felony drug convictions. First, we survey the current status of the ban at the state level, including actions by legislatures to opt out of the ban in full or in part. Next, we produce estimates of the number of women potentially affected by the ban in those states that apply it in full. We then assess the rationale for the ban and conclude that, for a multiplicity of reasons, the ban not only fails to accomplish its putative goals, but also is likely to negatively impact public health and safety. Finally, we offer policy recommendations for future treatment of the ban on receipt of food stamps and cash assistance for individuals convicted of felony drug crimes.

STATE POLICIES

Although PRWORA banned the receipt of SNAP and TANF benefits for individuals with felony drug convictions, it gave states the discretion to opt-out of or modify the ban. By 2001, eight states and the District of Columbia had entirely opted out of the ban, while an additional 20 states had modified it.[10] In the last decade, more states have joined the ranks of those that do not enforce PRWORA's drug-crime exclusion provisions in full.

Despite these changes, a 2011 review of state policies by the Legal Action Center documents that three-quarters of the states enforce the ban in full or in part.[11] Currently, 37 states either fully or partially enforce the TANF ban, while 34 states either fully or partially enforce the SNAP ban (Table 1). Of these states, half (largely, but not precisely the same for both policies) have modified the ban to allow individuals with felony drug convictions to receive TANF or SNAP benefits under certain circumstances. For example, Arkansas, Florida, and North Dakota allow people to receive TANF if they were convicted of possessing drugs, but not manufacturing or distributing drugs. Other states allow receipt of TANF benefits for individuals who take part in or complete drug treatment, submit to drug testing, or have completed a specified waiting period. North Carolina, for instance, bans people from receiving benefits for six months following completion of a felony drug sentence. Although states are minimally more lenient in allowing people to receive food stamps, SNAP restrictions generally mirror state TANF restrictions.

Table 1. State drug conviction policies on cash assistance (TANF) and food stamps (SNAP)

TANF[1]			SNAP[2]		
Full Ban	Modified Ban	No Ban	Full ban	Modified Ban	No Ban
AK	AR	KS	AK	AR	DE
AL	AZ	ME	AL	AZ	IA
DE	CA	MI	GA	CA	KS
GA	CO	NH	MO	CO	ME
IL	CT	NJ	MS	CT	MI
MO	FL	NM	SC	FL	NH
MS	HI	NY	TX	HI	NJ
NE	IA	OH	WV	ID	NM
SC	ID	OK	WY	IL	NY
SD	IN	PA		IN	OH
TX	KY	RI		KY	OK
VA	LA	VT		LA	PA
WV	MA	WY		MA	RI
	MD			MD	SD
	MN			MN	VT
	MT			MT	WA
	NC			NE	
	ND			NC	
	NV			ND	
	OR			NV	
	TN			OR	
	UT			TN	
	WA			UT	
	WI			VA	
				WI	
13	24	13	9	25	16

[1]Source: http://bit.ly/HIRE_TANF
[2]Source: http://www.lac.org/toolkits/TANF/TANFhtm#summary

IMPACT OF THE FEDERAL BAN ON TANF

The federal ban on TANF benefits has been in effect since 1996. Given the scale of drug convictions annually, the number of individuals affected by the ban is potentially quite substantial. In this analysis we develop estimates of this effect. To produce a conservative estimate of the impact of the ban, we use the following methodology:

- First, since state policies vary somewhat between prohibitions on TANF or SNAP we focus here only on the TANF ban. We do so because the financial effect of the TANF ban is more significant for affected households, but with the recognition that many of the individuals excluded under the TANF ban have also lost food stamp benefits.

- Our analysis only covers 12 states that impose a ***full*** ban on TANF benefits (excluding Virginia). Although there are an additional 24 states that impose a ***partial*** ban, there is no reliable means of obtaining data on the factors that trigger these bans (such as distinctions between convictions for drug sales or drug use, or the number of people with felony drug convictions enrolled in treatment programs).

- Our analysis only covers the effect on women with felony drug convictions. Although the absolute number of men with drug convictions is far greater, women with children are far more representative of the TANF population.

Our estimates below represent the lifetime *potential* impact of the TANF ban in these selected states. That is, the prospect that at some point in their lives women who would otherwise qualify for such benefits will be denied them due to a prior felony drug conviction. At any given moment in time, many women would not qualify for these benefits since eligibility criteria include having custody of minor children, meeting income and work requirements, and not having exhausted the lifetime eligibility limit (five years in most states).[12] Eligibility for food stamps is similar, except non-parents are also eligible to receive SNAP benefits.[13]

The estimated number of women potentially affected by the PRWORA ban in states that fully ban people convicted of drug felonies from receiving TANF was derived using data from the Bureau of Justice Statistics' *Felony Sentences in State Courts* series.[14] These data are based on a nationally representative sample of counties and are available for even years from 1996 through 2006. The average of the preceding and subsequent years was used to estimate odd year values, and the 2006 value was used to approximate values for each year from 2007 through 2012.

Estimates of the proportion of sentencing events involving women and the proportion in which a drug offense was the most serious offense were used to estimate the number of women convicted annually of a felony drug offense. The annual estimates were adjusted downward to account for multiple convictions during one sentencing event. Further adjustments were made to account for mortality and reconviction over time. These adjustments led to an estimate of the unique number of women convicted of felony drug offenses from 1996-2011. The estimated total number of women convicted of drug felonies from 1996 through 2011 was apportioned to states according to the estimated proportion of the national combined female probation, parole, and prison populations within those states.

As seen in Table 2, for the 15-year period 1996 – 2011 there are now an estimated 180,100 women in these states who may be affected by the TANF ban at some point in their lives.

Table 2. Estimated number of women affected by the TANF ban, 1996 to 2011

States with Full Ban	
State	Women
Alabama	9,600
Arkansas	1,200
Delaware	2,000
Georgia[†]	56,100
Illinois	18,800
Missouri	10,500
Mississippi	5,200
Nebraska	2,200
South Carolina	5400
South Dakota	1400
Texas	65,900
West Virginia	1,800
TOTAL	180,100

[†]The Bureau of Justice Statistics reports that probation counts in Georgia may overstate the number of individuals under supervision because the agency that reports the county data has the capacity to report probation cases, but not the number of individuals under supervision. Therefore, individuals on probation with multiple sentences may be under supervision by more than one agency. http://bjs.gov/content/pub/pdf/ppus11.pdf

Note that the number of individuals affected would greatly increase if the analysis were expanded to include women in the 24 states that partially implement the ban or who are only seeking SNAP benefits, as well as low-income men with felony drug convictions.

THE BAN'S DISPARATE EFFECTS

While the TANF ban does not target any demographic groups specifically, the dynamics of social class and the accompanying disparate racial effects of criminal justice policy and practice combine to produce highly disparate effects on women, children, and communities of color.

IMPACT ON WOMEN

The ban's effect on women results from several factors. First, women comprise the vast majority of recipients of both TANF and SNAP benefits. In 2009, 85.9% of adult TANF recipients were women;[15] women are also about twice as likely as men to receive food stamp benefits at some point in their lives.[16]

Law enforcement and sentencing trends in recent decades have also combined to skew the effect of the ban on women. This has come about through two interrelated trends - a sharply rising number of women charged with drug offenses and a disproportionate effect of drug law enforcement on women. While prison populations have grown dramatically in recent decades, the rise in women's incarceration has outstripped that of men. From 1980 to 2010, the number of women in prison rose by 646%, compared to a 419% increase for men.[17]

Within the prison population, women have been affected more so than men by drug law enforcement. Given that women are typically a small percentage of people who commit violent crimes, their numbers in prison historically were quite low. But as drug law enforcement accelerated rapidly beginning in the 1980s, women became much more likely to be convicted of a felony or sentenced to prison than in previous eras. By 2011, 25.1% of women in state prisons were incarcerated for a drug offense, compared to 16.2% of men.[18] Thus, the combination of the high rate of women as SNAP and TANF recipients, along with the disproportionate effect of the drug war on women, has produced the skewed effects of the PRWORA ban.

IMPACT ON CHILDREN

In addition to the direct effect of the TANF ban on parents, the ban also has an immediate impact on their children, who have committed no crime themselves. Under the terms of the law, in a TANF-eligible household the monthly grant allotment is reduced for the ineligible parent, but is still allowed for that person's children. For example, if a single mother with two dependent children has a felony drug conviction the TANF benefit will be reduced from the three-person level to that of a two-person household. Given that TANF benefits are quite modest to begin with, a reduction of this size creates substantial additional hardship for such families.

RACIAL / ETHNIC IMPACT

The federal ban on receipt of food stamps and cash assistance for individuals with felony drug convictions disproportionately impacts African Americans and other minority groups. This is a direct reflection of the racial disparities produced by the "war on drugs." Data on illicit drug use collected by the Department of Health and Human Services has consistently shown over time that whites, African Americans, and Latinos use drugs at roughly comparable rates.[19] But as of 2011, African Americans comprised 40.7% of prisoners in state prisons for drug crimes, while individuals of Hispanic origin made up another 21.1% of this population.[20] Thus, the racial/ethnic disparities in drug offender incarceration produced by the interaction of law enforcement and sentencing policies through the war on drugs then translate into a disproportionate impact of the felony drug ban.

ASSESSING THE BAN AS POLICY

As we have seen, the felony drug ban potentially affects hundreds of thousands of women (as well as children and men) over the course of their lifetimes, well after most will have completed serving their felony sentences. For this disproportionately lower-income population, the

sudden loss of a job or change in family circumstances can move an otherwise self-supporting household into a situation whereby the loss of federal benefits can make the difference between stability and vulnerability in one's life prospects.

In order to justify such effects, we can explore the possible beneficial effects of the ban that may have motivated federal lawmakers to adopt the policy originally, and to determine to what extent the policy of benefits denial has succeeded in its goals. Although members of Congress did not specifically articulate a rationale for the ban, it has often been assumed that denying SNAP and TANF benefits to individuals convicted of drug crimes arose out of "the government's desire to deter drug use and to reduce incidences of fraud."[21] The following is an assessment of the ban's effect on these goals, which leads us to conclude that the ban is not necessary to or effective at achieving them.

DETERRING DRUG USE

To the extent that policymakers believed that the ban on benefits would deter use, they were unfortunately very misinformed about the connection between substance abuse and certain criminal behaviors. While the ban applies to individuals convicted of a drug offense, many people in this category do not use drugs themselves. Looking at data from 2006 (most recent available) from the Bureau of Justice Statistics, we find that more than half (56%)[22] of the 377,860 drug convictions that year were for selling drugs, not using drugs. Some people who sell drugs do so to support their own drug use or addiction, but many do so as a means of making money. In addition, of the remaining 44% of drug convictions for possession, many were for the offense of "possession with intent to deliver," a charge involving sale of drugs. Therefore, the welfare ban applies to many people convicted of a drug crime who do not use drugs, but does not apply to drug users who have been convicted of larceny, theft, robbery, and a host of other felonies.

Denying individuals convicted of drug crimes food stamps and cash assistance is one of the many collateral consequences of a felony conviction that have been termed an "invisible punishment"—a sanction that results from a criminal conviction but "take[s] effect outside of the traditional sentencing framework," and as a result "operate[s] largely beyond public view, yet ha[s] very serious, adverse consequences for the individuals affected."[23] Collateral consequences in general have dubious value as deterrents, in large part because most people are unaware of the civil penalties that result from criminal convictions.

In particular, there is little reason to believe that barring individuals with felony drug convictions from receiving welfare benefits deters drug use or crime. For example, one study of women with drug convictions or pending felony drug charges found that not a single one of the 26 women interviewed was aware prior to her involvement with the criminal justice system that a felony drug conviction could lead to a loss in SNAP or TANF benefits.[24] Furthermore, 92% of the women reported that even if they had known of the ban, it "would not have acted as a deterrent during active addiction."[25] Because of the nature of addiction, it is also generally implausible to believe that a person who is not deterred from criminal activity by the specter of criminal prosecution or imprisonment would be halted by the threat of losing access to TANF and SNAP benefits.

REDUCING WELFARE FRAUD

The ban on receipt of TANF and SNAP benefits for individuals with felony drug convictions is sometimes defended on the ground that the ban helps to reduce fraud in the federal welfare system. The logic of this claim seems to be that individuals with drug convictions

are more likely to be drug users, and that drug users are more likely to commit welfare fraud—for example, by using TANF cash payments to buy drugs or by trafficking food stamps.[26]

The perception that drug users may be likely to commit fraud may be traceable, in part, to "[a] series of media accounts in the early 1990s," which "suggested that food-stamp benefits were being exchanged readily for cash and contraband."[27] Scholars have noted that the problem with these accounts is that they often involved undercover officers who tried to exchange food stamps for cash, drugs, or weapons, and that while their success in doing so demonstrates that food stamps have value, "[t]hese anecdotes did not establish that households receiving monthly food-stamp allotments—as opposed to undercover agents with benefits provided explicitly for sting operations—were exchanging food stamps improperly."[28] In reality, the SNAP fraud rate is extremely low: from 2006-2008, the trafficking rate for food stamps was approximately one cent per every dollar.[29] At least one explanation for the low fraud rate is the fact that SNAP benefits are now issued on an electronic benefit card that functions like a regular debit card and makes it both harder to misuse benefits and easier for the government to identify and track suspicious food stamp activity.[30]

Even though the fraud rate is low, it is not unreasonable to attempt to detect and prevent the trafficking of food stamps. But disallowing TANF and SNAP benefits to individuals with felony drug convictions is hardly necessary to achieve this goal since federal legislation already proscribes and punishes fraudulent use of welfare benefits.[31] In fact, trading controlled substances for SNAP benefits is specifically prohibited in a separate section of the United States Code; individuals who are found to have traded controlled substances for SNAP benefits are punished with two years of SNAP ineligibility for a first offense and permanent ineligibility for a second offense.[32] This provision is more closely tailored to the purpose of deterring food stamp fraud than the blanket ban on receipt of food stamps for individuals with felony drug convictions, because it is responsive to actual misuse of benefits regardless of whether the recipient has a history of criminal or drug involvement. In contrast, the ban on receipt of benefits for individuals with felony drug offenses is over-inclusive, because it disallows SNAP benefits to people who have never and would never engage in fraudulent use of SNAP or TANF benefits—for life.

IMPLICATIONS FOR REENTRY AND RECIDIVISM

Each year, nearly 700,000 people are released from state and federal prison.[33] Along with the stigma of the criminal conviction and incarceration that they carry, a host of public policy restrictions make the reentry process increasingly challenging. In addition to potentially losing access to food stamps and TANF benefits, individuals with felony convictions (for drug offenses or other felonies, depending on the particular sanction) may not be eligible for public housing or federal loans to pursue an education; they may face substantial hurdles in obtaining employment, particularly when this involves applying for a professional license; driver's licenses may be suspended; and there may be a loss of the right to vote, serve on a jury, or join the military.

These collateral consequences of a criminal conviction would be difficult to manage under any circumstances, but for people who are trying to reenter society after a period of incarceration, they are particularly damaging. Most people returning home from prison had been struggling in some significant way prior to their involvement with the criminal justice system; surveys consistently show that substantial proportions of people who are incarcerated have histories of substance abuse, mental health issues, homelessness, or physical or sexual abuse.[34] Without proper support, these individuals may continue to struggle with similar issues upon their release from prison.

In this context, access to SNAP and TANF benefits may be particularly critical. The SNAP and TANF programs are designed to provide subsistence level benefits for people who cannot afford to feed themselves or clothe their children.[35] People who use these benefits typically do so for short periods of time; one overview of the program found that less than ten percent of recipients used food stamp benefits for five consecutive years.[36] People who apply for benefits are more likely to do so in the wake of a catastrophic life event, such as the loss of a job.[37] For formerly incarcerated individuals transitioning back to their home communities, SNAP or TANF benefits can help to meet their basic survival needs during the period in which they are searching for jobs or housing. By doing so, the programs reduce the likelihood that formerly incarcerated individuals will return to criminal activity to secure food or other essentials for themselves or their families.

Restrictions on SNAP and TANF benefits are also counterproductive for providing drug treatment services. Historically, drug treatment facilities have used their patients' SNAP and TANF benefits to subsidize the cost of treatment.[38] If individuals who are recovering from drug addiction are denied access to these "subsistence benefits, treatment, and safe and sober housing, it is much less likely that these [people] will be able to live drug-free in the community and avoid recidivism."[39]

PUBLIC HEALTH EFFECTS

In addition to enhancing the risk of recidivism, there is some evidence that barring individuals with felony drug convictions from receiving food stamps may have troubling public health consequences. One of the few analyses done in this area was a recent pilot study conducted in Texas, California, and Connecticut that examined the relationship between "food insecurity and HIV risk behaviors among individuals recently released from U.S. prisons."[40] The study found that formerly incarcerated people who lived in states that fully enforce the ban on receipt of food stamps for individuals with felony drug convictions were more likely to report having gone an entire day without eating than people who lived in states that did not enforce the ban; furthermore, people who did not eat for an entire day were more likely to engage in HIV risk behaviors, such as using alcohol, heroin, or cocaine before sex or exchanging sex for money.[41] While the authors note that the small sample size limits the ability to draw definitive conclusions, they report that "[i]ndividuals released from prison are at high risk for food insecurity," and that the level of food insecurity among recently released prisoners uncovered by the study "mirror[s] the magnitude of food insecurity in developing countries."[42]

Overall, there is little reason to believe that the drug felony ban has had any constructive impact on either substance abuse or public safety. States that enforce the ban in full have not conducted any studies that suggest there may be positive outcomes in comparison to states that have fully opted out of the ban. After 17 years of implementation, though, there is reason to believe that affected individuals in these states may be subject to substantial reentry challenges and food insecurity.

CURRENT POLITICAL CLIMATE

Since the TANF ban was enacted in 1996, a number of states have taken action to opt out of its provisions in full or in part, but three-quarters still retain either a full or partial ban on the receipt of welfare benefits. At the federal level members of Congress have introduced bills that would repeal the ban, but such legislation has not gained sufficient support to change policy.[43]

More recently there have even been proposals to expand the scope of the ban's restrictions, such as the one introduced during the 2013 legislative session of

Congress by Senator David Vitter (R-LA). Senator Vitter's proposal, which was presented as an amendment to the omnibus Farm Bill, called for a retroactive ban on individuals convicted of murder, aggravated sexual abuse, or sexual exploitation of children from receiving SNAP benefits for life.[44] Although the amendment was strongly denounced by many outside the halls of Congress,[45] it was unanimously consented to in the Senate.[46] A version of the amendment was later approved by the House as well.[47] However, broader political strife over the Farm Bill leaves the future of such policy uncertain.

POLICY RECOMMENDATIONS

Since the adoption of the ban on receipt of SNAP and TANF benefits for individuals with felony drug convictions in 1996, we estimate that 180,100 women in the states that fully enforce the ban's provisions may be affected by these provisions at some point in their lives. Including women in the states with partial bans, or men who are impacted by the policy, would clearly raise this number substantially.

There is no evidence to date that any harm caused by the ban has been offset by the realization of significant positive outcomes for public safety. The ban has not been shown to decrease drug use, nor is it necessary to reduce welfare fraud, which is proscribed by other sections of the United States Code. Furthermore, by raising a new substantial barrier to successful reentry, the ban may actually harm public safety and public health, while contributing to swollen prison populations. Policymakers who wish to address these challenges should consider the following reforms:

CONGRESS

Given how little evidence was supplied in support of the ban in 1996 or regarding its impact since then, it is long overdue for Congress to repeal the drug felony ban on access to welfare benefits and food stamps. Among other incongruous effects, the ban is clearly inconsistent with Congressional support for reentry services through funding provided by the Second Chance Act, as well as current policy recommendations of the Federal Interagency Reentry Council. Policies such as the TANF/SNAP ban make it increasingly difficult for formerly incarcerated individuals to return home and lead productive law-abiding lives.

STATES

Until such time as Congressional repeal of the ban on receipt of SNAP and TANF benefits is enacted, states should consider adopting policies to opt out of the ban's provisions. At a minimum, states should modify the ban such that individuals with felony drug convictions have some possibility of regaining eligibility for SNAP or TANF benefits—perhaps by successfully completing drug education or treatment. To the extent that any prohibitions remain in place, they should be narrowly tailored to achieving some kind of public health or safety goal, rather than being merely punitive in nature.

A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits

NOVEMBER 2013

REVISED JANUARY 2014

Further reading available on our website:

- Children in Harm's Way: Criminal Justice, Immigration Enforcement, and Child Welfare (2013)
- The Affordable Care Act: Implications for Public Safety and Corrections Populations (2012)
- State-Level Estimates of Felon Disenfranchisement in the United States, 2010 (2012)
- Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated (2010)

The Sentencing Project works for a fair and effective U.S. criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration.

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Prepared Statement of the Consumer Data Industry Association (CDIA)

Written Comments Submitted for the Record

from the

Consumer Data Industry Association

to the

Over-Criminalization Task Force of the House Judiciary Committee

in connection with the Task Force's Hearing on

Collateral Consequences

June 26, 2014

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On June 26, 2014, the Over-Criminalization Task Force ("Task Force") of the House Judiciary Committee held a hearing the on collateral consequences of criminal convictions. A number of statements were made during that hearing that require correction, clarification, and elaboration.

The Consumer Data Industry Association ("CDIA") is the international trade association representing, among others, the companies that conduct criminal background checks on behalf of their employer and landlord clients.[1] CDIA is well-positioned to offer comments to the Task Force on the value of criminal background checks, the consumer protections associated with criminal checks, and the laws that regulate those checks.

We respectfully request that this comment be included in the record of the June 26 Task Force hearing on collateral consequences.

CDIA offers the following points: (1) The Fair Credit Reporting Act ("FCRA") already comprehensively addresses the accuracy of criminal records used in employment decisions; (2) Employers use criminal histories fairly and responsibly; (3) Criminal histories are reliable and tested in the marketplace every day; (4) There is no magic point of redemption when an ex-offender is no longer likely to reoffend; and (5) FBI criminal searches have been criticized for being incomplete, but private sector searches are often more comprehensive.

We agree with the chairman when he noted that criminal background checks are important to protect public safety, especially in workplaces. We also agree with governmental and charitable efforts to help rehabilitate ex-offenders and to lessen the risk of their reoffending following release. And, as we will note below, we agree that

[1] CDIA members represent the nation's leading institutions in credit reporting, mortgage reporting, check verification, fraud prevention, risk management, employment reporting, tenant screening and collection services.

licensing agencies must be cautious in imposing outcomes consequences based on criminal history when employers would not reach the same decision.

1. **The FCRA already comprehensively addresses the accuracy of criminal records.**

Since 1971, the FCRA has served employers and applicants alike by acknowledging vibrant and lawful use of criminal history information, requiring reasonable procedures to ensure maximum possible accuracy, and requiring substantial systems to correct any inaccuracies that occur. The FCRA is "an intricate statute that strikes a fine-tuned balance between privacy and the use of consumer information."[2] Many states have their own state FCRA laws.[3]

A. General protections

The FCRA governs consumer reports, regulates consumer reporting agencies, and protects consumers. The law requires consumer reporting agencies to maintain reasonable procedures to assure maximum possible accuracy.[4] The law also provides many other consumer protections as well. For example:

- Those that furnish data to consumer reporting agencies cannot furnish data that they know or have reasonable cause to believe is inaccurate, and they have a duty to correct and update information.[5]
- Consumers have a right to dispute information on their consumer reports with consumer reporting agencies and the law requires dispute resolution within 30 days (45 days in certain circumstances). If a dispute cannot be verified, the information subject to the dispute must be removed.[6]
- A consumer reporting agency that violates federal law is subject to private lawsuits and enforcement by the Federal Trade Commission ("FTC"), Consumer Financial Protection Bureau ("CFPB"), and state attorneys general.[7]

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[2] Remarks of FTC Chairman Tim Muris, October 4, 2001 before the Privacy 2001 conference in Cleveland, Ohio.
[3] *E.g.*, Cal. Civ. Code § 1785 *et seq.*; N.Y. Gen. Bus. L. § 380 *et seq.*
[4] *Id.*, § 1681e(b).
[5] *Id.*, § 1681s-2(a)(1)-(2).
[6] *Id.*, § 1681i(a)(1), (5).
[7] *Id.*, § 1681n, 1681o, 1681s.

B. Protections specific to employment screening

In addition to the general protections above, there are protections specific to the use of consumer reports for employment purposes.

For example, under § 1681k of the FCRA, a consumer reporting agency which "furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment," such as criminal record information, must either

- notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the employer to whom such information is being reported; or
- "maintain strict procedures designed to insure" that the information being reported is complete and up to date, and such information "shall be considered up to date if the current public record status of the item at the time of the report is reported."

As a result of these requirements, consumer reporting agencies that include adverse criminal record information in an employment report either notify the consumer of that fact or access directly the most up-to-date information.

Although the FCRA allows employers to review the criminal histories of prospective and existing employees,[8] this review comes with certain obligations. Under § 1681b(b) of the FCRA:

- Before ordering a consumer report for employment purposes, an employer must certify to the consumer reporting agency that the employer has and will comply with the employment screening provisions of the FCRA, and that the information from the consumer report will not be used in violation of any applicable federal or state EEO laws or regulations.
- Before requesting a consumer report, an employer must give the prospective employee a written disclosure that a consumer report may be obtained for employment purposes and get the consumer's authorization to obtain a

[8] *Id.*, § 1681b(a)(3)(B).

consumer report for employment purposes. The disclosure document provided to the consumer must be clear and conspicuous and contain only the disclosure.

- Before taking an adverse action based on a consumer report, the employer must provide to the consumer a copy of the report and the summary of rights mandated by the CFPB. This notice gives the employee an opportunity to dispute the report.
- The employer must provide a second adverse action notice if an adverse action is actually taken.

One of the witnesses at the Task Force hearing, Mr. Rick Jones, said the FCRA was frequently violated, yet he offers no evidence to suggest that was the case. The FCRA is a carefully thought out balancing of many interests. Criminal background checks under the FCRA are dependable and trusted.

2. Employers use criminal histories fairly and responsibly

In July 2012, the Society for Human Resources Management ("SHRM") released a study on employer use of criminal histories. Of the 69% of employers that do conduct a criminal background check on employees, SHRM reported 69% consider criminal histories because the position requires a fiduciary duty or financial responsibility; 66% consider them for positions where there is access to highly confidential employee salary, benefits, or personal information; 55% will review a criminal history for positions with access to corporate or personal property, including technology; 48% of employers will consider criminal histories for senior executive positions; and 37% for safety-sensitive positions, like transportation and the operation of heavy equipment. The SHRM study shows that employers weigh different offenses differently, consider the severity of the crime, and examine the time between an offense and the job application.[9] In short, real evidence shows that employers use criminal

[9] *Background Checking—The Use of Criminal Background Checks in Hiring Decisions*, Society for Human Resource Management, July 19, 2012, http://www.shrm.org/Research/SurveyFindings/Articles/Pages/CriminalBackgroundCheck.aspx.

checks in a responsible and focused manner. Not surprisingly, employers are reluctant to disqualify the talented workers most qualified for the jobs unless unacceptable levels of risk drive them to do so.

3. Criminal histories are reliable and tested in the marketplace every day

The public and private sectors make regular use of criminal background checks. These checks are done to help employers reduce crime and violence in the workplace, especially when those workplaces are in homes. There is a clear value to criminal background checks. If there were as many errors in these checks as has been alleged, private employers would abandon criminal histories much more rapidly than laws could be amended. Yet, both public and private employers continue to conduct criminal background checks every day.[10]

4. There is no magic point of redemption when an ex-offender is no longer likely to reoffend.

Mr. Jones, in his response to a question, said that there are studies that suggest that after a certain number of years a person is less likely or no more likely to reoffend than

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SHRM testified before the House Financial Services Committee on the use of credit for employment decisioning and a comment made on credit histories applies also to criminal histories:

> ...SHRM does believe there is a compelling public interest enabling our Nation's employers to take a full assessment of potential hires. This is because the consequences of making a poor hiring choice can be great. Consequences include financial or property losses for the company or employees, legal liability in the form of negligent hiring, identity theft, and physical harm to employees, customers, and property.

The Equal Employment for All Act: Hearing on H.R. 3149 Before the Subcomm. on Financial Institutions & Consumer Credit of the H. Comm. on Financial Services, 111th Cong. 2. (Sept. 23, 2010), Serial No. 111-159 (Statement of Colleen Parker Denston, Director of Human Resources, Worcester Preparatory School, on behalf of SHRM), 18.

[10] In the public sector, for example, the Office of Personnel Management ("OPM") conducts over two million investigations each year. http://www.opm.gov/investigations/background-investigations/.

anybody in the general society might. We presume Mr. Jones is referring to the work of Alfred Blumstein and Kiminori Nakamura.

Even if the Task Force considers Profs. Blumstein and Nakamura's latest findings, as was the case with their 2009 study[11], their 2012 report remains incomplete and "some important next steps should still be pursued."[12] No matter how much research is undertaken, the search for a single bright redemption line is likely doomed to fail. The authors readily concede "[t]hose with no prior record . . . are inherently less risky than those with a prior record."[13] Since those with no prior record are less risky than those with a criminal record, the research into redemption times relies heavily on an employer's judgment that the risk of a convicted person being re-arrested is "close enough" to the risk of a never-arrested person being arrested for the first time.[14] It would run counter to that research to impose a redemption time across different positions for different employers with different risks and different risk mitigation. This redemption research certainly supports the Task Force's sense that licensing bodies should be cautious in prohibiting employers from hiring candidates when those employers' assessments are indeed that the risk is "close enough."

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[11] Blumstein, A. & Nakamura, K. (2009). Redemption in the presence of widespread criminal background checks. *Criminology*, 47(2) ("Blumstein & Nakamura, 2009").

[12] Alfred Blumstein and Kiminori Nakamura, Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences, Oct. 2012, available at https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf ("Blumstein & Nakamura, 2012"), 90. For example, the authors acknowledge that:

> The estimates of redemption shown in this report are based on the length of time since the *first* arrest or conviction. In this sense, we only address redemption for first-time offenders. Although such *first-time* offenders can be viewed as most deserving of redemption, it is possible to extend the concept of redemption to people with more than one prior criminal event. Employers also routinely receive applications from individuals with multiple arrests or convictions who have stayed clean a reasonable length of time. How do the redemption estimates vary with the number of prior crime events?"

Id., 90-91 (emphasis original).

[13] *Id.*, 90.

[14] *Eg., id.* at 108-09.

Separately, Prof. Blumstein has acknowledged the overwhelming difficulties facing those trying to predict and compare future criminal behavior by ex-offenders and non-offenders:

> [A]n individual with a prior violent conviction who has been crime-free in the community for twenty years is less likely to commit a future crime than one who has been crime-free in the community for only ten years. But neither of these individuals can be judged to be less or equally likely to commit a future violent act than comparable individuals who have no prior violent history. It is possible that those differences might be small, but making such predictions of comparable low-probability events is extremely difficult, and the criminological discipline provides no good basis for making such predictions with any assurance that they will be correct.[15]

Since even the latest research from Profs. Blumstein and Nakamura has been criticized, a redemption period may not exist outside of a specific employer's knowledge of the risks entailed in its positions and, in any event, it may be impossible to predict. Given the difficulty of establishing a point of redemption, deference to employers' educated and reasonable judgment is fully warranted. Similar deference to licensing agencies decisions, made without reference to any specific employer's operations, is less warranted.

5. FBI criminal searches have been criticized for being incomplete, but private sector searches are often more comprehensive.

While many people think the FBI criminal history database is the touchstone for all criminal history information, it is not. Checking the FBI database alone offers an incomplete picture in to someone's criminal history. While the FBI database can be a source for criminal history information it should not be the only source. According to a U.S. Attorney General's report on background screening,

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[15] *El v. SEPTA*, 479 F.3d 232, 246 (3d Cir. 2007) (citing expert testimony of Dr. Alfred Blumstien. App. 953) (internal citations omitted in original).

> [t]he fact is that there is no single source of complete information about criminal history records. A check of both public and commercial databases and of primary sources of criminal history information such as county courthouses would, perhaps, provide the most complete and up-to-date information.[16]

In the end,

> [c]ommercial databases…offer other information that may not be available through state and FBI repository checks. A search of commercially available databases may reveal charges and dispositions not reported to the state or national repositories [and] records relating to some offenses are not reported to the FBI…Even state repositories may not have records on less serious offenses that have not been forwarded by local law enforcement agencies. Some of this information may be available through certain commercial databases.[17]

Conclusion

CDIA thanks the Task Force for allowing CDIA to offer this written testimony following the hearing. We look forward to a continuing dialog with the Task Force in the hope of bringing additional information and insight to its deliberations.

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[16] The Attorney General's Report on Criminal History Background Checks, U.S. Dep't. of Justice, Office of the Att'y. Gen. (June 2006), 54, www.justice.gov/olp/ag_bgchecks_report.pdf.
[17] Id., 54.

Letter from the National Association of Professional Background Screeners (NAPBS)

napbs
National Association of Professional Background Screeners
The Voice of Screening Professionals

July 14, 2014

The Honorable Jim Sensenbrenner
United States House of Representatives
House Committee on the Judiciary
Over-Criminalization Task Force
Washington, DC 20515

Dear Mr. Chairman:

The National Association of Professional Background Screeners (NAPBS or Association) welcomes the opportunity to submit the following comments with respect to the Over-Criminalization Task Force's June 26, 2014 hearing entitled, "Collateral Consequences." We respectfully request that these comments be made part of the Task Force's formal hearing record.

NAPBS commends the Task Force for its consideration of this important topic so that we can work together to determine the most appropriate and effective way to address such consequences in a way that balances competing interests. We agree with Chairman Sensenbrenner and Rep. Gohmert that the argument advanced by some, to force private employers to ignore an employee's criminal history when making a hiring decision, is not appropriate. This type of reaction does not address the core issues with over-criminalization nor offer a sound solution.

NAPBS currently represents over 700 companies engaged in employment and tenant background screening across the United States dedicated to providing the public with safe places to live and work. We are the voice of the background screening industry, and our member companies range from Fortune 100 companies to small local businesses, conducting millions of employment and tenant background checks each year. NAPBS member companies are defined as "consumer reporting agencies" pursuant to the Fair Credit Reporting Act (FCRA) and are regulated by both the Federal Trade Commission (FTC) and Consumer Financial Protection Bureau (CFPB).

The Association's overarching goal is to provide employers, residential managers, non-profit entities, volunteer organizations, and public sector employers, among others, with a tool—the criminal background check—that enables them to make better decisions that help keep workplaces and residences safer.

We submit these comments to expand upon some of the key points made at the June 26th hearing as well as to rebut certain points made during the hearing regarding the

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role of background screeners and the reports provided when a background check is conducted for employment or tenancy purposes.

I. Role of Background Screeners

We believe it is important to clarify and expand upon statements made during the hearing regarding the background screening industry.

Contrary to statements made by Mr. Rick Jones, the industry is highly regulated and individuals for whom a background check is conducted by a professional background screening company on behalf of an employer are afforded significant rights under the federal Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq*, and corresponding state analogs.

One important right individuals have as the subject of a background check is the right under the FCRA to access a copy of their background report (referred to as a "consumer report" under the FCRA) and request corrections if the report is not accurate or complete. A background screener is legally obligated under the FCRA to conduct a reinvestigation to determine whether the disputed information is inaccurate within 30 days.[1] Free of charge. Furthermore, the background screening company must provide written notice to the individual of the results of the reinvestigation.[2]

Mr. Jones' statement that employers can buy a person's rap sheet from consumer reporting agencies is not accurate. There is a difference between a rap sheet, which is repeatedly referenced to during the hearing, and a "consumer report," which is provided by a consumer reporting agency; the latter being how a background screening company is defined under the FCRA.[3]

A rap sheet, as defined by the FBI, is an "Identity History Summary—often referred to as a criminal history record or a 'rap sheet'—is a listing of certain information taken from fingerprint submissions retained by the FBI in connection with arrests and, in some instances, federal employment, naturalization, or military service."[4]

As a general rule, background screeners do not provide employers with rap sheets, do not have access to the FBI's criminal records databases, and in fact, rap sheets are generally not available to the public due to limited access to the FBI's databases for non-law enforcement purposes. Instead, background screeners conduct checks using a name-based process whereby they match identifiers to the records. Even if they had access to the FBI's database, it would likely only be used to generate tips and leads as it is not a reliable enough source of information to be the only source checked when preparing a

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[1] 15 U.S.C.§ 1681i(a).
[2] 15 U.S.C.§ 1681i(a)(6).
[3] 15 U.S.C.§ 1681a(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.
[4] *See* FBI Identity History Summary Checks available online as of 7/10/14 at: http://www.fbi.gov/about-

background report. Rep. Bass raised the question during the hearing about the FBI's website being "wrong a significant amount of time" and she wanted to know how it is wrong. In response, we would say that the issue is not the website, but rather the issue lies with the repository of information. A Department of Justice report on this very issue best highlights the problems associated with the FBI's criminal history database:

> The Federal Bureau of Investigation (FBI) maintains a criminal history record repository, known as the Interstate Identification Index (III or "Triple III") system that contains records from all states and territories, as well as from federal and international criminal justice agencies. The state records in the III are submitted to the FBI by central criminal record repositories that aggregate criminal records submitted by most or all of the local criminal justice agencies in their jurisdiction....*Although it is quite comprehensive in its coverage of nationwide arrest records for serious offenses, the III is still missing final disposition information for approximately 50 percent of its records* (emphasis added).[5]

II. Public Safety Value of Background Checks

Rep. Gohmert was correct when he stated that those who access individual criminal histories are subject to strict regulations regarding the use of that information under the FCRA and by the Equal Employment Opportunity Commission (EEOC). Both the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB) have enforcement authority under the FCRA. The EEOC uses its authority under Title VII of the Civil Rights Act as well as through its enforcement guidance on the use of criminal history records against employers.[6]

While the panelists advocated for greater controls and Congressional action with respect to the use of criminal history records by employers, we must highlight what is already available. In an exchange between Rep. Bass and Mr. Jones, he stated, "...I think that there have to be guidelines that are set out clearly for decision makers, for employers and landlords and others, there have to be guidelines that clearly instruct individuals as to what is relevant and what is not and what the passage of time is and what the evidence of rehabilitation might be...." These guidelines already exist.

The EEOC's Enforcement Guidance and case law in this area require that employer's factor in job applicants' criminal conduct by considering: (i) the nature and gravity of the offense or conduct; (ii) the time that has passed since the offense, conduct, and/or completion of the sentence; and (iii) the nature of the job held or sought. These are commonly referred to as the *Green* factors after the seminal case in this area, *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977). Furthermore, the EEOC's

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[5] *See*, U.S. Department of Justice, *The Attorney General's Report on Criminal History Background Checks*, p. 3 (June 2006).

[6] *See*, EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decision Under Title VII of the Civil Rights Act of 1964, Number 915.002 (4/25/2012)

Enforcement Guidance requires use of a targeted screen and individualized assessment for job applicants when their criminal history is considered during the hiring process.[7]

We must not lose sight however, of the fact that there are valid public safety and risk mitigation reasons employers, landlords, volunteer organizations and others conduct background checks.

Policymakers around the country recognize the benefits of background checks. Especially since 9/11, we have witnessed an upsurge of federal, state and local laws mandating background checks in myriad settings, especially those involving vulnerable populations such as the elderly, medical patients, children and the disabled. The federal government requires its employees to undergo background screening. NAPBS believes that in enacting such laws, policymakers are acting consistent with the public perceptions about the benefits of checks. As a broad group of screeners and employers told the United States Civil Rights Commission (USCCR) in December 2012, there are many reasons why the public deems checks to be critical:

> Checks help parents know whether a convicted sexual predator is working at their child's day care center, is driving their child's school bus, is a counselor at their summer camp or a coach in their son's or daughter's little league. Family members want assurances that parents will be safe when they move to an assisted living facility. Companies providing in-home services rely on checks because homeowners and apartment dwellers expect to be safe when opening their front door to a repairman, installer or deliveryman. Hotels use checks to help ensure guests that the worker with key access is not a violent ex-offender. Checks also give customers and patients' peace of mind that the individual filling their prescriptions at the local pharmacy or the healthcare provider tending to their illness does not have a criminal history that renders them unsuitable for that position.[8]

Policymakers should encourage, not discourage the responsible use of criminal background checks.

III. Potential Solutions

We appreciate the opportunity to provide some clarity on how the background screening industry works. And we would be remiss if we did not say that employers do in fact hire individuals with criminal records and an arrest record alone is not sufficient to deny an applicant employment. Our experience tells us otherwise. Furthermore, the use of arrest records by employers is limited by law. The FCRA prohibits the reporting of arrest records after seven years.[9]

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[7] *Id.*

[8] Letter from ACRAnet. et al. to the United States Commission on Civil Rights 6 (December 4. 21012).

[9] 15 U.S.C. § 1681c(a)(2).

We offer the following solutions to the Task Force and others as we address the issues of collateral consequences and over-criminalization:

- Make the expungement process more accessible in the courts;
- Work on greater use of diversion programs and sentencing reform;
- Expand incentives for employers for hiring ex-offenders, such as through tax credits, including the federal Work Opportunity Tax Credit (WOTC);
- Expand programs for certificates of rehabilitation; and
- Extend immunity to employers for liability under civil claims for negligent hiring.

Thank you for considering our views.

Respectfully submitted,

Judith A. Gootkind

Chair
National Association of Professional Background Screeners

Material submitted by the Federal Interagency Reentry Council

Federal Interagency
REENTRY COUNCIL

June 2014

The Cabinet-level Reentry Council is working to enhance community safety and well-being, assist those returning from prison and jail in becoming productive citizens, and save taxpayer dollars by lowering the direct and collateral costs of incarceration.

Collateral Consequences

Collateral consequences are the legal and regulatory penalties, sanctions, and restrictions imposed upon persons convicted of crime that are distinct from the direct consequences imposed as part of the court's judgment at sentencing. The American Bar Association (ABA), with Department of Justice (DOJ) support, has researched state and federal codes to identify some 45,000 collateral consequences. The ABA has catalogued each jurisdiction's collateral consequences in a National Inventory that can be searched by state, category, and keyword. A chief focus of the Reentry Council is to consider whether policies and regulations can be more narrowly tailored, without impeding public safety or other legitimate government interests, to remove or reduce unnecessary collateral consequences to individuals reentering society. In spring 2011, U.S. Attorney General Eric Holder sent a letter to all state attorneys general, asking them to evaluate the collateral consequences imposed by laws, regulations, and policies under their supervision and to determine if any could be eliminated or amended so that people who have paid their debt to society are able to live and work productively. In 2012, Attorney General Holder asked Reentry Council agencies to review their agencies' regulations with an eye toward how and where they could eradicate or mitigate certain federally imposed collateral consequences without compromising public safety.

Accomplishments to Date

- The Equal Employment Opportunity Commission (EEOC) issued updated guidance on the consideration of arrest and conviction records in employment decisions. EEOC has conducted significant outreach to educate employers, workers, and job applicants about the applicability of its updated guidance on the use of arrest and conviction records in employment.
- The Department of Labor (DOL) issued a guidance letter to provide information about how exclusions based on criminal records relate to the existing nondiscrimination obligations for the public workforce system and other entities. DOL also issued a directive that advises federal contractors and subcontractors about nondiscrimination obligations regarding the use of criminal records as an employment screen.
- DOJ has drafted an advisory to recipients of DOJ financial assistance of their obligation not to engage in discriminatory employment practices related to the improper use of arrest and criminal records. Although most grant recipients are subject to Title VII, which generally applies to both public and private employers with fifteen or more employees, nearly all recipients of DOJ financial assistance, regardless of the number of employees, must comply with the prohibition against employment discrimination based on race, national origin, and other protected classes.
- The Department of Housing and Urban Development (HUD) developed a Reentry MythBuster and sent letters to the executive directors of public housing authorities and multi-family property owners, clarifying HUD's position on the limited categories of ex-offenders who are permanently barred from HUD properties and encouraging the development of policies and procedures that allow formerly incarcerated individuals to rejoin their families in HUD-assisted housing while maintaining safety for residents.
- The Department of Health and Human Services (HHS) provided guidance clarifying that the drug felon ban for Temporary Aid to Needy Families (TANF) recipients does not apply to services or benefits not specifically delineated within the regulatory definition of the term "assistance." Examples of nonassistance benefits include services such as counseling, case management, job retention, job advancement, certain other employment-related services that do not provide basic income support, education, training, work subsidies, and short-term non-reoccurring subsidies.
- The Department of Veterans Affairs (VA) proposed clarifying amendments to more narrowly tailor the rules governing the types of offenses or acts that can be considered as a basis for dishonorable discharge, a determination that results in veterans' ineligibility for disability compensation and other benefits.

Snapshot

- The Small Business Administration (SBA) proposed amendments to the rules governing its Microloan Program to allow most individuals on parole and probation to be eligible to apply.
- DOJ issued a new policy requiring all Department of Justice components to take collateral consequences into account when proposing any new regulation or guidance.

Agenda Moving Forward

Institutionalizing Collateral Consequence Reviews

In addition to reviewing existing federal regulations and policies for unnecessary collateral consequences, Reentry Council agencies are considering mechanisms to develop procedures to institutionalize consideration of collateral consequences in future regulatory and policy initiatives. For example, DOJ has required all Justice components to conduct a collateral consequences review when proposing new regulations and policies or revising or updating existing ones. In 2013, Attorney General Holder issued a memorandum to the heads of DOJ components and United States Attorneys instituting and explaining this directive. DOJ is prepared to assist other government agencies in establishing similar processes.

Increasing Legal Services to Address Collateral Consequences

DOJ is collaborating with legal services providers to enhance the legal services available to individuals experiencing barriers to reentry due to the collateral consequences of convictions.

The White House Domestic Policy Council and DOJ launched a Legal Aid Interagency Roundtable to raise awareness about the profound impact legal aid programs can have in advancing federal efforts to promote access to health and housing, education and employment, family stability, and community well-being. As a result of this work, several large grant programs—such as the DOJ Second Chance Act grants and DOL Reintegration of Ex-Offender grants—now allow for the use of federal funds to pay for legal assistance to secure driver's licenses, expunge criminal records, litigate inappropriate denials of housing, employment, and violations to the FAIR Credit Reporting Act, and modify child support orders.

Developing Practical Tools for the Field

DOJ aims to help prosecutors, defense attorneys, and the accused understand the full spectrum of sanctions that a conviction entails. DOJ has developed a reentry legal services case study and a directory of legal services. DOJ is working with the field to develop additional tools that will be helpful to judges, to give them a more transparent view of their sanctioning options and impacts.

Key Resources (Collateral Consequences)

Reentry Council
http://csgjusticecenter.org/nrrc/projects/firc/

Reentry MythBusters
http://csgjusticecenter.org/nrrc/projects/mythbusters/

National Inventory of the Collateral Consequences of Conviction
http://abacollateralconsequences.org/

U.S. Attorney General's Letter on Collateral Consequences
http://csgjusticecenter.org/wp-content/uploads/2014/02/Reentry_Council_AG_Letter.pdf

U.S. Attorney General's Memorandum to Heads of Department of Justice Components and United States Attorneys
http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9230
http://www.dol.gov/ofccp/regs/compliance/directives/Dir306.htm

Reentry Legal Aid Case Study
http://www.justice.gov/atj/legalaid/reentry-case-study.pdf

Reentry Legal Aid Project Chart
http://www.americanbar.org/groups/probono_public_service/resources/volunteer_opportunities/reentry_projects.html

Prepared Statement of the Brennan Center for Justice Legislative Office

House Judiciary Committee Over-Criminalization Task Force
"Collateral Consequences"
June 26, 2014
Submitted by
Brennan Center for Justice Legislative Office
For further information contact Danyelle Solomon, Policy Counsel, at danyelle.solomon@nyu.edu

Chairman Sensenbrenner, Ranking Member Scott, and distinguished members of the House Judiciary Committee Over-Criminalization Taskforce, thank you for the opportunity to address the issue of collateral consequences facing individuals returning from the criminal justice system.

The Brennan Center for Justice is a nonpartisan law and policy institute that seeks to improve the national systems of democracy and justice. The Brennan Center for Justice was created in 1995 by the clerks and family of the late Supreme Court Justice William J. Brennan, Jr. as a living memorial to his belief that the Constitution is the genius of American law and politics, and the test of our institutions is how they treat the most vulnerable among us. Affiliated with New York University School of Law, the Brennan Center has emerged as a national leader on issues of democracy and justice.[1]

The Brennan Center is committed to reducing mass incarceration to ensure that the lives of millions of Americans, their families, and their communities are improved. We seek reforms that meet the twin goals of reducing the criminal justice system's size and severity while improving public safety. We applaud the Committee for holding a hearing to discuss the barriers faced by those returning to our communities. Collateral consequences can deeply affect the ability of the formerly incarcerated to reenter society successfully. This testimony urges the Committee to make changes where appropriate to remove unnecessary barriers in returning to communities as part of an effort to ensure our systems of democracy and justice are working efficiently and effectively.

I. COLLATERAL CONSEQUENCES OF INCARCERATION HAVE AN ECONOMIC, FISCAL AND SOCIAL IMPACT ON SOCIETY

Collateral consequences of incarceration are legal sanctions and restrictions imposed on people because of their criminal record. The United States, as the largest incarcerator in the world, subjects numerous individuals to various collateral consequences everyday that limit their ability to participate in society fully. Indeed, the majority of offenders come home, and in 2012 alone almost 650,000 individuals were released from state or federal prison back into our communities.[2] When individuals returning from prison fail to successfully reintegrate into society there is a cost – a public safety and an economic cost to our communities.

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[1] This letter does not represent the opinions of NYU School of Law.
[2] *See* E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–20122 (2013), *available at* http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf.

The U.S. currently spends at least $70 billion each year on corrections, including incarceration, parole and probation, making it the fastest growing budgetary item after Medicaid.[3] While this number is staggering, the economic and fiscal costs attributed to the re-entry barriers faced by those leaving the corrections system are likely even higher. Two barriers in particular – restrictive employment and housing practices – illustrate the economic and fiscal costs of collateral consequences on society.

Restrictive employment practices, such as hiring discrimination based on criminal records, bar ex-offenders from obtaining stable employment and lower their economic prospects within the workforce. Studies show that serving time in either prison or jail reduces hourly wages for men by approximately 11 percent, annual employment by 9 weeks and annual earnings by 40 percent.[4] Because a high number of formerly incarcerated are unable to secure work, the Center for Economics and Policy Research (CEPR) estimates that they "lower overall employment rates as much as0.8 to 0.9 percentage points."[5] A 2010 CEPR study determined that this exclusion of individuals from the workforce costs the U.S. economy the "equivalent of 1.5 to 1.7 million workers,"[6] representing a loss of goods and services that reduced the gross domestic product (GDP) for the U.S. by $57 to $65 billion in 2008 alone.[7]

Systemic barriers to employment also impose a large cost on federal, state, and local budgets. For example, in a report prepared by the Economy League of Greater Philadelphia, it is estimated that if "100 currently unemployed formerly incarcerated individuals" obtain employment, their employment "would produce an additional $1,900,000 in city tax revenue and $770,000 in sales tax revenue over their post-release lifetimes."[8]

Restrictive housing policies directed at the formerly incarcerated also impose economic and fiscal costs on society at large. Section 8, local public housing and other federally subsidized housing providers, "may – and sometimes must – deny housing to people with a criminal history involving drugs or violence".[9] A study by the Urban Institute estimated that at least one-tenth of

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[3]N.Y. STATE BAR ASS'N, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY48, 55 (2006),*available at*http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26857; *see also* NAACP, MISPLACED PRIORITIES: OVER INCARCERATE, UNDER EDUCATE12 (2011), *available at*http://naacp.3cdn.net/01d6f368edbe135234_bq0m68x5h.pdf; CHRISTIAN HENRICHSON& RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISON: WHAT INCARCERATION COSTS TAXPAYERS 2 (2012), *available at* http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf.

[4]THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY4 (2010), *available at* http://www.pewtrusts.org/uploadedFiles/Collateral_Costs.pdf.

[5]JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. AND POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET14 (2010), *available at*http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf.

[6]*Id.* at 2.

[7]*Id.*

[8]ECON. LEAGUE GREATER PHILA., ECONOMIC BENEFITS OF EMPLOYING FORMERLY INCARCERATED INDIVIDUALS IN PHILADELPHIA, EXECUTIVE SUMMARY3 (2011), *available at* http://economyleague.org/files/Ex-Offenders_Exec_Summ_for_web.pdf.

[9]NINO RODRIGUEZ & BRENNER BROWN, VERA INST. OF JUSTICE, PREVENTING HOMELESSNESS AMONG PEOPLE LEAVING PRISON 3 (2003),*available at*http://www.vera.org/sites/default/files/resources/downloads/IIB_Homelessness.pdf.

those leaving prison will end up homeless,[10] an intolerable number considering 637,400 people were released from prison in 2012 alone.[11] Just one homeless individual is estimated to cost taxpayers more than $30,000 annually.[12]As such, the U.S. may have spent as much as $1.9 billion on housing formerly incarcerated individuals who were excluded from public housing in 2012 alone.

Homelessness also perpetuates the cycle of poverty, criminality and incarceration that sustains mass incarceration in the United States. Homelessness is associated with high rates of recidivism. A study of the formerly incarcerated in New York City revealed that of the 1.4% that "experienced a post-release shelter stay," 32.8% returned to prison within two years following their initial release.[13] Additionally, those who were formerly incarcerated living without housing are "seven times more likely to violate parole."[14]Exclusionary housing policies for the formerly incarcerated, therefore, can result in many returning to costly correctional systems in a short period.

Reentry programs that provide housing support and placement are associated with lower rates of recidivism. For example, a study of Project Re-Connect, an initiative by the City of St. Louis that provides housing, employment, and substance abuse support, revealed that only 8.2% of the program's 411 participants had committed a new crime since release from prison.[15] Of the 609 non-participants released from prison during the same time period, 34.5% committed a new crime[16] – demonstrating a substantial and costly difference.

There is a clear social cost to collateral consequences as well. These policies cumulate to exclude and isolate formerly incarcerated individuals from the fabric of society and often prevent successful reintegration. There is substantial public support for reentry programs that facilitate successful reintegration. Indeed, a 2011 study revealed that 88.7% of participants agreed that "it is a good idea to help people who are coming out of prison readjust to life in society."[17]Given

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[10]CATERINAGOUVIS ROMAN&JEREMY TRAVIS, URBAN INST., TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY iv (2004),*available at*http://www.urban.org/UploadedPDF/411096_taking_stock.pdf.
[11]CARSON &GOLINELLI, *supra* note 2, at 2.
[12]*See, e.g.*, Kate Santich, *Cost of Homeless in Central Florida? $31K Per Person*, ORLANDO SENTINEL(May 21, 2014),http://articles.orlandosentinel.com/2014-05-21/news/os-cost-of-homelessness-orlando-20140521_1_homeless-individuals-central-florida-commission-tulsa (finding that homeless individuals in Central Florida costs taxpayers roughly $31,000 per individual annually); DANIEL FLAMING ET AL., ECON. ROUNDTABLE, WHERE WE SLEEP: COSTS WHEN HOMELESS AND HOUSED IN LOS ANGELES 1 (2009),*available at*http://www.economicrt.org/pub/Where_We_Sleep_2009/Where_We_Sleep.pdf (finding an average public cost of $2,897 per month for each homeless person in Los Angeles County).
[13]STEPHEN METRAUX& DENNIS P. CULHANE, HOMELESS SHELTER USE AND REINCARCERATION FOLLOWING PRISON RELEASE: ASSESSING THE RISK 11 (2002),*available at*http://csgjusticecenter.org/nrrc/publications/homeless-shelter-use-and-reincarceration-following-prison-release-assessing-the-risk-3/.
[14]CORP. FOR SUPPORTING HOUSING & NAT'L ALLIANCE TO END HOMELESSNESS, BUILDING ON THE SECOND CHANCE ACT: HOUSING AS THE FOUNDATION FOR SUCCESSFUL RE-ENTRY1 (2009),*available at*http://www.metropolisstrategies.org/documents/BuildingonSecondChanceAct_Housing_Concept_Paper5-19-09.pdf.
[15]THE U.S. CONFERENCE OF MAYORS. STATUS OF EX-OFFENDER REENTRY EFFORTS IN CITIES: A 79 CITYSURVEY 22 (2009),*available at*http://usmayors.org/pressreleases/uploads/REENTRYREPORT09.pdf.
[16]*Id.*
[17] Brett Garland et al., *Value Conflict and Public Opinion Toward Prisoner Reentry Initiatives*,24CRIM. JUST. POL'Y REV. 27, 37 (2013), *available at*http://cjp.sagepub.com/content/24/1/27.full.pdf+html.

that support, combined with the economic and fiscal costs discussed above, it is clear that Congress should take action to curb these policies as a measure to improve the effectiveness and fairness of our systems of justice and democracy.

II. CONGRESS CAN ADDRESS VOTE RESTORATION AND CRIMINAL JUSTICE DEBT

While there are various types of collateral consequences facing the formerly incarcerated, there are two types of restrictions and/or legal sanctions particularly relevant to reentry - the voting restrictions and criminal justice debt. We recommend that the Taskforce focus on addressing these consequences as it considers recommendations to address over-incarceration.

A. Felon Disenfranchisement Prevents Successful Reintegration into Society

Felon disenfranchisement affects a large portion of the U.S. population. There are nearly 6 million American citizens currently unable to vote because of a past criminal conviction.[18]In fact, 75 percent of disenfranchised voters live in their communities, either under probation or parole supervision or having completed their sentence.[19] These laws also have a disproportionate impact on minorities. Across the country, 13 percent of African-American men have lost their right to vote, which is seven times the national average.[20]In three states – Florida (23 percent), Kentucky (22 percent), and Virginia (20 percent) – more than one in five black adults is disenfranchised. In total, 2.2 million black citizens are banned from voting.[21] Despite serving their sentence and returning to our communities, when asked to become productive, law abiding, tax paying citizens, the formerly incarcerated are systematically denied our country's most fundamental right – access to the voting booth.

As with the phenomenon of mass incarceration generally, the United States stands alone with its disenfranchisement policies. We are one of few western democratic nations to exclude such large numbers of people from the democratic process. Almost half of European countries preserve the right to vote for all incarcerated persons and a smaller number of countries impose a time limited ban on voting for a few categories of prisoners.[22]

Currently, individuals with criminal convictions in the United States are subject to a patchwork of state laws governing their right to vote. The scope and severity of these laws varies widely, ranging from the uninterrupted right to vote to lifetime disfranchisement, despite completion of one's full sentence.[23] Although voting rights restoration is possible in many states, and some

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[18]THE SENTENCING PROJECT, FACT SHEET: FELONY DISENFRANCHISEMENT LAWS 1 (2014), *available at* http://www.sentencingproject.org/doc/publications/fd_Felony Disenfranchisement Laws in the US.pdf.

[19]CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 5 (2010), *available at*http://www.sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.

[20]THE SENTENCING PROJECT, FEDERAL VOTING RIGHTS FOR PEOPLE RETURNING FROM PRISON 1, *available at*http://www.sentencingproject.org/doc/publications/fd_bs_peoplereturningfromprison.pdf.

[21]UGGEN ET AL.,*supra* note 22, at 2.

[22]AM. CIVIL LIBERTIES UNION, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 4 (2006), *available at* http://www.aclu.org/votingrights/exoffenders/25663pub20060525.html.

[23] Three states, Florida, Iowa, and Kentucky, permanently disfranchise citizens with felony convictions unless the state approves individual rights restoration; two states, Maine and Vermont, allow all persons with felony

recent progress has been made,[24] it is frequently a difficult process that varies widely across states.[25] More than 20 states have improved these laws, either repealing permanent voting bans or easing the restoration process. Delaware passed a constitutional amendment that undid much of its felony disenfranchisement law, and Virginia's Governor issued an executive order that made it possible for more people to get their voting rights back. Individuals with criminal convictions may lack information about the status of their voting rights or how to restore them. Further, confusion exists among elected officials about how state law contributes to the disenfranchisement of eligible voters.[26]

There is broad support for curtailing policies that disenfranchise the formerly incarcerated. Public opinion surveys report that eight in ten U.S. residents support voting rights for citizens who have completed their sentence, and nearly two-thirds support voting rights for those on probation or parole.[27] The revocation of voting rights compounds the isolation of formerly incarcerated individuals from their communities, and civic participation has been linked with lower recidivism rates. In one study, among individuals who had been arrested previously, 27 percent of nonvoters were rearrested, compared with 12 percent of voters.[28] There has been progress on this issue because Americans understand this issue is about fairness, which is why leaders from the full range of sectors and ideologies support felony disenfranchisement. George W. Bush signed legislation to amend Texas's law about 17 years ago. Rick Santorum supported reform of these laws during his presidential run.

Congress and the Obama administration have made efforts to address felony disenfranchisement at the federal level. For example, on April 10, 2014 Senator Benjamin Cardin (D-MD) and Congressman John Conyers (D-MI-13th) re-introduced the bi-cameral Democracy Restoration Act (DRA), based on a Brennan Center proposal[29]. The DRA would restore the right to vote in

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convictions to vote, even while incarcerated; all other states fall somewhere in between. *See Map of State Criminal Disenfranchisement Laws*, AM. CIVIL LIBERTIES UNION,http://www.aclu.org/map-state-felony-disfranchisement-laws (last visited June 26, 2014) (contains a map detailing state laws).

[24] Recently, bipartisan lawmakers in states with very restrictive laws, like Virginia and Kentucky have made reforms and considered changes. *See* Letter from Governor, Robert F. McDonnell to the Honorable Janet V. Kelly, Secretary of the Commonwealth (May 29, 2013), *available at* https://commonwealth.virginia.gov/media/1803/2013GovernorLettertoSOC.pdf;*see also* Press Release, Senator Rand Paul, Sen. Paul Testifies in Support of Restoring Voting Rights; Constitutional Amendment Passes Kentucky Senate (Feb. 19, 2014), *available at* http://www.paul.senate.gov/?p=press_release&id=1109.

[25]*See* AM. CIVIL LIBERTIES UNION, THE DEMOCRACY RESTORATION ACT OF 2014: 113TH CONGRESS 2 (2014), *available at* https://www.aclu.org/racial-justice-voting-rights/aclu-factsheet-democracy-restoration-act-2014.

[26]*See generally*ELECTION PROTECTION, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, OUR BROKEN VOTING SYSTEM AND HOW TO REPAIR IT: THE 2012 ELECTION PROTECTION REPORT (2013), *available at*http://www.866ourvote.org/newsroom/publications/document/EP-2012-Full-Report.pdf.

[27]*See* Jeff Manza et al., *Public Attitudes Towards Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 280 (2004), *available at*http://sociology.as.nyu.edu/docs/IO/3858/Public_Attitudes_Towards_Felon_Disenfranchisement_Laws_in_the_US.pdf.

[28]Christopher Uggen&Jeff Manza,*Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 205(2004), *available at*http://www.soc.umn.edu/~uggen/Uggen_Manza_04_CHRLR2.pdf.

[29] *See* ERIKA WOOD, BRENNAN CTR. FOR JUSTICE, RESTORING THE RIGHT TO VOTE (2d ed. 2009)

federal elections to the previously incarcerated immediately after their incarceration period is complete. Doing so would enable these individuals to resume the right and responsibility inherent in our role as Americans — asserting our voice through the ballot box. Under the legislation, once an individual has completed his or her incarceration period, their right to vote in federal elections will be automatically restored. Individuals will not be limited because of any ancillary issues related to their incarceration such as outstanding fees and fines or the fact that they have been released from prison but remain on probation. Senator Rand Paul (R-KY) has also been vocal about the need to restore voting rights to individuals. On February 19, 2014, before the Kentucky Senate Committee, he testified in support of restoring voting rights to people with past convictions. In addition, Senator Paul recently introduced a bill that would secure the federal voting rights of non-violent persons when released from incarceration (S. 2550). While this bill falls short of the Democracy Restoration Act, by not restoring voting rights to all, having both a Republican voice and a Democratic voice on this issue is a huge step forward. Attorney General Eric Holder additionally made statements in support of the easing of voter restoration requirements in February 2014.[30]

Although this progress is encouraging, public awareness alone does not go far enough to address the disfranchisement of millions of Americans following a criminal conviction. Reforms are necessary. Already approximately 40% of states have more expansive policies then those proposed by DOJ.[31] In addition, the Department's proposal that individuals must wait until after probation and parole fuels confusion among election officials and returning citizens, and the requirement to pay fines before voting, we believe, is tantamount to a poll tax.[32]

We recommend the Taskforce expand and clarify support for automatic restoration of voting rights to citizens upon their release from incarceration for disenfranchising convictions, and oppose restrictions for those on parole or probation or with unpaid fees or fines. Therefore, we strongly recommend support and passage of the Democracy Restoration Act.

Taking part in our democracy and having a voice in how our communities are governed is perhaps the most significant way for any American to feel that they have a stake not only in our nation as a whole, but also within the community they live.

B. Criminal Justice Debt is a Collateral Consequence of Incarceration that Prevents Successful Reentry

Upon entry into the criminal justice system, offenders incur criminal justice related fees and fines that can prevent successful reintegration into society. Often an unnoticed aspect of the

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[30] In February 2014, Attorney General Holder called upon state leaders and elected officials to pass reforms to restore voting rights. Although the called-for reforms are more limited than those provided in the Democracy Restoration Act, they are welcome statements from the DOJ. Attorney General Eric Holder, Remarks on Criminal Justice Reform at Georgetown University Law Center (Feb. 11, 2014), *available at* http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140211.html.

[31] *See Map of State Criminal Disenfranchisement Laws*, *supra* note 28.

[32] The DOJ proposal includes restoring the right to vote for all who have served their terms in prison or jail, completed their parole or probation, and paid their fines. Attorney General Eric Holder, Remarks on Criminal Justice Reform,*supra* note 36.

justice systems across the country, these fees and fines are frequently calculated without adequate consideration of an offenders' ability to pay. Excessive fines may add unnecessary pressure to individuals trying to get on their feet after incarceration and can, in some instances, result in re-incarceration.[33] As such, criminal justice debt unchecked contributes to the cycle of poverty, criminality and incarceration that perpetuates mass incarceration.

In 2010, the Brennan Center for Justice published a seminal report, *Criminal Justice Debt: A Barrier to Reentry*, exposing the realities of criminal justice in states across the country.[34] Since that time, the issue has captured the attention of numerous policymakers and the media.[35] Recently, the Brennan Center for Justice participated in an expose by National Public Radio documenting the struggles of formerly incarcerated individuals to cope with criminal justice related debt.[36] Additionally we provided data for a national state-by-state court fees survey NPR conducted.[37]

1. Learning from the States

Criminal justice debt refers to the compilation of legal financial obligations – including fines, restitution and other "user fees" – that a defendant may accrue while being processed in the criminal justice system.[38] These range from fees incurred for use of a public defender to court assessments to restitution to child support payments accrued during incarceration. Frequently, these fees and fines are imposed on individuals without regard to their ability to pay, and rather than furthering a particular purpose of punishment the fines are used to maintain financially strapped criminal justice systems on the backs of poor defendants. And while the U.S.

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[33] *See, e.g.*, Brief for Brennan Center for Justice, et al. as Amici Curiae supporting Appellant at 13, Michigan v. Joseph Bailey, 2014 WL 310203 (Mich. Ct. App. Jan. 28, 2014) (No. 311682) (unpublished), *available at* http://www.brennancenter.org/sites/default/files/legal-work/Bailey_Amicus_Brief_082313.pdf("the investigations of amici have shown that a significant number of Michigan courts jail individuals for nonpayment without ever conducting an assessment of the individual's indigence or ability to pay"); *see also* ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 2 (2010), *available at*http://www.brennancenter.org/sites/default/files/legacy/Fees and Fines FINAL.pdf("Although 'debtors' prison' is illegal in all states, reincarcerating individuals for failure to pay debt is, in fact, common in some – and in all states new paths back to prison are emerging for those who owe criminal justice debt."); AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (2010), *available at*https://www.aclu.org/files/assets/InForAPenny_web.pdf(chronicling individual experiences of re-incarceration for failure to pay fines and fees in Louisiana, Michigan, Ohio, Georgia and Washington).

[34] *See generally*, BANNON ET AL., *supra* note 40(chronicling the treatment of criminal justice debt in 15 states); *see also* ROOPAL PATEL & MEGHAN PHILIP, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION (2012), *available at*http://www.brennancenter.org/sites/default/files/legacy/publications/Criminal Justice Debt Background for web.pdf.

[35] *See, e.g.*, Sarah Stillman, *Get Out of Jail, Inc.*, THE NEW YORKER (June 23, 2014), http://www.newyorker.com/reporting/2014/06/23/140623fa_fact_stillman; Editorial Board, *Pay Up or Go to Jail*, N.Y. TIMES, May 20, 2014, at A28, *available at*http://www.nytimes.com/2014/05/21/opinion/pay-up-or-go-to-jail.html; Stephen Colbert, *The Word: Debt or Prison*, THE COLBERT REPORT (June 11, 2014), *available at*http://thecolbertreport.cc.com/videos/m87g43/the-word---debt-or-prison.

[36] Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, Nat'l Public Radio (May 19, 2014), *available at*http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor.

[37] *State-By-State Court Fees*, Nat'l Public Radio (May 19, 2014), *available at* http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees.

[38] The Brennan Center defines "user fees" as "financial obligations imposed not for any traditional criminal justice purpose such as punishment, deterrence, or rehabilitation but rather to fund tight state budgets." BANNON ET AL., *supra* note 40, at 1.

Constitution prohibits incarceration for failure to pay, the burden of debts can prevent defendants from successfully reentering society due to stress and inability to make ends meet upon release from prison.

The imposition of fees and fines are on the rise as states seek alternative means to impose punishment other than incarceration. The Brennan Center believes that now, more than ever, there is a need to create more adequate ability to pay determinations in the process of imposing criminal justice debt. In order to end mass incarceration, offenders must be able to leave the criminal justice system and stay out. To that end, reforms aimed at addressing criminal justice debt, like other collateral consequences discussed here, are crucial in creating long term solutions that will end mass incarceration.

2. Federal Criminal Justice Debt

The federal system is unique in its imposition of fees and fines. Unlike the states, the variety of criminal justice fines that can result in overwhelming criminal justice debt does not exist; nevertheless, the fees and fines can accrue quickly. For example, the court must impose an assessment upon an individual convicted of a crime. That assessment, based upon statute, must be imposed for each count of a crime. This means that an individual who is convicted of nine felonies will be required to pay $900 in assessments, even if the amount of the crime only amounts to $75.[39] These assessments are mandatory regardless of a defendant's ability to pay. Indeed, the constitutionality of assessments does not come into question until the time of debt collection.[40]

While assessment fees on their own may appear manageable, when combined with mandatory restitution and other court-imposed fines, it becomes quite unmanageable for many impoverished offenders. Under the Mandatory Victim Restitution Act (MVRA), the court must order restitution for certain offenses and may order restitution in all offenses.[41] But when determining the amount of restitution owed, the court may not take the defendant's ability to pay into consideration. Indeed, the defendant's ability to pay is only considered when declining to impose full restitution – at the second phase of analysis and "without consideration of the economic circumstances of the defendant."[42] The district court does set a payment schedule

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[39] *See* 18 U.S.C. § 3013(a)(2)(A).

[40] United States v. Rivera-Velez, 839 F.2d 8, 8 (1st Cir. 1988) ("The mere existence during indigency of an outstanding penal liability does not violate a defendant's rights"); *see also* United States v. Pagan, 785 F.2d 378, 381 (2d Cir. 1986)("the imposition of assessments on an indigent, per se, does not offend the Constitution. Constitutional principles will be implicated here only if the government seeks to enforce collection of the assessments 'at a time when [Pagan is] unable, through no fault of his own, to comply.'") (citations removed); Cooper v. United States, 856 F.2d 193, 193 (6th Cir. 1988) ("a constitutional issue arises only if the government seeks to enforce collection against indigent defendants"); United States v. Rising, 867 F.2d 1255, 1259–1260 (10th Cir. 1989) ("The assessment provided for in § 3013 has been held to be mandatory, and imposition of the assessment on an indigent does not, per se, offend the Constitution. Constitutional principles will be implicated only if enforcement is later sought at a time when the defendant is unable, through no fault of his own, to pay the assessment."); United States v. Cooper, 870 F.2d 586, 586 (11th Cir. 1989) ("Appellant contends . . . that the assessments are unconstitutional as applied to him, because he is indigent. We disagree, adopting the reasoning of the First and Second Circuits . . . .").

[40] *Pagan*, 785 F.2d at 380 ("[B]ecause the imposition of special assessments under section 3013 was mandatory, a sentence lacking such an assessment would have been illegal.") (cited by United States v. Mann, 7 Fed.Appx. 424 (6th Cir. 2001) and United States v. Valentine, 715 F.Supp. 51, 53 (W.D.N.Y. 1989)).

[41] *See* 18 U.S.C. § 3556.

[42] 18 U.S.C. § 3664(f)(1)(A).

taking into consideration "financial resources and other assets . . . projected earnings . . . [and] any financial obligations of the defendant" but this analysis does not require a reasonable subsistence for the individual. Unsurprisingly, numerous defendants have gone to court after their conviction claiming that prisons garnished wages earned to pay court-ordered restitution without prisoner assent and/or enough money for reasonable subsistence. The burden for providing adequate subsistence to the prisoners, in turn, shifts to the families of inmates. In this way, criminal justice debt not only inhibits the lives of the offenders but it affects the lives of their families as well.

3. Preventing Criminal Justice Debt: Standardized Ability to Pay Determinations

The Brennan Center for Justice seeks reforms that will alleviate the onerous and burdensome effects of criminal justice debt that may prevent offenders from successfully disentangling themselves from the criminal justice system. To that end, we encourage ability to pay determinations to be a more prevalent part of the court (and legislators) analysis of fees and fines. We support two alternative measures to improve ability to pay: a) including a reasonable subsistence standard into the analysis of criminal justice debt; and b) allowing ability to pay determinations to cap all fees and fines beyond restitution. These policy solutions will be discussed in a more detail in a forthcoming report.

We encourage the Taskforce to consider these alternatives and the burdens that these fees and fines may pose on different offenders. Particularly given that 90% of all federal defendants qualify for court-appointed lawyers, inability to pay fees and fines is a problem that can plague a majority of offenders.[43] As the Taskforce considers the interlocking web of collateral consequences facing offenders upon release from incarceration, we encourage you to address the burden of criminal justice debt as well.

III. CONCLUSION

The Brennan Center thanks the Taskforce for holding a hearing to discuss collateral consequences facing individuals returning to our communities. We appreciate the opportunity to submit written testimony on this issue. The Taskforce has a key role to play in helping pass comprehensive and meaningful legislation to address these issues, and we urge you to consider our recommendations as you do so.

[43] Richard Nixon. *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. TIMES, Aug. 23, 2014, at A14, *available at*http://www.nytimes.com/2013/08/24/us/public-defenders-are-tightening-belts-because-of-steep-federal-budget-cuts.html?pagewanted=all&_r=0.

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