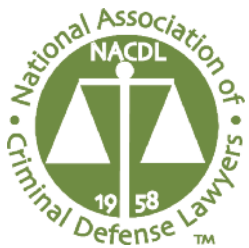


**COLLATERAL
DAMAGE**

**America's Failure to Forgive or
Forget in the War on Crime**

**A Roadmap to Restore Rights and
Status After Arrest or Conviction**



**NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS**

May 2014



COLLATERAL DAMAGE

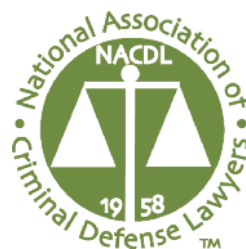
Supported by a grant from the Foundation for Criminal Justice.

COPYRIGHT © 2014 NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

This report is subject to a Creative Commons Attribution-Noncommercial-Nonderivative Work license (see www.creativecommons.org). It may be reproduced, provided that no charge is imposed, and the National Association of Criminal Defense Lawyers is acknowledged as the original publisher and the copyright holder. For any other form of reproduction, please contact NACDL for permission.

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

1660 L Street NW, 12th Floor
Washington, DC 20036
Phone: 202-872-8600
www.nacdl.org



COLLATERAL DAMAGE:

America's Failure to Forgive or Forget in the War on Crime A Roadmap to Restore Rights and Status After Arrest or Conviction

JERRY J. COX

President, NACDL
Mount Vernon, KY

GERALD B. LEFCOURT

President, FCJ
New York, NY

STEVEN D. BENJAMIN

Immediate Past President, NACDL
Richmond, VA

NORMAN L. REIMER

Executive Director, NACDL
Washington, DC

ANGELYN C. FRAZER

State Legislative Affairs Director, NACDL
Washington, DC

NACDL Task Force on Restoration of Rights and Status After Conviction

RICK JONES

Co-Chair
New York, NY

VICKI H. YOUNG

Co-Chair
San Francisco, CA

LAWRENCE S. GOLDMAN

New York, NY

ELISSA B. HEINRICH

Newtown, PA

MARGARET COLGATE LOVE

Washington, DC

PENELOPE S. STRONG

Billings, MT

GENEVA VANDERHORST

Washington, DC

CHRISTOPHER A. WELLBORN

Rock Hill, SC

Reporter

JENNY ROBERTS

American University Washington College of Law

TABLE OF CONTENTS

ABOUT THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS	3
ABOUT THE FOUNDATION FOR CRIMINAL JUSTICE	4
FOREWORD	5
ACKNOWLEDGEMENTS	7
PREFACE	9
EXECUTIVE SUMMARY	12
METHODOLOGY AND TERMINOLOGY	19
INTRODUCTION	21
RECOMMENDATIONS	30
I. The United States should embark on a national effort to end the second class legal status and stigmatization of persons who have fulfilled the terms of a criminal sentence.	30
II. All mandatory collateral consequences should be disfavored and are never appropriate unless substantially justified by the specific offense conduct.	32
III. Discretionary collateral consequences should be imposed only when the offense conduct is recent and directly related to a particular benefit or opportunity.	35
IV. Full restoration of rights and status should be available to convicted individuals upon completion of sentence.	42
V. Congress and federal agencies should provide individuals with federal convictions with meaningful opportunities to regain rights and status, and individuals with state convictions with mechanisms to avoid collateral consequences imposed under federal law.	46
VI. Individuals charged with a crime should have an opportunity to avoid conviction and the collateral consequences that accompany it.	50
VII. Employers, landlords and other decision-makers should be encouraged to offer opportunities to individuals with criminal records, and unwarranted discrimination based on a criminal record should be prohibited.	52
VIII. Jurisdictions should limit access to and use of records for non-law enforcement purposes and should ensure that records are complete and accurate.	54
IX. Defense lawyers should consider avoiding, mitigating and relieving collateral consequences to be an integral part of their representation of a client.	61
X. NACDL will initiate public education programs and advocacy aimed at curtailing collateral consequences and eliminating the social stigma that accompanies conviction.	64
CONCLUSION	66
SUMMARY OF RECOMMENDATIONS	67
APPENDIX A — DEFINITIONS OF KEY TERMS	71
APPENDIX B — WITNESS LIST BY CATEGORY	74
APPENDIX C — SITE VISITS	81
APPENDIX D — TASK FORCE MEMBER BIOGRAPHIES	82
ENDNOTES	84

ABOUT THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

3

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's core mission is to: *Ensure justice and due process for persons accused of crime ... Foster the integrity, independence and expertise of the criminal defense profession ... Promote the proper and fair administration of criminal justice.*

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, *amicus curiae* advocacy and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's approximately 10,000 direct members — and 90 state, local and international affiliate organizations totalling up to 40,000 members — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

The research and publication of this report was made possible through the support of individual donors and foundations to the Foundation for Criminal Justice, NACDL's supporting organization. This report would not have been possible without support from the Foundation for Criminal Justice and the Open Society Foundations.

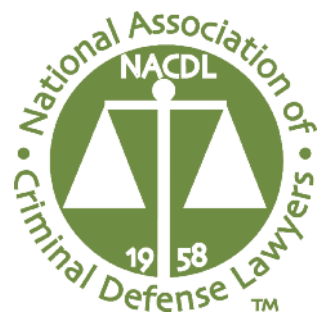
For more information contact:

**NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS**

1660 L Street NW, 12th Floor
Washington, DC 20036
202-872-8600
www.nacdl.org

This publication is available online at

www.nacdl.org/restoration/roadmapreport



ABOUT THE FOUNDATION FOR CRIMINAL JUSTICE

4

The Foundation for Criminal Justice (FCJ) is organized to preserve and promote the core values of America's criminal justice system guaranteed by the Constitution — among them due process, freedom from unreasonable search and seizure, fair sentencing, and access to effective counsel. The FCJ pursues this goal by seeking grants and supporting programs to educate the public and the legal profession on the role of these rights and values in a free society and assist in their preservation throughout the United States and abroad.

The FCJ is incorporated in the District of Columbia as a non-profit, 501(c)(3) corporation. All contributions to the FCJ are tax-deductible. The affairs of the FCJ are managed by a Board of Trustees that possesses and exercises all powers granted to the Foundation under the DC Non-Profit Foundation Act, the FCJ's own Articles of Incorporation, and its Bylaws.

For more information contact:

FOUNDATION FOR CRIMINAL JUSTICE

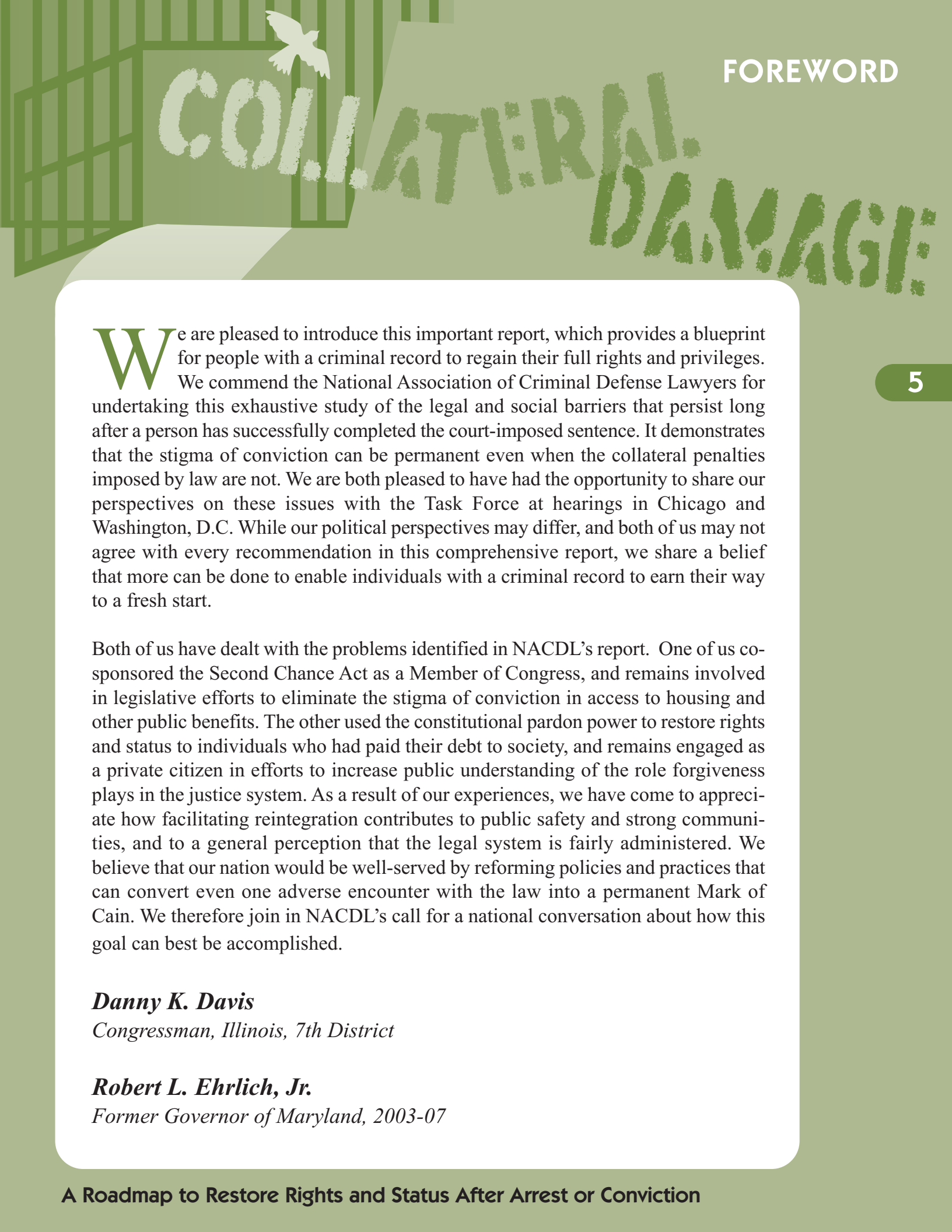
1660 L Street NW, 12th Floor

Washington, DC 20036

202-872-8600

www.nacdl.org/foundation





We are pleased to introduce this important report, which provides a blueprint for people with a criminal record to regain their full rights and privileges. We commend the National Association of Criminal Defense Lawyers for undertaking this exhaustive study of the legal and social barriers that persist long after a person has successfully completed the court-imposed sentence. It demonstrates that the stigma of conviction can be permanent even when the collateral penalties imposed by law are not. We are both pleased to have had the opportunity to share our perspectives on these issues with the Task Force at hearings in Chicago and Washington, D.C. While our political perspectives may differ, and both of us may not agree with every recommendation in this comprehensive report, we share a belief that more can be done to enable individuals with a criminal record to earn their way to a fresh start.

Both of us have dealt with the problems identified in NACDL's report. One of us co-sponsored the Second Chance Act as a Member of Congress, and remains involved in legislative efforts to eliminate the stigma of conviction in access to housing and other public benefits. The other used the constitutional pardon power to restore rights and status to individuals who had paid their debt to society, and remains engaged as a private citizen in efforts to increase public understanding of the role forgiveness plays in the justice system. As a result of our experiences, we have come to appreciate how facilitating reintegration contributes to public safety and strong communities, and to a general perception that the legal system is fairly administered. We believe that our nation would be well-served by reforming policies and practices that can convert even one adverse encounter with the law into a permanent Mark of Cain. We therefore join in NACDL's call for a national conversation about how this goal can best be accomplished.

Danny K. Davis

Congressman, Illinois, 7th District

Robert L. Ehrlich, Jr.

Former Governor of Maryland, 2003-07



COLLATERAL DAMAGE

Collateral Damage: America's Failure to Forgive or Forget in the War on Crime

First and foremost, NACDL is extremely grateful to the more than 150 witnesses who testified at the Task Force hearings. They generously gave their time and travelled great distances to provide the Task Force with their expertise and personal stories. Although they expressed varying points of view, reflecting various perspectives on the criminal justice system, each embraces a passion for justice and is dedicated to ensuring public safety while supporting the need for the restoration of rights and status. Many others contributed to this comprehensive project in myriad ways. NACDL gratefully acknowledges the following individuals and institutions.

This project would not have been possible without the unwavering support of the Trustees of the Foundation for Criminal Justice (FCJ); the NACDL Board of Directors; FCJ President Gerald B. Lefcourt; NACDL President Jerry J. Cox; and NACDL Past Presidents Jim E. Lavine, Lisa M. Wayne and Steven D. Benjamin.

Law Firm Support

The Task Force is most appreciative of several law firms, their attorneys and staff for providing space, refreshments and logistical assistance for the hearings. They include:

In Chicago — Mayer Brown LLP

Marc R. Kadish, Director of Pro Bono Activities and Litigation Training, and Mike Gill, Partner, for sponsoring the Task Force and securing the conference space; Lauren B. Almandarz, Secretary to Mr. Kadish, and Eloise Tobias, Conference Services Coordinator, for assisting with overall logistics for the hearings; and Staff Assistant Jennifer Mielnicki for providing administrative support.

In Miami — Carlton Fields Jorden Burt

Kevin Napper, Shareholder, for sponsoring the Task Force and securing the conference space; Cathy Jones, Director of Administration; Raymond Seara, Office Services Supervisor; Dawn Robinson, Document Production Specialist; Portia Smith, Administrative Assistant; Charmaine Vassall, Administrative Assistant; and Tresha Titus, Aramark Services Catering Manager, all for providing overall logistical support.

In Cleveland — McDonald Hopkins LLC

Special thanks to NACDL Board Member Elizabeth Kelley for initiating contact with McDonald Hopkins LLC and for providing edits to the first draft of the report.

Dean DePiero, Of Counsel at McDonald Hopkins LLC, for sponsoring the Task Force and securing conference space; Kate Hemsath, Director of Administration at the firm, and her assistant, Emily Coil-Hostess, for providing overall logistical support.

In San Francisco — Orrick, Herrington & Sutcliffe LLP

Special thanks to NACDL Member Martin A. Sabelli for initiating contact with Orrick, Herrington & Sutcliffe LLP.

Walter F. Brown, Jr., Attorney at Law, Orrick, Herrington & Sutcliffe LLP, for sponsoring the Task Force and securing conference space; Angela Wills, Assistant to Mr. Brown, and Myrna A. Maltez, IT Support Specialist, for providing overall logistical support.

In New York — Cravath, Swaine & Moore LLP

Rowan Wilson, Partner, for sponsoring the Task Force and securing conference space; Janice Singh, Executive Assistant to Rowan Wilson; James Swoboda, CTS Audio Visual Specialist; Coleen Ryan, Conference Center Coordinator; and Marilyn Roman, Conference Center Coordinator, all for providing overall logistical support.

Transcript Digests

The six hearings generated thousands of pages of transcripts that were digested by Columbia Law School students in New York. The Task Force is indebted to Madeline Kurtz, Director of Public Interest Professional Development at Columbia Law School, who helped identify students to digest transcripts. The following students digested transcripts for the cities designated: Talia Epstein (Chicago and portions of Miami); Shimeng Cheng (portions of Miami); Nicholas Matuschak (Cleveland); Sharyn Broomhead and Brian Hooven (San Francisco); Kate Mollison and Anne Silver (New York); and Joo Young Seo (Washington, DC).

Institutional & Staff Contributions

The institutions and staff of various Task Force members were instrumental in assisting with the project in numerous ways. They include: Lauren Winston-McPherson, Executive Assistant to Task Force Co-Chair Rick Jones, for coordinating Rick's schedule, participating in hearings, and coordinating Columbia Law Students; American University Law School Research Fund and American University Washington College of Law Dean Claudio M. Grossman for supporting the work of Professor Jenny Roberts on this project; Kathryn Wilson and Ashley Ahlholm, Dean's Fellows for Professor Jenny Roberts at American University Washington College of Law, for their significant research assistance with the report; Professor Rebecca Green, Professor of the Practice of Law at William & Mary Law School, for her insightful comments on criminal records reform; and Josh Gaines, Law Office of Margaret Love, for cite-checking the report.

Finally, an undertaking of this magnitude necessitates the dedication and commitment of numerous members of the NACDL staff, including: Tom Chambers, Deputy Executive Director, for coordinating financial support for the project; Tamara Kalacevic, Director of Events, for coordinating accommodations for the Task Force members; Obaid Khan and Elsa Ohman, National Affairs Assistants, for reaching out to witnesses, staffing hearings, and cite editing; Ivan Dominguez, Director of Public Affairs & Communications; Tiffany M. Joslyn, Counsel for White Collar Crime Policy; and Quintin Chatman, Editor of *The Champion* magazine, for their expert editing of the report; Catherine Zlomek, Art Director, for the layout and design of the report; Vanessa Antoun, Senior Resource Counsel, for staffing and providing assistance to the Task Force at the San Francisco hearing; Doug Reale, Manager for Strategic Marketing & Sales, for his technical video expertise and assistance with hearing site logistics; Steven Logan, Manager for Information Services, for the project website and survey design; Nelle Sandridge, Member Services Assistant, for her support during the Washington, DC hearings; and Angelyn C. Frazer, State Legislative Affairs Director and project staff to the Task Force, for report editing and overall coordination of the project.

Policies and practices that at one moment seem prudent and logical can over time have imprudent and illogical consequences. While much has been written about the adverse impact of mass incarceration, another less obvious but equally devastating development has accompanied the escalation of criminal prosecution: the proliferation of collateral consequences. A vast, half-hidden network of legal penalties, debarments, and disabilities that arise not from the penal laws but from ancillary statutes and regulations now stigmatizes the 65 million people in this country who have a criminal record. Worse, a growing obsession with background checking and commercial exploitation of arrest and conviction records makes it all but impossible for someone with a criminal record to leave the past behind.

These collateral consequences, whether based on specific legal provisions or the general discrimination they encourage, have produced untold collateral damage in the war on crime. Collateral consequences affect jobs and licenses, housing, public benefits, voting rights, judicial rights, parental rights, the right to bear arms, immigration status, and even volunteer opportunities. Each individual consequence may have seemed prudent and logical when enacted, but their overall effect is to consign millions to second-class status.

Traditionally, criminal defense lawyers and their clients part ways after a case ends at the trial level or, in some cases, after an appeal of a conviction. In an age of collateral consequences, however, that paradigm is no longer valid. The defense lawyer cannot effectively represent a client without an awareness of the collateral consequences that may ensue. But even that may not be enough.

In 2011, NACDL's leadership recognized that the defense bar could no longer remain silent about the multitude of legal and social obstacles that confront clients long after their case is concluded and their sentence served. Acting together, NACDL President Jim Lavine and President-Elect Lisa Wayne impaneled the Task Force on the Restoration of Rights and Status After Conviction to study the magnitude of the problem and articulate a solution. An overarching goal was to identify laws and policies that will dismantle the functional exile to which convicted persons are consigned in American society.

On the occasion of her installation as NACDL president in August 2011, Lisa Wayne said that "we must determine how to tear down the barriers that have turned hundreds of thousands of convicted persons into a permanent underclass," and urged the Task Force "to search far and wide throughout the country to find out what works, what does not work, and what we can do to find a solution to the problem." This report is the product of that effort.

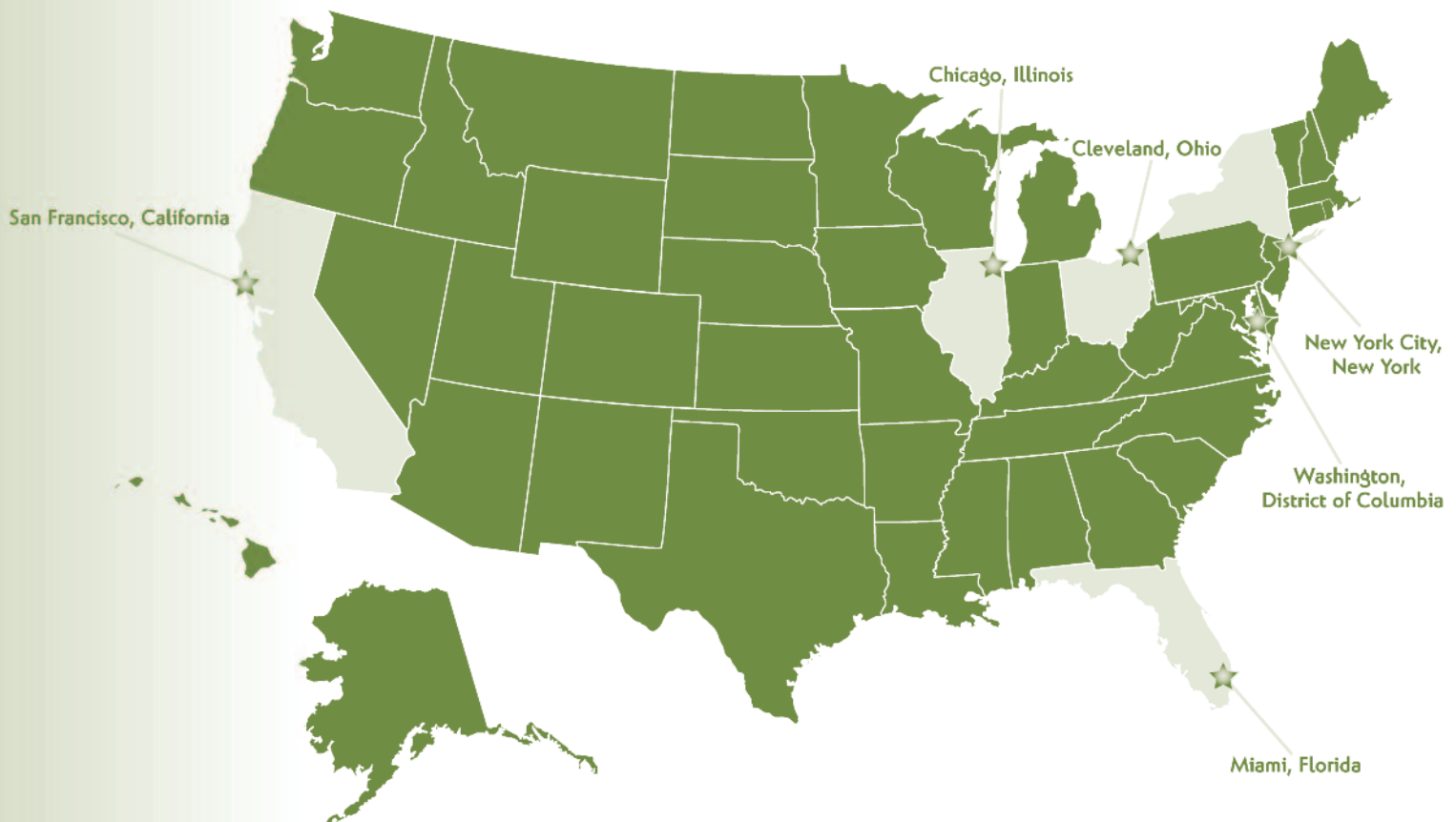
Responding to the challenge it was given, the Task Force did indeed search far and wide. Its members took testimony from more than 150 witnesses over the course of two years at public hearings conducted in six cities (a complete list

of witnesses is provided in Appendix B to this report).¹ They reviewed case law, studies, statutes, and model standards; made numerous site visits (a complete list of which is provided in Appendix C to this report); and engaged in countless hours of discussion and analysis. Finally, they distilled the findings into a report that is intended to provide the entire profession, lawmakers and society with a roadmap to the restoration of rights and status after arrest or conviction.

After an extensive period for review, NACDL's Board of Directors formally adopted the report and recommendations on March 8, 2014, at its midwinter meeting in New Orleans, Louisiana.

The work of this Task Force was strongly supported by NACDL's Board of Directors and has been funded by the Foundation for Criminal Justice with crucial support provided by the Open Society Foundations. The project was conducted by eight outstanding criminal defense lawyers from across the country, reflecting an array of practice settings: Lawrence S. Goldman, Elissa B. Heinrichs, Rick Jones, Margaret Colgate Love, Penelope S. Strong, Geneva Vanderhorst, Christopher A. Wellborn, and Vicki H. Young. Professor Jenny Roberts of the American University Washington College of Law served as the

Hearing Locations



project's consultant and reporter. Professor Roberts's dedication and skill were essential to the development of this report. Her commitment to the project is a consummate example of a partnership between the legal academy and the practicing bar in service to society. (Complete biographies of the Task Force members are provided in Appendix D to this report.)

While numerous members of NACDL's staff provided ongoing and indispensable support for the project, NACDL State Legislative Affairs Director Angelyn C. Frazer guided the project from start to finish. Ms. Frazer was principally responsible for assembling the extraordinary array of witnesses whose stories and insights exposed the magnitude of the problem and defined the essential elements of the solution.

This report is the result of an unparalleled volunteer effort that reflects the highest level of professionalism and an unprecedented commitment by a bar association to further the cause of justice. The Task Force members and their reporter contributed their experience, judgment, intellect, and thousands of hours to complete this project. That historic effort is evident in the transcripts of the hearings that are now available to the public. NACDL, the legal profession and society, especially the millions who must cope every day with the collateral consequences of a criminal case, are indebted to these outstanding professionals for their service.

The Foundation for Criminal Justice and NACDL proudly offer this report and its conclusions and recommendations for consideration by all who have an interest or a role in shaping the nation's criminal justice system, secure in the knowledge that it reflects the highest aspirations of the criminal defense bar to advocate for the dignity and humanity of every individual.

Norman L. Reimer

Executive Director, NACDL

Collateral damage occurs in any war, including America's "War on Crime." Ironically, our zealous efforts to keep communities safe may have actually destabilized and divided them. The vast expansion of the nation's criminal justice system over the past 40 years has produced a corresponding increase in the number of people with a criminal record. One recent study estimated that 65 million people — one in four adults in the United States — have a criminal record.² At the same time, the collateral consequences of conviction — specific legal restrictions, generalized discrimination and social stigma — have become more severe, more public and more permanent. 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 relegating a person to second-class status. The obsession with background checking in recent years 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. The primary legal mechanisms historically relied on to restore rights and status — executive pardon and judicial expungement — have atrophied or become less effective.

It is time to reverse this course. It is time to recognize that America's infatuation with collateral consequences has produced unprecedented and unnecessary collateral damage to society and to the justice system. It is time to celebrate the magnificent human potential for growth and redemption. It is time to move from the era of collateral consequences to the era of restoration of rights and status.

NACDL recommends a broad national initiative to construct a legal infrastructure that will provide individuals with a criminal record with a clear path to equal opportunity. The principle that individuals have paid their debt to society when they have completed their court-imposed sentence should guide this initiative. At its core, this initiative must recognize that individuals who pay their debt are entitled to have their legal and social status fully restored.

Until recently, defense lawyers have not regarded avoiding and mitigating collateral consequences as part of their responsibility to the client. This has changed, in part because of court decisions recognizing collateral consequences as an integral part of the criminal case, and in part because of the increasing social and economic significance of collateral consequences themselves. As a result, in 2011 NACDL established a Task Force on Restoration of Rights and Status After Conviction to inquire into how existing restoration mechanisms are actually functioning and to determine how they can be improved. The Task Force conducted extensive hearings in six different major American cities in five distinct regions of the country over more than two years and took testimony from more than 150 wit-

nesses. The result is this report and the following comprehensive recommendations for reform.

I. The United States should embark on a national effort to end the second-class legal status and stigmatization of persons who have fulfilled the terms of a criminal sentence.

13

The three branches of government, on the federal, state and local levels, should undertake a comprehensive effort to promote restoration of rights and status after conviction. This is a major effort that requires a multifaceted approach. It should include enactment of laws to circumscribe or repeal existing collateral consequences and a resolve to stop enacting new ones. More fundamentally, government entities, the legal profession, the media and the business community must promote a change in the national mindset to embrace concepts of redemption and forgiveness, including a public education campaign to combat erroneous and harmful stereotypes and labels applied to individuals who have at one point or another committed a crime. As a cornerstone of this movement, the United States and its states and territories 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.

Defender organizations and offices, as well as individual defense attorneys and the legal profession as a whole, have an important role to play in this effort. They should propose and support efforts to repeal collateral consequences and to enact effective ways to relieve any remaining collateral consequences. They should participate in efforts to catalogue collateral consequences and make them available in a form that is useful and educational to lawyers, courts, government agencies, researchers, and the public at large. These entities should work to change the way people with a criminal record are depicted in the media and discourage the use of disparaging labels such as “felon,” “criminal” and “ex-con” that reinforce fear-inducing stereotypes and perpetuate discriminatory laws and policies. They should participate in efforts to educate the public about the broad range of conduct that can result in conviction and the harmful effects of permanently burdening those who are convicted. Further, they should support efforts to provide equal opportunity to people with a criminal record, including in their own employment policies and practices.

II. All mandatory collateral consequences should be disfavored and are never appropriate unless substantially justified by the specific offense conduct.

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. This means that most mandatory collateral consequences should be repealed, including the loss of voting and other civil and judicial rights, which serve no public safety purpose at all. For those few mandatory consequences that can be justified in terms of public safety, sentencing courts should be authorized to relieve them on a case-by-case basis at sentencing and while a person is under sentence. 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.

III. Discretionary collateral consequences should be imposed only when the offense conduct is recent and directly related to a particular benefit or opportunity.

Where a decision-maker is authorized but not required to deny or revoke a benefit or opportunity based upon a conviction, it should do so only where it reaches an individualized determination that such action is warranted based upon the facts and circumstances of the offense. States and the federal government should develop and enforce clear relevancy standards for considering a criminal record by discretionary decision-makers, requiring them 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 should be required to specify and justify the types of 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 should never be denied based upon a criminal record that did not result in conviction.

IV. Full restoration of rights and status should be available to convicted individuals upon completion of sentence.

After completing their sentence, individuals should have access to an individualized process to obtain full restoration of rights and status, either from the executive or from a court, by demonstrating rehabilitation and good character. This relief process should be transparent, accountable and accessible to all regardless of means. Standards for relief should be clear and attainable, high enough to make relief meaningful, but not so high as to discourage deserving individuals. A pardon or judicial certificate should relieve all mandatory collateral consequences, and decision-makers should give full effect to a pardon or judicial certificate where a collateral consequence is discretionary. Jurisdictions should give their residents with convictions from other jurisdictions access to their relief procedures, and should also give effect to relief granted by other jurisdictions.

V. Congress and federal agencies should provide individuals with federal convictions with meaningful opportunities to regain rights and status, and individuals with state convictions with mechanisms to avoid collateral consequences imposed by federal law.

Congress should expand non-conviction dispositions for federal crimes, and federal prosecutors should be encouraged to offer them wherever appropriate. Individuals convicted of federal crimes should have an accessible and reliable way of regaining rights and status through the courts or a reinvigorated federal pardon process. Congress should limit access to and use of federal criminal records through judicial expungement, set-aside or certificates of relief from disabilities.

Congress should authorize state and federal courts to dispense with mandatory collateral consequences arising under federal law. By the same token, state legislatures should provide individuals with federal convictions a way to avoid consequences arising under state law. Federal courts and agencies should recognize and give effect to state relief.

Federal agencies should provide incentives to public and private employers to offer equal opportunity to persons with a criminal record. The federal government should fund research into whether relief mechanisms help individuals reintegrate into society and reduce recidivism.

VI. Individuals charged with a crime should have an opportunity to avoid conviction and the collateral consequences that accompany it.

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. Decision-makers should be barred from asking about or considering such dispositions.

Collateral consequences should be taken into account at every stage of the case by all actors in the criminal justice system. Defense lawyers should advise clients about them and explore opportunities to avoid them through creative plea bargaining and effective sentencing advocacy. Prosecutors should structure charges and negotiate pleas to enable defendants to avoid collateral consequences that cannot be justified. Courts should ensure that defendants are advised about applicable collateral consequences before accepting guilty pleas, and should take collateral consequences into account at sentencing.

VII. Employers, landlords and other decision-makers should be encouraged to offer opportunities to individuals with criminal records, and unwarranted discrimination based on a criminal record should be prohibited.

Government at all levels should find creative ways to give employers, landlords, and other decision-makers affirmative incentives to offer opportunities to those with criminal records. There should be meaningful tax credits for hiring or housing those with criminal records and free bonding to provide insurance for any employee dishonesty. 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. Jurisdictions should enact clear laws prohibiting unwarranted discrimination based upon an individual's criminal record, and should provide for effective enforcement and meaningful review of discrimination claims.

VIII. Jurisdictions should limit access to and use of criminal records for non-law enforcement purposes and should ensure that records are complete and accurate.

State repositories, court systems and other agencies that collect criminal records should have in place mechanisms for ensuring that official records are complete and accurate, and should facilitate opportunities for individuals to correct any inaccuracies or omissions in their own records. Records must be provided in a form that is easy to understand and that does not mislead. Records that indicate no final disposition one year after charges are filed should be purged from all records systems. The FBI must ensure that information relating to state relief, such as expunged and sealed records, is reflected in its criminal record repository.

State and federal authorities should limit access to their central repositories to those with a legitimate need to know. Court records should be available only to those who inquire in person, in order to balance public access to records with privacy concerns for individuals with a criminal record, and access to online court system databases should be strictly limited. Law enforcement records (non-judicial) should never be publicly disseminated. Criminal records that do not result in a conviction should be automatically sealed or expunged, at no cost to their subject. Jurisdictions should prohibit non-law enforcement access to conviction records after the passage of a specified period of time, depending upon the nature and seriousness of the offense, and should authorize courts to prohibit access in cases where it is not automatic. Any exceptions should be justified in terms of public safety, and persons who disclose records in violation of limitations on access should be subject to substantial civil penalties.

Employers and other decision-makers should be prohibited from asking about or considering a criminal record to which access has been limited by law or court order. For accessible records, decision-makers should comply with applicable relevance and non-discrimination standards. Employers should also be prohibited from inquiring about an applicant's criminal record until after a contingent offer of employment has been made.

Jurisdictions should never sell criminal records and should strictly regulate private companies that collect and sell records. Federal law should prohibit credit reporting agencies from disclosing records of closed cases that did not result in conviction, and convictions that are more than seven years in the past. States should enact their own restrictions on credit reporting companies to the extent permitted by federal preemption. Jurisdictions should provide for effective enforcement of laws governing credit reporting agencies.

IX. Defense lawyers should consider avoiding, mitigating and relieving collateral consequences to be an integral part of their representation of a client.

Defense counsel should consider avoiding and mitigating collateral consequences to be an integral part of their representation of a client, both at and after sentencing. If post-sentence representation is not feasible, defense counsel should refer clients to organizations or individuals that can provide such representation. Agencies that fund indigent defense services should fund representation in connection with restoration of rights and status.

X. NACDL will initiate public education programs and advocacy aimed at curtailing collateral consequences and eliminating the social stigma that accompanies conviction.

NACDL resolves to use all of its resources, particularly the dedication of its members who are on the front lines fulfilling the mandates of the Sixth Amendment, to implement the preceding nine principles. The nation's criminal defense bar must be in the vanguard of the effort to make the full restoration of rights and status a reality for all who successfully fulfill the terms of a sentence. NACDL and the defense community will lead efforts to repeal or modify existing collateral consequences that cannot be justified in terms of public safety, to avoid enacting any additional ones, and to implement meaningful restoration procedures both during and after the conclusion of the criminal case.

This report is the result of the work of the Task Force on Restoration of Rights and Status After Conviction, established by NACDL Past Presidents Jim Lavine and Lisa Wayne in 2011. 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. In connection with its hearings, members of the Task Force also participated in site visits. The Task Force also reviewed a wide range of studies, reports, and articles on various restoration and relief mechanisms, and on collateral consequences more generally. See Appendices B and C for a complete list of witnesses and sites visited. The transcripts of those hearings are available on NACDL's website at www.nacdl.org/restoration/roadmapreport.

Throughout the hearings, the Task Force engaged in discussions about the testimony and direction of the report. Professor Jenny Roberts assumed primary drafting responsibility for this report. Multiple drafts were discussed and revised through a collaborative process with the Task Force and NACDL's staff and Board of Directors. On March 8, 2014, the NACDL Board of Directors adopted the Task Force draft report and recommendations.

Throughout the report, terminology is used to describe individuals who have a conviction on their record. NACDL subscribes to the principle that people with convictions should not be referred to as "criminals," "convicts," "offenders," "ex-cons," or other disparaging labels. However, uses of these terms are retained in direct quotations from witnesses that appear in the report in order to ensure the accuracy of the quote.

Types of Collateral Consequences:

Mandatory consequences apply automatically as a matter of law, regulation or policy, without regard to the individual or the circumstances of the conviction. Some mandatory consequences end when a person's sentence ends, some end after a specified number of years, and others apply indefinitely. Automatically losing the right to vote because of a felony conviction is a mandatory consequence that generally ends upon release from prison or completion of sentence.

Discretionary consequences are those an agency or official is authorized but not required to impose based on conduct underlying a conviction. An example is denial or revocation of a real estate license based upon a finding by the licensing board that an individual convicted of fraud lacks "good moral character."

Continued on next page

Continued from previous page

Informal consequences (“stigmatization”) are policies and practices based on social custom and cultural attitude, as opposed to law or formal policy. Although frequently unwritten, they can be just as harmful as restrictions that are formally adopted and enforced. For example, someone unable to find a private landlord willing to rent him an apartment is suffering the informal consequences of conviction; his family also suffers the economic and psychological impact of this stigma.³

Legal avenues for relief from the adverse effects of arrest or conviction come in many forms and variations, with a corresponding lack of clarity and consistency from jurisdiction to jurisdiction. Frequently, one jurisdiction has no mechanism for dealing with convictions obtained or relief granted in another, making it difficult for a convicted person to move from one state to another. Relief mechanisms by the same name differ from state to state in terms of applicable procedures and eligibility criteria as well as in substantive effect. For example, “expungement” of a criminal record can mean anything from actual destruction of the record in one state to mere limitations on its use in another. A pardon may or may not restore firearms rights, and may or may not be given effect by a sister state. Certificates may recognize “good conduct,” “rehabilitation” or “employability.”

The “Definitions of Key Terms” provided in Appendix A of this report offers general working definitions of the common terms and phrases referenced here and many others used throughout this report.

Types of Relief Mechanisms

Avoidance mechanisms allow an individual to avoid a conviction in the first place. For example, diversion or deferral of judgment may lead to dismissal of the charges upon successful completion of any conditions.

Automatic restoration mechanisms are legislatively or administratively determined points in time after which a particular collateral consequence terminates. An example is the automatic restoration of the right to vote upon release from prison or completion of sentence.

Individual restoration mechanisms include pardon, expungement or sealing of a record, and certificates of good conduct or restoration of rights. Some of these mechanisms are consequence-specific such as a court-ordered restoration of firearms rights or certificate of employability, while others apply generally to lift all or most legal restrictions, such as a pardon.

Systemic relief mechanisms operate outside of the individual case to place general limits on consideration of conviction in allocating benefits or opportunities. They may be procedural (e.g., ban-the-box policies or limitations on liability) or substantive (“business necessity” under Title VII).

In 2004, Martha Stewart went to federal prison for five months after being convicted of obstructing justice and making false statements to federal investigators.⁴ Even before she finished her short sentence, the groundwork was being laid for her redemption. One conservative columnist wrote, “Stewart is paying her dues. As she prepares her comeback, there is simply no reason for anyone to attempt to deny her right to leave her troubles in the past and start anew.”⁵ Although her conviction barred her from serving on a board or as an executive for any public company for five years,⁶ she returned to work immediately upon release from prison.⁷ Within two years, her company returned to profitability.⁸ By 2011, Stewart was back on the company’s board of directors⁹ and, in 2012, returned as chairperson.¹⁰



Philadelphia Eagles owner Jeff Lurie described a “surprise” phone call from President Obama after the team signed Michael Vick shortly after his release from prison: *“He said, ‘So many people who serve time never get a fair second chance. . . . It’s never a level playing field for prisoners when they get out of jail.’ And he was happy that we did something on such a national stage that showed our faith in giving someone a second chance after such a major downfall.”*¹³

Michael Vick had a similarly soft landing. In 2009, as soon as he finished 23 months in prison for running a dogfighting ring, the National Football League lifted Vick’s suspension. The Philadelphia Eagles immediately signed him, with Eagles Coach Andy Reid noting: “I’m a believer that as long as people go through the right process, they deserve a second chance. . . . He’s proven he’s on the right track.” Eagles President Joe Banner added, “Everybody we talked to said the same thing, that he was remorseful and that he had gone through an incredible transformation, that he was basically good at heart. We heard this over and over again from people who felt he deserved a second chance.”¹¹ While the Eagles were undoubtedly motivated by more than compassion, their decision received praise from President Obama himself, who telephoned Eagles owner Jeff Lurie to commend the team for doing “something on such a national stage that showed . . . faith in giving someone a second chance after such a major downfall.”¹²

Leaving her troubles in the past and starting anew. Good at heart. On the right track. Showing faith in giving someone a second chance. These expressions certainly apply to the many individuals with convictions who testified at the Task Force hearings. Yet Jessica Chiappone could not volun-

teen at her children's school because of a conviction that was 15 years in her past.¹⁴ 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.¹⁵ 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.¹⁶ Brenda Aldana trained as a dental assistant while in federal prison for a drug crime, and pursued this work when first released, but could not risk the cost and time of an additional program given the likelihood that the licensing board would deny the exemption she would later need based on her criminal record.¹⁷ 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.¹⁸

These individuals encountered just a few of the 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, in Jennifer Smith's case, charges that were dismissed).¹⁹

"We don't want you to roll out the red carpet to us. We want to make sure that when we do our time, our past doesn't dictate our future.... I think that when you go 18 years without getting into trouble...that shows something about me, my character and what I'm truly about."

Ralph Martin, President & CEO, RCRM Consulting
(Miami Day 1 at 20-24)

Brenda Aldana, Jessica Chiappone, Jennifer Smith, Mr. C., and Darrell Langdon are not alone in suffering a different fate than Martha Stewart or

Michael Vick. More than one in four adults in the United States — some 65 million people — has a rap sheet. And this is a conservative estimate.²⁰ There are 14 million new arrests every year.²¹ More than 19 million people have felony convictions,²² and millions more have been convicted of less serious crimes. The nation's shameful incarceration rate — 2.2 million adults currently in jail or prison²³ — is the highest in the world.²⁴

Branding so many millions of people with this "Mark of Cain"²⁵ has new and dangerous meaning in the electronic age. Arrest and conviction records are no longer pieces of paper that sit in court clerks' files, accessible only by a trip to the local courthouse. Instead, they are usually on publicly available 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.²⁶ This means that a minor marijuana possession conviction, one of the most common misdemeanors,²⁷ can follow a person for the rest of his life. Charges that are never prosecuted, or are eventually dismissed, live on in the digital world. Some law enforcement agencies actually sell arrest records, and the private data companies buying them or getting them from public sites have proliferated, profiting from the misery of innocent and convicted people. Even with conviction records, the well-documented failure of states to record when charges are dismissed or records sealed,²⁸ and the failure of private data companies to keep accurate records, hurt millions of individuals.

The Disparate Racial and Ethnic Impact of Collateral Consequences

The troubling confluence of overcriminalization and ever-expanding collateral consequences in the electronic era has not affected all people equally. Poor and minority communities, where residents are policed most heavily and where zero-tolerance policing practices have led to skyrocketing num-

bers of minor quality of life arrests, bear the brunt of the nation's criminalization obsession. The pervasiveness of these policies is highlighted most dramatically when considering minor drug offenses. In 2010, of the 1,717,064 drug arrests in the United States, more than half were for marijuana, the overwhelming majority of which were for possession.²⁹ While these numbers alone are shocking, the enormous disparities that exist between arrest rates for black and white Americans is even more telling — the black arrest rate is 716 per 100,000 while the white arrest rate is 192 per 100,000, despite the fact that both populations use marijuana at similar rates across all age groups.³⁰ These troubling differentials extend far beyond arrest. New York City Probation Commissioner Vincent Schiraldi, discussing “amazing levels of disparity” in the nation's corrections systems, stated, “We have a good system — but it's the one that white kids get, which diverts kids out of the system and retains the few who really need to be in prison[.]”³¹

African-Americans and Hispanics also bear the brunt of consequences that follow a criminal record, even a minor misdemeanor record. Collateral consequences are disproportionately leveled against communities of color and are

“[W]e look at crime in a very different way than most traditional criminologists because we know there are a lot of antecedents to crime. We know that people are not born criminals. We know that anybody can be defined as a criminal, depending on whether or not they've been caught. . . . We won't ask for a show of hands because we know that there are many people who are professionals today, who had they . . . gotten caught, would be defined as a criminal. We don't think that the criminal act defines your total person. We don't think that a person who commits a crime is a bad person, but simply a person who did something not so good.”

Dr. Divine Pryor, Executive Director,
Center for NuLeadership on Urban Solutions (NYC
Day 3 at 275-76)

overly punitive, stripping many of the right to vote, denying people public benefits, and making housing and work considerably harder to find.

In a compelling demonstration of the unfairness of this racial disparity, the documentary project *We Are All Criminals*, based in Minnesota where one in four people have criminal records, looks at the other 75 percent, “those of us who have had the luxury of living without an official reminder of a past mistake” and “opportunities to move on and move up.”³² On the website www.weareallcriminals.com, participants describe crimes they committed for which they were never caught, ranging from drug possession and

A Criminal Record Hits Black Job Seekers Harder Than White Job Seekers

A recent large-scale study found that men with a drug felony conviction were 50 percent less likely than men without a record to get a callback or job offer for an entry-level job that required no previous experience and no college degree. Most significantly, black applicants suffered this “criminal record penalty” twice as often as white applicants. The study authors found that “[t]his interaction between race and criminal record is large and statistically significant, which indicates that the penalty of a criminal record is more disabling for black job seekers than whites.”³³ In addition, evidence of the “persistent effect of race on employment opportunities” using matched pairs of testers applying for employment in the Milwaukee area found: “Blacks are less than half as likely to receive consideration by employers, relative to their white counterparts, and black non-offenders fall behind even whites with prior felony convictions.”³⁴

sale to felony theft to sexual misconduct. These individuals, many of whom “benefited from belonging to a class and race that is not overrepresented in the criminal justice system,” were allowed to move on with their lives, and they are now able to work as engineers, lawyers, corrections professionals, bank tellers, and teachers.

The situation has reached crisis proportions. A study of arrest rates among youth in the United States noted how arrests can lead to immediate and long-term negative consequences. Using data gathered from 1997 to 2008, the study found that 49 percent of black men, 44 percent of Hispanic men and 38 percent of white men will be arrested by age 23.³⁵

Are We Really a Nation of Criminals?

Are millions in the United States inherently bad people, undeserving of the chance to move beyond their past? NACDL, whose members interact daily with individuals accused of crimes in courtrooms all over the nation, does not believe that is the case. After all, who are all these people with criminal records? They are our friends and neighbors, and sometimes ourselves. They are family members and families of our co-workers. The brute force of our criminal justice system, and the severe consequences that await people as they try to move on from the system, hurts us all. It is time to confront the notion that a person with a criminal conviction is somehow different from the rest of us, our families, and our communities. We must move away from fear and hesitation and towards forgiveness and providing people the opportunity to move on by restoring their rights and status.

The easiest solution to this urgent problem would be to end the punishment for the crime once the sentence has been served, by simply ending all collateral consequences and letting people move on with their lives. But formal and informal collateral consequences are deeply embedded in the nation’s laws, regulations, policies, and culture. And millions of people in the United States are struggling, right now, to live their daily lives in the face of these existing obstacles.

The U.S. Lags Far Behind Other Countries in Restoration of Rights and Status

As the United States struggles to compete with other nations in the rapidly changing global workplace, a unique obsession with labeling people as “criminals” is leading the country down a dangerous moral and economic path. Other countries criminalize less, incarcerate less, and let people fully re-enter and participate in civic and daily life after a conviction. In Europe, prisoners can vote,³⁶ and many countries extend criminal record confidentiality protections into a person’s adulthood.³⁷ The Netherlands, France, Germany, and Spain have strict policies that limit the amount of information available in criminal records and limit access to these files.³⁸ And although employers in Spain can ask applicants to disclose their criminal record, Professor James Jacobs testified, “It’s very, very rare that a private employer asks.” Further, “there are . . . no disabilities that come with a criminal record, at least with respect to private employment.”³⁹ In a stark illustration of the different way that European countries balance individual privacy and the public’s right to access data from the United States, Europe has a “right to be forgotten” movement.⁴⁰

There are a few avenues for relief from the many harsh consequences of a criminal conviction, including pardon, sealing or expungement of the record and certificates of good conduct or relief from disabilities. There are also policies to help individuals with a conviction have a better chance in the job market. These include “banning the box” that asks applicants about their criminal history on an initial job application, civil rights laws barring discrimination based on a person’s criminal con-

viction, and tax incentives and immunity for employers willing to hire qualified individuals with a conviction. But these relief mechanisms are limited in their scope and effectiveness. They are not widely known and are underutilized. In many jurisdictions, pardon is the only way a convicted person may regain rights and status, but pardons are rarely granted. Relief based on restricting access to a criminal record through sealing or expungement offers only limited protection in an electronic era that reveals all secrets.

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. It must include the repeal of mandatory consequences that ignore individual circumstances; strict limits on discretionary disqualifications so they are used only when the conviction is closely related to the opportunity at issue; legal mechanisms that formally and legally restore rights and opportunities; and innovations and inducements to incentivize employers, landlords and other decision-makers to give individuals with convictions a chance.



"[I]ndividuals have to have a sense of finality with respect to the offense that they committed. They have to be able to put it behind them if they're ever going to move on with their lives."

**Sam Morison, former Staff Attorney,
Office of the Pardon Attorney, U.S.
Department of Justice (DC Day 2 at 228-29)**

It is time to move on from the age of mass incarceration and overcriminalization, away from the stigmatization produced by what might be a one-time adverse encounter with the justice system, and into a new era of restoring the rights and status of individuals with criminal records.

Giving People the Opportunity to Move Beyond a Criminal Record Enhances Public Safety and Saves Money



"When has helping someone turn their life around been considered being soft on crime?"

**Ralph Martin, President &
CEO, RCRM Consulting⁴¹**

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 and thus increase public safety.

Consistent research shows that the ability to earn a living is the best way to keep someone from committing another crime.⁴² Yet setting up impassable barriers for those with convictions undermines public safety. Alameda County DA Nancy O'Malley, who chairs the California Sex Offender Management Board, told the Task Force, "We want people to not commit more crimes, and we don't want to have more victims of crimes. So it's in all of our best interests to help people stay or get into a position where they have the ability to be successful when they're out of an incarceration facility."⁴³

"[W]hat is the cost-benefit analysis when we don't provide opportunities to individuals, when we simply judge people based on these past criminal convictions? . . . If we don't provide them with real opportunities for gainful legitimate employment, we are putting people in positions where they may have to make other choices."

Nicole Austin-Hillery, Director and Counsel
of the Washington Office of the Brennan
Center for Justice (DC Day 3 at 159, 162)



Wayne Rawlins, a community justice and economic development consultant, testified, "A person that can get a job, that can pay taxes, that can feel vested in the community is less likely to reoffend than someone that doesn't." However, he noted, "the state of Florida has divested ex-felons and ex-offenders from feeling invested in community and society."⁴⁴ Bill Evans, who has worked in Florida law enforcement for 30 years, says that helping people with convictions become productive members of society "is a public safety issue. . . . If your only

skill sets were not the most law-abiding jobs in the world but you really wanted to change in your heart, if you got released and you still couldn't take care of yourself and feed your children, would you go ahead and go back to those things you were doing that would have put some fast money in your pocket or would you sit there and continue to let your children go hungry?"⁴⁵

The cost savings of allowing people to earn an honest living and keeping them out of jail or prison is staggering. For example, in 2012 Ohio spent more than \$49,000 to incarcerate each person in its criminal justice system.⁴⁶ A study involving 40 states revealed that the total taxpayer cost in 2010 ranged from a low of \$76 million in Maine to a high of well over \$3 billion in New York and Texas.⁴⁷ As Deputy Attorney General James Cole stated in a recent speech: "We have a greater percentage of our population in prison than any other industrialized country, and the cost to maintain this is unsustainable."⁴⁸ For every person who can hold a job rather than sit in jail or prison, a state saves not only the cost of incarceration but also benefits from increased tax revenues and the individual's increased earnings.⁴⁹

When Ronald Davis became chief of police for East Palo Alto, a city once called "the murder capital of the United States,"⁵⁰ he believed police departments should be sending parolees back to prison to keep people safe. A series of events led Davis to change his approach, and he soon embraced "the idea of redemption" and the need for law enforcement to help remove unnecessary barriers to rehabilitation and a law-

abiding life. This led Davis to seek the passage of legislation creating a day center, run by the police department, where participants could earn \$10 an hour working for the California Department of Transportation and get other services. This effort was successful, and Davis testified about how homicides went down by half and recidivism rates plummeted in East Palo Alto in the years after the implementation of this program.⁵¹ He also described one change he “didn’t foresee happening”:

*The legitimacy of the police department changed. Instead of being just a tool of oppression that would incarcerate mass numbers of these young men of color, these people saw the officer as part of a holistic response to treatment, to making peoples’ lives better. . . . [W]hat we’re seeing is that it’s a very effective crime fighting strategy. It goes to the police legitimacy, it goes to the community’s trust inside the police department, it goes to giving people an option, it goes to families because a lot of these young men we’re talking about have kids.*⁵²

In every jurisdiction the Task Force visited, law enforcement officials were coming to similar conclusions. Vincent Schiraldi was the commissioner of the New York City Probation Department, which supervises 25,000 people on probation. He testified about the central role a probation department can play in advancing public safety by giving individuals with criminal records a second chance. The department’s probation officers work with anyone under their supervision who wants and is eligible for a Certificate of Relief from Disabilities under New York law, which judges can issue to lift employment barriers. “You’re supposed to get your [Certificate] out of the box so you can cut hair legally, and so you can be a security guard and the hundreds of other things you . . . can’t do if you don’t have it,” said Schiraldi.⁵³

Gary Mohr, who directs Ohio’s Department of Rehabilitation and Correction, testified that “at the end of my time, I want to be measured by recidivism rate[s].” His vision for his agency is

to “reduce recidivism among those people that we touch, that includes our 50,000 inmates, our 30,000 on parole, and another 40 to 50,000 offenders that we are working with.”⁵⁴ Using evidence-based practices to get there, Mohr supported Ohio’s move to divert thousands of individuals convicted of low-level felonies from state prison to community supervision, where they can get the services needed to overcome employment and other barriers. For Mohr, it simply does not make sense to bar for life someone convicted of a felony from a job like the unarmed guarding of a vacant building, without considering the particular person’s situation. This is particularly important where “1.9 million or 17 percent of Ohio’s population has been convicted of a felony or misdemeanor that . . . carr[ies] some collateral consequences or sanctions.”⁵⁵ Mohr thus supported the 2011 Ohio law creating a Certificate of Achievement and Employability, which offers individuals relief from Ohio’s many mandatory employment and licensing bars, so that their applications can be considered on the merits.⁵⁶ Shortly after testifying at the Task Force’s Cleveland hearings, Mohr described the “great feeling” he had signing Certificates, noting how they are “one of our first steps to address collateral consequences for offenders who are trying to make a better life for themselves and their families once they’ve paid their debt to society.”⁵⁷

This report focuses on legal avenues of relief from the barriers to full participation in society for those with a criminal record. Before any reform effort in this area can be successful, the nation must first come to grips with the insurmountable barriers faced by people with criminal records and how these barriers actually hurt public safety. This means stepping back to take a bird’s eye view of the full web of consequences that entrap people just trying to get on with their lives. The bleak view should convince legislators and policy-makers that, absent firm evidence that a particular consequence significantly improves public safety and is narrowly tailored to achieve its purpose, the consequence should be repealed.

The Illinois Example: Identifying Employment Restrictions That Are Unrelated to Public Safety



Recognizing that “[g]ainful employment after release from prison is one of the critical elements necessary to achieve successful re-entry” and that “employment has been shown to reduce recidivism,” Illinois legislators created a task force to identify employment restrictions for individuals with a criminal history that are not related to public safety.⁵⁸

The task force recommended “internal review of all licensure requirements [to] determine whether existing restrictions are based on job-related criteria consonant with business necessity.” It also recommended:

- ❖ In state hiring, asking only about convictions that are related to the particular job and consistent with business necessity and not asking about any such convictions on the application itself.
- ❖ Banning state agency inquiry into or use of expunged or sealed criminal records or arrest records, with exceptions for certain jobs.
- ❖ Uniform procedures for criminal history background checks, with notice of the results to the individual and an opportunity to be heard about the record’s accuracy and any lack of nexus to the job.⁵⁹

These recommendations would apply to employment in the more than 150,000 state jobs in Illinois,⁶⁰ and to the many government agencies that issue occupational licenses, certificates, and permits, and that must consider the 318 Illinois statutes with restrictions based on an applicant’s prior criminal record. Illinois offers bonding for insurance purposes and tax incentives for employers who hire individuals with convictions; the state also does outreach and provides education to employers and individuals with convictions.⁶¹ Carol Morris, statewide program manager for the task force, testified that “[t]he re-entry employment service program is designed to support the reduction of recidivism directly associated with the unemployment rate of the ex-offenders.”⁶²

Attorney General Eric Holder has highlighted the efforts in Illinois when urging state attorneys general to eliminate barriers that do not increase public safety.⁶³ Setting an important example, Holder “called upon all relevant federal agencies to conduct a similar analysis of current regulations to identify any unintended consequences” and described how “[w]ithin the Justice Department, we have evaluated more than 200 of our own regulations. And we have identified a number of rules that could be narrowed in scope without negatively impacting public safety.”⁶⁴

The Need for Data-Driven Decision-Making

“We actually know virtually nothing about the effectiveness of these different restoration of rights

mechanisms for individuals . . . seeking to improve their lives,” noted Charles Loeffler, a postdoctoral scholar at the University of Chicago Crime Lab.⁶⁵

As with criminal laws and procedures, legislators often enact conviction-based barriers, in the form

of collateral consequences, based on a single, high-profile incident or a desire to look tough on crime rather than careful consideration of data showing that the barrier will advance (or harm) public safety. Professor Al Blumstein, testifying about laws that ban a person from a right or benefit for their entire life, stated: “The statutes get enacted when somebody did something heinous and then, as a response, the legislature doesn’t think of the subtle tension between the social benefits of providing job opportunities and the private risks of employers or the social or the public risk of someone doing something.” He described how “legislative bodies . . . have lots of knee-jerk responses, which show up as a forever rule.”⁶⁶ Since many of these “forever” rules are retroactive, they apply to employees who have been in a job for many years, who will then suddenly lose that job because of an old, often irrelevant, criminal record.

Instead of such knee-jerk reactions, there must be evidence-based decisions to determine which consequences actually advance rather than harm public safety and which relief and restoration mechanisms are most effective. Data is particularly important for emotionally laden issues, such as laws imposing barriers to re-entry for individuals convicted of sex offenses. Nancy O’Malley, Alameda County DA and chair of the California Sex Offender Management Board, noted how most people are sexually abused by someone they know and how residency restrictions for those convicted of sex offenses do little to address this reality. She testified that “[n]obody wanted to hear about the humanity of who’s behind the registration. And so . . . we held ourselves out as the experts who could help educate and bring that evidence-based information to legislators.”⁶⁷

Since collateral consequences are not intended to be punishment, legislators should support them only if there is solid data demonstrating a strong public safety benefit for such a barrier that outweighs obstacles to reintegration. Professors Alfred Blumstein and Kiminori Nakamura testified that their research shows how a conviction becomes less relevant the older it is, and eventually reaches a point where an employer takes no greater risk hiring that person than any other person. For example, one data point demonstrated

that once a person with a prior conviction has been arrest-free for 3.8 years, that person’s risk of recidivism drops to the same or lower level than the risk of arrest in the general population.⁶⁸ At the Task Force’s DC hearings, Justice Department official Amy Solomon, who Co-Chairs the Federal Interagency Re-entry Council Working Group, testified that “research sponsored by our National Institute of Justice shows that people who stay out of trouble for just a few years are largely indistinguishable from the general population in terms of their odds of another arrest.”⁶⁹ Such evidence might also guide states in deciding when to limit access to and use of criminal records, for example in sealing conviction records after a certain number of years. Indeed, Massachusetts is one state that has already done this.⁷⁰

State and federal governments should fund studies on the effectiveness of different avenues of relief from a criminal conviction to see what works and what does not. For example, there should be an examination of whether sealing minor conviction records, combined with banning commercial distribution of those records, prevents the discrimination that individuals with such records currently experience. Mark Myrent, Research Director for the Illinois Criminal Justice Information Authority, stressed the need to “get data from the agencies to try to do an assessment of the impact of these [licensing and employment] restrictions, how many people are employed in these restricted positions, how many people have applied, how many people have been turned down because of the restrictions, how many have applied for various forms of relief, how many have made attempts to appeal that decision, either administratively or in court.”⁷¹ New York City Probation Commissioner Vincent Schiraldi raised a similar issue after describing how much time his officers spend helping probationers get Certificates of Relief from Disabilities: “Do I know whether getting somebody a certificate of relief is a better use of my time than these other practices with a lot of evidence? . . . I don’t know the answer to that question. I don’t know if civil sealing would be worth it. . . . Somebody’s got to research that because if we don’t, it’s never going to be on the list for these new probation commissioners to do.”⁷²

I. The United States should embark on a national effort to end the second-class legal status and stigmatization of persons who have fulfilled the terms of a criminal sentence.

- ❖ The three branches of government, on the federal, state and local levels, should undertake a comprehensive effort to promote the restoration of rights and status after conviction.
- ❖ This major effort should include enactment of legal mechanisms to circumscribe or repeal the collateral consequences of conviction and a resolve to stop enacting new consequences.
- ❖ 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 notions about individuals with convictions.
- ❖ The United States and its states and territories should enact legislation establishing 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.
- ❖ To support this campaign, defender organizations and offices, individual attorneys and the legal profession as a whole should:
 - ◆ propose and support efforts to repeal collateral consequences and to enact effective ways to relieve any remaining collateral consequences;
 - ◆ participate in efforts to catalogue collateral consequences and make them available in a form that is useful and educational to lawyers, courts, government agencies, researchers, and the public at large;
 - ◆ work to change the way people with a criminal record are depicted in the media and discourage the use of disparaging labels such as “felon” and “criminal” that reinforce fear-inducing stereotypes and perpetuate discriminatory laws and policies;
 - ◆ participate in efforts to educate the public about the broad range of conduct that can result in conviction, and the harmful effects of permanently burdening those who are convicted; and
 - ◆ support efforts to provide equal opportunity to people with a criminal record, including in their own employment policies and practices.

As an overarching and guiding principle for the work that must be done to combat the nation's collateral consequences crisis, there must be a profound sea change in the national mindset regarding individuals with convictions. As a matter of morality, the United States cannot justify saddling convicted persons with life-altering consequences that extend beyond the fulfillment of the terms of sentence. As a matter of practicality, the country must recognize the harm inflicted upon individuals, families, and society generally by collateral consequences, some of them imposed for life, that make it impossible for individuals with a criminal record to function as productive members of society. As a matter of law, the United States must protect against intentional or unintentional discrimination against poor people and people of color, who suffer disproportionately under the heavy burden of collateral consequences that effectively extend the criminal sentence long after it should have ended.

As Luz Norwood, the manager of a vocational training program for inmates returning to the community in Florida, explained:

*"[We need a] re-education process not only of the offender, but of the employer. It's just telling them over and over again what the person's skills are, what an offender can offer. Forget the word 'offender.' Look at this person as an applicant. Because there but for the Grace of God, [go] you or I. It's that simple. We have to show more compassion and educate the community."*⁷³

Collateral consequences are additional punishments, most of which bear no relationship to the crime. They reach into every imaginable area of life. A decorated veteran who is not yet a citizen can be deported for a misdemeanor drug conviction. A mother supporting four children can never work in a bank because of a shoplifting arrest that was dismissed. A 75-year-old man with a public

Language Matters: "Person With a Criminal Conviction," Not "Felon" or "Criminal"

*"Walmart is hiring a lot from us," testified Luz Norwood, who helps find work for individuals involved in the criminal justice system at Transition in Florida. But, she noted, "They call it a community jobs program because Walmart will never call it an offender jobs program."*⁷⁶

The labels "criminal," "felon," and even "ex-offender" define a person by one act and perpetuate negative stereotypes and societal prejudice against individuals with criminal records. It is tempting to use shortcuts to categorize people, but the disability rights, immigration reform, and other movements teach the importance of recognizing the humanity of the person behind the label.⁷⁷ One central component of restoration of rights and status efforts must be to encourage the press, advocates, and the public to avoid labels and instead use phrases that describe a person's attributes or experiences, such as "individual with a conviction," "person with a criminal record," or, when speaking of convicted persons as a group, "members of the affected community."⁷⁸

urination conviction in California can never live in public housing and will be on a public sex offense registry for the rest of his life. In the employment arena, as Mark Myrent, research director of Illinois' Criminal Justice Information Authority, described it, "[t]here is confusing complexity to all these restrictions that becomes rather nightmarish for both ex-offenders as well as employers." He testified how "criminal history restrictions on employment have really proliferated over many years by many entities. And there is not any single place where they're really catalogued in one place where we can get our finger on that. Typically, they're spread over numerous chapters of state laws. They're buried in agency rules, lost in obscure agency policy memos as well."⁷⁴ In addition to these formal collateral consequences,

people convicted of a crime face informal discrimination from employers, landlords, and neighbors who equate contact with the criminal justice system with poor character.⁷⁵ A major national effort currently underway to inventory all collateral consequences in state laws and regulations — reflected at www.abacollateralconsequences.org — has identified more than 45,000 separate collateral consequences currently in existence.

While NACDL recognizes that restrictions on convicted persons may be appropriate where there is a demonstrable nexus between a recent crime and a specific benefit or opportunity, even in those situations society needs to provide avenues for discretionary relief.

Recommendation

II. All mandatory collateral consequences should be disfavored and are never appropriate unless substantially justified by the specific offense conduct.

- ❖ Legislatures should not impose a mandatory collateral consequence unless its public safety benefit substantially outweighs its burden on an individual's ability to reintegrate into the community.
- ❖ For mandatory consequences that can be justified in terms of public safety, sentencing courts should be authorized to relieve them on a case-by-case basis at sentencing and while a person is under sentence.
- ❖ 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.

State and federal laws and policies have hundreds of mandatory collateral consequences that automatically flow from a conviction without regard to the individual or the circumstances of the conviction. For example, in Virginia there are 146 mandatory consequences affecting employment, ranging from ineligibility to work for the state lottery to ineligibility to hold a notary commission, and 345 mandatory consequences overall.⁷⁹ In Ohio, there are at least 533 mandatory consequences, affecting areas ranging from contracting to child care to driving a truck.⁸⁰

NACDL urges jurisdictions to follow Attorney General Eric Holder's recommendation that states "evaluate the[ir] collateral consequences . . . to determine whether those that impose burdens on individuals convicted of crimes without increasing public safety should be eliminated."⁸¹ Such an analysis will likely reveal many mandatory consequences that do not have a demonstrated public safety purpose, supporting NACDL's recommendation that most mandatory collateral consequences be repealed.

Although repeal of most mandatory consequences is preferable, NACDL recognizes that there are currently millions of individuals suffering under the burden of thousands of mandatory consequences. For this reason, state legislatures and Congress should pass relief-at-sentencing laws, giving the sentencing judge authority to remove any mandatory collateral consequence. As Beth Johnson, staff attorney at Cabrini Green Legal Services, described it in her testimony to the Task Force, “instead of legislature[s] amending each and every statute to have a waiver, you have one law that allows a court to waive any barrier.”⁸² The Uniform Collateral Consequences of Conviction Act (UCCCA) adopted in 2009 contains such a relief-at-sentencing process,⁸³ as does the recent revision of the sentencing articles of the Model Penal Code (MPC).⁸⁴ NACDL commends both of these law reform efforts to state legislatures and to Congress.

An Unfair Mandatory Public Housing Ban

Congress should reconsider federal law’s mandatory, lifetime disqualification from public housing for any person who is required to be on a sex offense registry for his or her entire life. This mandatory federal consequence depends on the state registration law, and so is unfairly harsh in states that put more individuals on lifetime registration. In California, 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.

New York has had a relief-at-sentencing law for many years,⁸⁵ but other states are now following suit. For example, in 2013, the Colorado legislature gave its judges the power to enter an “Order of Collateral Relief” to “relieve a defendant

Repealing Harmful Collateral Consequences

“In Ohio we found a large number of sanctions that take driver’s licenses away [based on convictions] that have nothing to do with driving. . . . [I]t’s tough enough to get a job, I can only imagine trying to get a job without a driver’s license.”

Gary Mohr, Director,
Ohio Department of Rehabilitation
and Correction (Cleveland Hearing
Day 2 at 390)

Many collateral consequences are put into place in the name of public safety, on the dubious theory that impairing the rights of individuals with a conviction will keep them from committing other crimes. But collateral consequences usually do not advance, and may actually hurt, public safety by setting up barriers to reintegration and full participation in society after a conviction. Unless a consequence 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, it should be taken off the books. Congress and federal agencies should lead the way, repealing laws, regulations and policies that set up unnecessary and harmful bars based on a criminal record. The federal government can also encourage reform of state laws, regulations and policies by directing existing federal resources to states that reduce harmful barriers and by withholding resources from those that do not.

of any collateral consequences of the conviction, whether in housing or employment barriers or any other sanction or disqualification that the court shall specify, including but not limited to statutory, regulatory, or other collateral consequences that the court may see fit to relieve that will assist the defendant in successfully completing probation or a community corrections sentence.” Colorado judges may order this collateral relief at sentencing when it is consistent with the applicant’s rehabilitation; would improve the applicant’s likelihood of successful reintegration into society; and is in the public’s interest. The judge has the power at any time to “enlarge, limit, or circumscribe the relief previously granted,” or to revoke it if the person is later convicted again.⁸⁶ At the Task Force’s New York hearings, several witnesses testified about that state’s Certificate of Relief from Disabilities, which allows the judge to lift mandatory barriers to employment and licensing.⁸⁷ At the Cleveland hearing, Federal District Judge Dan Polster, who supervises the re-entry court in his district, testified that he would welcome the authority to relieve certain collateral consequences at sentencing, including in particular the restrictions on eligibility for public housing.⁸⁸

These approaches put mandatory consequences where they belong: at sentencing. They put the power of relief into the hands of the person who is considering the appropriate punishment: the judge.

Voting and Other Civil Rights Should Never Be Taken Away

An estimated 5.8 million Americans are denied the right to vote because of a felony conviction.⁸⁹ Three quarters are no longer incarcerated and a disproportionate number of disenfranchised Americans are members of minority communities. In three states alone—Florida, Kentucky, and



Virginia — this shameful vestige of the Jim Crow laws means that more than one in five African-Americans is denied the right to vote.⁹⁰ Even where voting rights are restored automatically upon release from prison or completion of sentence, convicted people are frequently unaware of this fact and continue to believe they are disenfranchised.

The denial of voting rights, testified Dorsey Nunn, executive director of Legal Services for Prisoners with Children, *“forces me to ask the question: Am I a citizen or not? And I shouldn’t be wrestling with that particular question years after my conviction and years after completion of my sentence.”*⁹¹

A criminal conviction should never lead to the loss of voting rights. Taking away someone’s right to vote because they were convicted of a crime does not serve any non-punitive, regulatory purpose, such as making society safer or protecting against voter fraud. Maine and Vermont have allowed prisoners to vote by absentee ballot for years. Other states should encourage this civic engagement as an important part of the re-entry process.⁹² Misguided disenfranchisement laws are just one more example of how this nation is *“Out of Step With the World,”* an aptly-titled study revealing that “[a]lmost half of European countries allow *all* incarcerated people to vote while others disqualify only a small number of prisoners from the polls.”⁹³

Millions of individuals are also ineligible for jury service and to hold public office based on a conviction. These rights should never be suspended beyond any period of incarceration, except perhaps for convictions directly related to breach of the public trust.

The Mandatory Loss of the Right to Bear Arms Should Be Significantly 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 am-

munition.⁹⁴ 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 lack of a nexus between the prior criminal conduct and the risk of harm renders the blanket firearm ban particularly onerous and reveals it as punitive. For example, there is no evidence that prohibiting an individual with a fraud conviction from possessing a firearm advances public safety. Indeed, if that individual needs a firearm for his or her livelihood, the inability to continue in that line of work impairs that person's ability to be a productive member of society. In some parts of the country, firearms are relied upon to put food on the table.

Along with voting and civil rights, firearms dis-possession stands out as a unique restriction on a right that has been given constitutional protection by the Supreme Court. Firearm consequences are particularly severe because failure to comply is a separate and independent criminal offense. Under federal law, so-called felon in possession violations are punishable by up to 10 years in prison.⁹⁵

Under the laws of many states, convicted individuals may regain firearms rights from a court or an administrative agency. State relief, however, is not always honored in a sister state⁹⁶ and may not relieve the person of federal law restrictions.⁹⁷ As Professor James Jacobs described it, with respect to relief from this serious consequence, “the states are all over the map.”⁹⁸

“[I]f you were to say that a previously convicted person should not be disabled from exercising their Second Amendment rights and if that were to become an accepted proposition, then a lot of other things would seem like they would easily follow. Well, if they are responsible enough to possess firearms, they’re certainly responsible enough to work in pesticide areas.”

Professor James Jacobs,
NYU School of Law (NY Day 3 at 154)

Recommendation

III. Discretionary collateral consequences should be imposed only when the offense conduct is recent and directly related to a particular benefit or opportunity.

- ❖ Where a decision-maker is authorized but not required to deny or revoke a benefit or opportunity based upon a conviction, it should do so only where it reaches an individualized determination that such action is warranted based upon the facts and circumstances of the offense.
- ❖ States and the federal government should develop and enforce clear relevancy standards for considering a criminal record by discretionary decision-makers, requiring them 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 should be required to specify and justify the types of 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 should never be denied based upon a criminal record that did not result in conviction.



"I committed a felony 29 years ago . . . receiving stolen property, forgery and theft. That was my crime, and that has haunted me since the day that it happened," testified Charles Gunnell. He described difficulties he has had finding jobs over the years. "You go through hundreds [of] . . . rejections. I used to keep them all at one point in time but there were so many, it was taking over my little space in the house, hundreds of them. People look at you in a different manner. There is a stigma that goes along with this and it does lead to . . . a person maybe having feelings of inferiority or not being equal and . . . puts them in a position a lot of times where they cannot live to the full potential of their lives." Gunnell now mentors younger people, telling them "how they have to work hard in order to survive in this society which does not forgive people for criminal records."⁹⁹ He added: "In my instance the person that committed that crime in 1983 is no longer around, but it does not matter. . . . When I have to disclose a felony, I am viewed in that circle, that part of society, as a felon. So it has to change. It has to change."¹⁰⁰

Witness after witness testified about the difficulties individuals with criminal records face in the employment and housing markets. Yet a job and a stable home are critical factors in reducing recidivism.¹⁰¹ Everett Gillison, deputy mayor for public safety and chief of staff for the mayor of Philadelphia, described several city job training initiatives for individuals with convictions. He told the Task Force a story that highlights what employers can gain by giving people a chance:

"I had a guy who started in our cooking class that we did. . . [with] ShopRite . . . [who's been a] great partner. . . . They didn't even take the \$10,000 [tax] credit. They were doing it because they said it's the right thing to do. The guy . . . passed a safe food handling course, got his certificate, had a flair for cooking, put him through another course. He ended up graduating from that. . . . He was making \$9 an hour. He left that, and he got promoted [and] promoted. . . . He's now the head chef at the local university, and they know he's a returning citizen, but they didn't care because he had the skills."¹⁰²

Almost all employers require some or all job applicants to undergo a criminal background

check.¹⁰³ Employers ask potential employees about their criminal history to manage the risk that employees will fail to perform adequately or engage in misconduct; employers also worry about being liable for negligent hiring. NACDL appreciates this concern and recognizes that federal, state and local laws sometimes require an employer to run a background check.

Individuals with criminal convictions are not a class that is protected by fair employment laws in most jurisdictions. However, decision-makers may not consider an applicant's criminal convictions in a way that has disparate impact based on factors that are prohibited, such as race, sex and ethnicity. Because restrictive policies based upon arrest and conviction have long been held to disproportionately affect racial minorities,¹⁰⁴ decision-makers must take extra care when considering the weight to give an applicant's criminal record.

The laws of more than half the states provide that a conviction should be disqualifying only if it is directly related to the benefit or opportunity at issue.¹⁰⁵ The Uniform Collateral Consequences of Conviction Act provides that before a decision-maker imposes a discretionary disqualification, it should "undertake an individualized assessment" to determine whether the facts of the offense are

“substantially related to the benefit or opportunity at issue[.]”¹⁰⁶ NACDL believes that decision-makers should never disqualify an individual from any benefit or opportunity except pursuant to such an individualized inquiry, using fair and functional standards.

Employers, occupational licensing boards, housing officials, and private landlords often lack guidance on how to properly exercise their discretion to consider a person’s criminal record. For example, a state regulatory board might be authorized to deny an occupational license or certificate to applicants who lack “good moral character” or are “unfit or unsuited” to engage in the occupation or profession. Mark Myrent, Research Director for the Illinois Criminal Justice Information Authority, testified that Illinois state agencies do not have a uniform standard for exercising their discretion in considering an applicant’s criminal record. Instead, each agency’s personnel department sets its own standard. And that standard might come from an email that a personnel director sent three years ago. In addition, Myrent noted, “In some instances, it’s a completely subjective decision where there aren’t specific offenses that are delineated, but it’s more of a determination of . . . moral turpitude or something along those lines.”¹⁰⁷

NACDL recognizes that in limited circumstances there may be a clear relationship between a recent conviction and the particular benefit or opportunity sought, making discretionary consideration of a person’s criminal conviction appropriate. However, jurisdictions should have two things in place that help ensure the fair, individualized exercise of discretion in a way that does not unlawfully discriminate on the basis of prohibited factors, and that encourage decision-makers to give equal consideration to individuals with records. First, each should have clear, published standards to guide decision-makers, whether in state law or in more specific guidance from administrative agencies specifying the types of convictions that may be relevant in particular specialized areas. And second, each should have rules or policies that prohibit consideration of non-relevant criminal history and effective mechanisms to enforce them. (See Recommendation VII, below).

Jurisdictions Should Have Clear Relevancy Standards for Discretionary Decision-Makers

Two recent, important publications have addressed standards for employers conducting criminal history checks, both recommending discretionary consideration of a person’s conviction only when highly relevant to the job, license, or housing and when such consideration advances public safety. In 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued “Enforcement Guidance on the Use of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964.”¹⁰⁸ In 2013, three advocacy organizations co-published “Best Practices Standards: The Proper Use of Criminal Records in Hiring,” which seeks to “help employers properly weigh adverse personal history to find those applicants who will contribute most to the productivity of the organization.”¹⁰⁹ NACDL adopts — and slightly adapts — the recommendations of the Best Practices Standards Report, which incorporate the EEOC Guidance. These recommendations counsel employers and background checking companies to:

- ❖ Consider only convictions and pending prosecutions highly relevant to the application by looking at the nature of the conviction, the time elapsed since the offense, and the nature of the job held or sought.
- ❖ Consider only convictions recent enough to indicate significant risk and apply a presumption of a non-substantial relationship between a conviction and an opportunity after a determined period of time.
- ❖ Refrain from asking about criminal records on application forms, postponing any inquiry until a provisional offer is made.
- ❖ Use only qualified Consumer Reporting Agencies (CRAs), which are regulated by the Fair Credit Reporting Act and required to “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates” to conduct record checks.

- ❖ Require CRAs to report only recent, relevant convictions where full name and other identifiers match the applicant; confirm all information from online databases with the original source; seek the current disposition of all relevant information; and report all charges related to a single incident as a single entry to avoid confusion.
- ❖ Provide applicants the opportunity to challenge the CRA's report.
- ❖ Consider evidence of rehabilitation from the applicant, including the applicant's current age and the time elapsed since conviction; facts and circumstances surrounding the conviction, sentence, and parole release; number of other convictions; age at the time of conviction; pre- and post-conviction employment history (including post-conviction performance of the same type of work without incidents of criminal conduct); post-conviction education, training, and alcohol or substance abuse program completion; references; post-conviction bonding for employment under a federal, state, or local bonding program; and family stability and responsibilities.
- ❖ Minimize conflicts of interest by decision-makers by training human resources staff and maintaining a diversity program.

Although the Best Practices Standards Report and EEOC Guidance do not discuss the effect to be given relief such as pardon or certificates of good conduct, those may give the applicant a presumption of suitability for the benefit or opportunity despite any criminal history. New York is one state whose law incorporates such a presumption where the discretionary decisions of public agencies and private employers are concerned.¹¹⁰

Best "Ban-the-Box" Practices

Many public and private employers require people to check a box on an initial application disclosing whether they have any convictions, and some even ask about arrests. Thanks to this little box, most people with a criminal record do not even get a foot in the door. They never even get an interview. The box discourages many people with convictions from applying. But 10 states and more than 50 cities and counties now recognize that this is a bad way to do business and that it harms the local economy.¹¹¹ These jurisdictions have taken the initiative and banned the box asking about criminal history, postponing any inquiry until a later stage in the process. Some jurisdictions have extremely limited "ban-the-box" policies that apply only to state employment and allow government interviewers to ask about criminal history as early as the first interview. Best "ban-the-box" practices do more. They do the following:

- ❖ Apply statewide
- ❖ Apply to both public and private employers
- ❖ Prohibit criminal history questions until the employer extends a conditional job offer
- ❖ Have standards limiting criminal history inquiries to recent convictions with a business necessity nexus to the job

Continued on next page

Continued from previous page

- ❖ Pair the ban with immunity from negligent hiring for employers who follow the rules
- ❖ Encompass landlords as well as employers

In 2013, the EEOC endorsed ban-the-box policies in its guidance for considering arrest and conviction records in employment decisions.¹¹² In California, former East Palo Alto Police Chief and Interim Mayor Ronald Davis supported a bill to ban-the-box statewide, because it “allows people with a conviction history to compete fairly for employment without compromising safety and security on the job.”¹¹³ In New York City, even though the Department of Probation has an exemption from the state’s “ban-the-box” law, Commissioner Vincent Schiraldi followed the policy “for all our non-public safety jobs, which we have a lot of, secretaries, . . . IT people.” The agency also requires its vendors to ban the box, hire from the neighborhoods where probationers come from, and hire “credible messengers.” Schiraldi testified that this approach means “that a lot of the people in our vendor pool have priors.”¹¹⁴ In 2013, Target, the nation’s second largest retailer, banned the box on its employment applications.¹¹⁵ Private employers need to follow Target’s lead and stop asking about criminal history on initial applications, even when not required to do so by law.



Public and Private Housing Should Be Reopened to Individuals With Convictions¹¹⁶

39

“Not only are you restricted from government housing, but there are numerous homeowners’ associations that include that provision in their bylaws. . . . [B]asically, [a conviction] would prevent you from renting or even owning a house if you have not had your civil rights restored.”

Desmond Meade, President,
Florida Rights Restoration Coalition.¹¹⁷

David Rosa administers the permanent supportive housing program at St. Leonard’s Ministries in Chicago. He discussed the importance of stable housing for individuals with convictions and the obstacles they face getting that housing. Because of highly restrictive public housing policies, his organization has “had individuals who couldn’t stay with their grandmother on the premises even though they wanted to go there to look after her [T]hey couldn’t do that because of fear that [housing officials] would kick their grandmother out.” Rosa, who has been out of prison since 1999, was turned down for several apartments until “[s]omeone came and talked for me to a landlord, and they gave me the opportunity to have my first apartment . . . I was ecstatic to have my own place. Now, I own my own home.”¹¹⁸

Public housing consists of Section 8 vouchers for private housing and public housing units. Both are 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 in individual cases. Federal housing law currently requires PHAs to impose mandatory, lifetime bans on access to public housing in two circumstances: (1) for individuals convicted of producing methamphetamine at a housing authority property and (2) for individuals subject to a lifetime sex offense registry.¹¹⁹ PHAs must also deny an application if any household member was evicted from public housing based on “drug-related criminal activity” during the past three years, although there is limited discretion to lift this denial.¹²⁰

Federal regulations also authorize local PHAs to evict or deny housing when *any* household member is or within a “reasonable time” of application has been engaged in (1) drug-related activity; (2) violent criminal activity; or (3) “[o]ther criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity” or threaten the owner or others working on the premises.¹²¹

These regulations grant PHAs broad discretion to bar entire households even when no one in the household has been convicted of a crime,¹²² making standards for and limits on discretion particularly important. Roberta Meyers, director of the National HIRE Network, testified how “[i]t’s haphazard. The policies differ all across the country. You can go housing authority by housing authority, and you’ll have a different policy.”¹²³

NACDL recommends the following to help open up public housing and protect against unlawful discrimination:

- ❖ **HUD should issue uniform national standards to PHAs about how to weigh a conviction record, including evidence of rehabilitation, in order to allow greater access to public housing.** The eight points

for general standards for discretionary decision-makers described above should apply to landlords and housing officials as well as to employers and licensing boards. In addition, private landlords and PHAs must comply with the Fair Housing Act and other federal housing laws, applicable state housing law, and Department of Housing and Urban Development (HUD) regulations and policies. HUD’s Office of Fair Housing and Equal Opportunity and the Department of Justice should fully enforce any disparate impact or other housing complaints under applicable laws.

- ❖ **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 violates local policy, even if the rest of the household is unaware of that member’s violation.¹²⁴
- ❖ **Local PHAs should heed HUD’s recent reminders that PHAs have broad discretion to allow individuals with convictions and their families into public housing in appropriate cases.** Pamela Lawrence, a public housing revitalization specialist and grant manager at HUD, testified that in 2011 and 2012, HUD sent letters to all PHAs to remind them that they had broad discretion to extend housing to more individuals (although these letters also noted the two mandatory bars to public housing).¹²⁵ Even so, she noted the persistent problem of misinformation at the local level. “Locally, the communication that goes to applicants and housing advocates is that Federal Government disallows us from leasing to criminals who have misdemeanors and felon[ies],” she stated. So it is “key that you understand where the authority lies when attempting to try to influence new policy for admissions and evictions as it relates to those with criminal histories.”¹²⁶



"[Landlords] need to be mindful about what . . . information they're asking about; what are they looking for, first, and then not make some snap judgment that anyone

with a felony, we don't want to talk to. That makes no sense given the number of people who have had a conviction in the United States. You're cutting out a huge part of your potential market who may be very good, responsible tenants."

Rebecca E. Kuehn, vice president and senior regulatory counsel for Core Logic's "SafeRent" tenant screening company (SF Day 1 at 109)

In the area of private housing, there is much work to be done. Rebecca E. Kuehn, vice president and senior regulatory counsel at Core Logic, a large data company that performs background checks, testified about her company's nationwide "SafeRent" tenant screening company. SafeRent clients "do criminal background checks to . . . look . . . for history of violent crimes, drug-related crimes, and sex-offender status. . . . [T]hey are interested in frequency, recency, and severity."¹³⁰ One important service that her company provides is to "filter out anything except for what you're looking for. In other words, if we find a felony that meets your criteria, we will report that. But if it's a misdemeanor or another type of charge that doesn't meet your criteria, that won't get conveyed to the local rental office so that you

Best Public Housing Practices in New Orleans and New York City

Some local public housing authorities (PHAs) are recognizing the unfairness and damage done to families when policies are too restrictive towards individuals with convictions. They are finally starting to follow HUD's repeated suggestions that they make their local housing policies less restrictive. There are now 24 PHAs with programs that serve individuals with convictions in different ways, including transitional living to reunite women with their children, policies that allow people with a conviction to live with their families already in public housing, and a few places that set aside units for new leases for individuals with convictions.¹²⁷

A recent Housing Authority New Orleans (HANO) policy announced that "[o]ther than the two federally required categories, no applicant [for housing] will be automatically barred from receiving housing assistance because of his or her criminal background We are taking the necessary steps to . . . make sure that those with criminal activity in their past who now seek productive lifestyles have a shot at a new beginning." HANO also banned the box asking about criminal convictions on its own employment applications and has opened up its procurement process in a similar manner.¹²⁸

In late 2013, the New York City Housing Authority (NYCHA), which houses more than 400,000 residents, announced a two-year pilot program to allow 150 people coming out of prison to return to or enter public housing with their families. The program requires participants to work with social service providers to find jobs, get necessary substance abuse counseling, and meet other needs.¹²⁹ While this very small program cannot fully address an enormous problem in New York City, it is a promising development on the public housing front.

don't have a risk, which is a legitimate concern, that your local rental officer is engaging in their own judgment based on what they see as a criminal record."¹³¹

To help open up private housing and protect against unlawful discrimination, private landlords should follow the general standards for discretionary decision-makers described above, including the use of federally regulated Credit Reporting Agencies for any background checks. Although not currently required to do

so by law, landlords should notify applicants before taking any adverse action based on a criminal record, and should give the applicant an opportunity to correct any errors and provide evidence of suitability despite the record.¹³² Further, housing advocates should make people aware of the Consumer Financial Protection Bureau's list of screening companies that provide free reports to consumers, so individuals can correct any errors on those reports before applying for housing.¹³³

Recommendation

IV. Full restoration of rights and status should be available to convicted individuals upon completion of sentence.

- ❖ After completion of their sentence, individuals should have access to an individualized process to obtain full restoration of rights and status either from the executive or from a court by demonstrating rehabilitation and good character.
- ❖ The relief process should be transparent and accountable, and accessible to those without means.
- ❖ Standards for relief should be clear and attainable, high enough to make relief meaningful but not so high as to discourage deserving individuals.
- ❖ A pardon or judicial certificate should relieve all mandatory collateral consequences, and decision-makers should give full effect to a pardon or judicial certificate where a collateral consequence is discretionary.
- ❖ A jurisdiction should give its residents with convictions from other jurisdictions access to its relief procedures and recognize relief granted by other jurisdictions.



"[E]ven if we assume that legislators and judges and prosecutors are all acting in good faith, . . . we still are going to have a need for the pardon power because there are still going to be mistakes that are made. There are still going to be circumstances where we look back in hindsight and say, well, maybe that made sense when it was done, but with the passage of time, with the change of circumstances, that's something we ought revisit."

Sam Morison, former staff attorney, Office of the Pardon Attorney, U.S. Department of Justice¹³⁴



"[Certificates of relief from disabilities] should be presumptive at sentencing. If the prosecutor wants to raise an objection, they're more than . . . welcome to. I'm sure that that actually would be very seriously taken into consideration. . . . People would get [certificates] by the boatloads if they were presumptive, but right now, because the burden is on the defendant, they're just not getting them a lot at sentencing."

**New York City Probation
Commissioner Vincent Schiraldi¹³⁵**

Every jurisdiction allows individuals to seek restoration through a pardon process. Some also have certificates to relieve particular consequences or to demonstrate good conduct. These case-specific restoration avenues vary greatly from jurisdiction to jurisdiction, and the Task Force heard testimony about many different forms of such individual relief. As Sam Morison, former staff attorney in the Department of Justice's Office of the Pardon Attorney, testified, "There has to be some practical mechanism somewhere for people to get relief. We simply have . . . this growing body of people, hundreds of thousands, maybe millions by now, who are suffering under potentially lifetime disabilities without any real practical mechanism in many cases for getting relief from those disabilities. That's not a sustainable situation."¹³⁶

Yet the pardon process has atrophied in many jurisdictions, and nowhere more lamentably than at the presidential level. For jurisdictions with meaningful certificate laws, individuals do not seek them enough, judges do not grant them enough, and decision-makers do not rely on them enough to give opportunities to qualified individuals with convictions.

The Pardon Process Should Be De-Politicized so That Pardons Are Granted in Appropriate Cases

Obama's Unpardonable Neglect of Clemency.¹³⁷ The Quality of Mercy Strained.¹³⁸ Governor's Pardon Power Used Too Rarely.¹³⁹ Arizona Prisoners Rarely Granted Clemency.¹⁴⁰ As these recent media headlines suggest, most governors have shown little interest in exercising their pardon power.¹⁴¹ At the federal level, the pardon power has atrophied. Jorge Montes, former chair of the Illinois Prisoner Review Board, suggested that to encourage more chief executives to use their pardon power, "[l]et's give them more cover to go on, and then let's encourage them to be better leaders . . . by . . . highlighting great cases of people who turned their lives around and what they're doing with their lives today. . . . And I think society will begin to understand that people need a second chance or a third chance."¹⁴²

For a restoration avenue with so little likelihood of actual relief, the pardon application process can be onerous and complicated. It took Johnnie Jenkins, who now works as a township employment manager in Lake County, Illinois, seven years to finally get a pardon from Illinois Gov. Blagojevich, though she was one of the lucky ones.¹⁴³ As current Gov. Pat Quinn's general counsel testified, former Gov. Blagojevich left a backlog of 2,500 pardon applications. Committed to eliminating the backlog, Gov. Quinn had acted on over 1,500 petitions during the first two years of his term.¹⁴⁴



"Begin a process, devote the resources, educate the public, and do it."

Former Maryland Governor Ehrlich's
advice to executives dealing with
clemency petitions (DC Day 2 at 121)

NACDL recommends that the state and federal pardon processes be made more transparent and accountable, and that grants be made generously pursuant to clear standards:

- ❖ The pardon process, at both the presidential and gubernatorial levels, should be handled by an independent executive office and staffed by attorneys with diverse backgrounds and professional experience.
- ❖ Pardons should be considered an integral part of the criminal justice system, and should be used to offer relief and restoration of rights to individuals demonstrating need for such relief.
- ❖ In the many states and the federal system where pardons are rarely if ever granted, the pardoning authority should reinvigorate the pardon process and grant pardons to deserving individuals.

Two Successful Approaches to the Pardon Process

Former Maryland Gov. Robert Ehrlich testified about his success in normalizing the pardon process in Maryland through ground rules and guidelines. "We only took referrals from the Maryland Parole Commission," explained Ehrlich. "I had five lawyers, direct reports to me, in the Office of Counsel, Governor's Counsel. I fully had two and a half of those folks on a daily basis devoted to this project, to clemency, to commutations and pardons. . . . We established a process . . . of monthly meetings. I would be presented with 30 to 40 petitions a month."¹⁴⁵ Governor Ehrlich attributed his successful use of the pardon power to a non-political commission for petition consideration, a regular monthly review process, and open communication with the press. He observed that "voluminous pardons with very little notice at the end of [the gubernatorial or presidential] term typically end up in really bad [press] stories and tend to tarnish your legacy as an executive as well."¹⁴⁶ Instead, Ehrlich was "able to de-politicize [pardons] at the very beginning of the process by stating a policy which read 'we will only take referrals from the Parole Commission.' So you had that first level and no bypass. So everybody knew that's where they had to begin."¹⁴⁷

Connecticut takes a different approach and vests the power to grant pardons in an administrative agency rather than the governor. In 2004, the state legislature delegated this power to the Connecticut Board of Pardons and Paroles. Chairperson Erika Tindill described the Board's structure: "There are currently five pardons officers in the unit. I have a manager in the unit . . . and they process, give or take, 1,000 applications a year." With "about a 50 percent grant rate,"¹⁴⁸ Connecticut successfully uses an administrative agency to grant relief.

All Jurisdictions Should Offer Certificates of Relief from Collateral Consequences

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. Several states have recently joined New York in enacting certificates of relief administered through the courts or the correctional system, including Illinois, North Carolina and Ohio.¹⁴⁹ The Uniform Collateral Consequences of Conviction Act also provides a comprehensive “Certificate of Restoration of Rights,” which lifts most mandatory collateral consequences and also serves to signify a person’s good conduct for a significant period of time after completion of sentence.¹⁵⁰ All jurisdictions should offer this type of comprehensive post-sentence relief from collateral consequences, however it is denominated. Certificates should be available for all convictions and should have clear, objective eligibility standards. Jurisdictions establishing or reviewing a certificate law or program must consider such key elements as: Who qualifies? What, if any, waiting period is there after conviction or the completion of sentence? In addition to lifting specific legal disabilities, what does this relief signify about the recipient’s character?

Which institution is best suited to grant certificates — the judiciary, the correctional system, or both? NACDL believes that certificates can best address the problem of mandatory consequences and stigmatization where relief comes from the courts, as the case of Darrell Langdon (discussed above at page 22) illustrates.¹⁵¹ During the Task Force hearings, judges from the state and federal bench testified that they believed restoration of rights was an appropriate function for courts.¹⁵² The role of the courts in granting relief from collateral consequences is highlighted in the recent revisions of the sentencing articles of the Model Penal Code.¹⁵³

Defense counsel in criminal cases should make clients aware of any available certificate, and should help clients seek them at sentencing or, if possible, thereafter. The federal government, states, and localities that fund indigent defense

should make funding available for representation in connection with certificates. Judges at sentencing should make defendants aware of available certificates and should grant them to eligible defendants unless the government objects and there is good cause to deny the certificate. In addition, prison officials should provide information on restoration of rights mechanisms upon an inmate’s release from prison, as should officials overseeing parole, supervised release, and probation. Further, there should be no fees for certificates. Employers and other decision-makers should not be permitted to ask about any conviction where a certificate has been granted, and credit reporting companies should not be permitted to report them.

“It would be appropriate for there to be end of parole ceremonies, where you say to the parolee congratulations, you finished your term of parole. . . . Here is your voting certificate, if you’re in a jurisdiction where you can’t vote while you’re on parole. Here is something. Here’s your family. Here’s your applause. You did it. You’re back. . . . There’s a graduation. . . . [T]he restoration of status as programmatic and policy and a sort of symbolic activity . . . is very important.”

John Jay College President

Jeremy Travis (NY Day 1 at 79-81)

Jurisdictions should carefully consider the best way to promote certificates, so that people know about them, officials grant them, and decision-makers take them into consideration when deciding whether to offer a person with a conviction an opportunity or benefit. For example, Jorge Montes, former chair of the Illinois Prisoner Review Board, testified that while there have never been many certificates granted in Illinois, the numbers dropped to only 10 in a period of two years once they were moved from the Review Board to the courts. Montes believes this drop took place in part because courts “are not in the business of promoting these things,” and will not “promote the certificates the way the Prisoner Review Board used to promote

them.”¹⁵⁴ On the other hand, Montes pointed out, “The court’s imprimatur on something is a lot more powerful.”¹⁵⁵

Several witnesses suggested that a ceremony to mark the occasion of the end of a criminal case might be appropriate. Jurisdictions might consider the granting of a certificate as a time to hold such a ceremony. Glenn Martin, vice pres-

ident of the Fortune Society and a person with a conviction, testified how sentencing serves to remind us “that being found guilty of a crime in the U.S. is met not only with direct punishment meted out by the courts but also coupled with a deliberate devaluation of one’s civil status. Unfortunately, we have no similar ceremony post-conviction to return people to their prior role as full-fledged citizens.”¹⁵⁶

Recommendation

46

V. Congress and federal agencies should provide individuals with federal convictions with meaningful opportunities to regain rights and status, and individuals with state convictions with mechanisms to avoid collateral consequences imposed under federal law.

- ❖ Congress should expand diversion and deferred adjudication options that result in dismissal of federal charges after completion of all conditions, and federal prosecutors should be encouraged to offer them wherever appropriate.
- ❖ Individuals convicted of federal crimes should have an accessible and reliable way of regaining rights and status through enactment of a federal judicial certificate that relieves consequences of a federal conviction and through reinvigoration of the federal pardon process.
- ❖ Congress should enact meaningful record-sealing laws, modeled after successful state sealing and expungement laws.
- ❖ Congress should authorize federal courts to dispense with mandatory collateral consequences arising under federal law that apply to individuals with federal convictions. Congress should authorize state courts to grant relief from mandatory federal collateral consequences. By the same token, state legislatures should provide individuals with federal convictions a way to avoid consequences arising under state law.
- ❖ Federal courts and agencies should recognize and give the same effect to relief granted by state courts and executive officials as state authorities give that relief.
- ❖ Federal agencies should provide incentives to encourage private employers and state agencies to offer equal opportunity to persons with a criminal record.
- ❖ The federal government should fund research into the ways that various avenues of relief are or are not working to help individuals reintegrate into society and lower recidivism rates.

This nation’s collateral consequences crisis is a civil rights problem in need of a coordinated national solution. Presidents Barack Obama and George W. Bush have spoken up in support of giving people a second chance.¹⁵⁷ Attorney General Eric Holder has been consistent in his support for reducing barriers to re-entry. In a 2014 speech, the attorney general emphasized how “we must never hesitate . . . to enable those who have paid their debts to society to become productive cit-

izens; to make our criminal justice expenditures as smart and productive as possible; and to ensure that 21st century challenges can be met with 21st century solutions.”¹⁵⁸

These officials must go beyond speeches and act to help individuals avoid unnecessary convictions and collateral consequences and gain the restoration of their rights and status. There has been some recent positive movement, particularly at the federal agency level. For example, in 2011 the attorney general assembled a Cabinet-level Interagency Re-entry Council to promote a federal effort aimed at reintegration of individuals returning from prison back into their communities.¹⁵⁹ Amy Solomon, who co-chairs the Re-entry Council’s staff-level working group, testified at the Task Force’s District of Columbia hearings, and described the Council’s efforts “to remove the federal barriers to re-entry, barriers to employment and housing and federal benefits such as food assistance, TANF [cash assistance], veterans benefits and Social Security.”¹⁶⁰ Some federal agencies have encouraged employers and public housing officials to put less emphasis on an individual’s criminal record.¹⁶¹ Yet there is still much work to be done with respect to the hundreds of federal laws, regulations and policies that set up harmful barriers for individuals with criminal records.

In addition, federal officials must turn their attention to the federal criminal justice system, which lacks viable avenues of relief from a federal conviction. Individuals with federal, military, and District of Columbia Code convictions have even more limited access to relief from collateral consequences than individuals with state convictions. Unlike many state systems, there is no expungement, sealing, or certificate of relief from disabilities for federal and military convictions, or even for non-conviction records.

Presidential pardons, the only avenue for relief from federal convictions, are rarely granted. President Obama has approved less than four percent of pardon applications he has acted on.¹⁶² The current presidential pardon system must be reformed so it sets a national example and offers

applicants a true chance at mitigation of our harsh federal sentencing laws. Sam Morison, a former staff attorney in the U.S. Department of Justice’s Office of the Pardon Attorney, testified that the real problem is not political, but inheres in the culture of the Justice Department’s pardon program. “It’s not that this [pardon] is too risky, [that] it can’t be done. . . . It’s really a cultural problem. If we tell ourselves we can’t do it, it becomes a self-fulfilling prophecy.”¹⁶³ The inadequacies of the current system can be addressed either by creating a new procedure within the White House to review and process pardons or by undertaking major reforms if the procedures remain within the Department of Justice. As this report went to press, the Obama administration announced a clemency initiative that will provide an opportunity for the commutation of sentences for those whose sentences would be shorter today, due to changes in statutory law, charging policy or case law. Significantly, however,



“To be abundantly clear, the NAACP supports federal and state initiatives to re-enfranchise all ex-offenders once they leave prison. At the heart of this debate . . . is, of course, the [ideas of] rehabilitation, democracy, and fairness.”

Hilary O. Shelton, Director of the NAACP’s Washington Bureau, Senior Vice President for Policy and Advocacy (DC Day 3 at 83)

as worthy as this initiative may be, it does not address restoration of rights. As Deputy Attorney General James Cole made clear, sentencing commutations do not amount to pardons or forgiveness. Congress must expand opportunities for relief and restoration by giving sentencing judges the power to relieve collateral consequences at sentencing and by creating a federal certificate of relief from disabilities.

Kemba Smith, whose sentence was commuted by President Clinton in 2000, has faced numerous barriers, including difficulty finding housing. Asked what she would say in a face-to-face meeting with President Obama or Attorney General Holder about the federal pardon process, Smith told the Task Force: “I would basically say how . . . we want to feel whole.” Further, “we should all believe in redemption, and once a person has served their time, proved themselves to society above and beyond . . . people [should] . . . be able to move forward and have a clean slate. I think that people should be afforded that opportunity.”¹⁶⁴

Legislating Forgetting and Encouraging Forgiving in the Electronic Era

Many people who testified before the Task Force grappled with the complexities and difficulties of having so many people in the United States with some type of criminal record in this electronic age. Some preferred an approach that legislated forgetting, such as sealing and expungement of records and prohibitions on employer inquiry about non-recent convictions. Others saw this as a lost cause in an era where technology allows no secrets, and urged an approach that encourages individuals to acknowledge their past but move beyond it, seeking forgiveness and demonstrating redemption.

“All the evidence points to the fact that time matters. People age out of crime, and there’s a certain point where a person is no longer a threat. . . . And after a certain period of time, the record shouldn’t exist. It just should not exist. It’s the easiest solution. It doesn’t require people to have compassion or forgive. . . . [I]t requires them to not have the information, and if they don’t have the information, they can’t make decisions based on it. If the research proves that that’s a safe thing to do, it’s the easiest thing to do. I think expungement after a period of time is the way to go.”

Vivian Nixon, executive director,
College & Community Fellowship¹⁶⁵

“I’m firmly in the camp of forgiveness as opposed to forgetfulness. I’m a technologically aware person. Forgetfulness just can’t work. There are too many holes in the dam. We can’t plug them all. It just won’t work.”

Stephen Johnson Grove, deputy director of policy,
Ohio Justice and Policy Center¹⁶⁶

"[T]here has to be sealing and expungement of convictions that are remote in time. The research tells us that these convictions do not predict a person's likelihood to engage in crime. . . . [O]ur clients tell us . . . unless people are told they have to forget, forgiveness is an illusion."

Ann Jacobs, director of the prisoner reentry institute, John Jay College of Criminal Justice¹⁶⁷

"I always liked the idea of expungement after a certain period of time. I think the forgetting is more important than the forgiving. Do you know what I mean? I mean, nobody is asked to forgive anybody, but to forget so that the person can get on with their life."

Judge Matthew D'Emic, New York State Supreme Court¹⁶⁸

"[Y]ou can't legislate what's in people's hearts in the first instance, but when you force people to deal with each other and accept people based on reality instead of preconceived notions, over the course of generations, you do, in fact, provide the mechanism to change hearts. So it's a long process, but if we legislate forgetting, we might get to a place where our grandchildren can forgive."

**Judy Conti, federal advocacy coordinator,
National Employment Law Project¹⁶⁹**

"[T]he people that we're talking about and trying to help, they're sort of in between forgetfulness and forgiveness as well. I think there are a lot of people, if you sort of sit down and talk with them will say, you know, that wasn't me 15 years ago, here's who I am now, judge me by this standard, don't judge me by that standard. . . . I think for some people, it's not an element of forgiveness. . . . [T]hey're not that personal. They want to just move forward from this point forward. So it's a really interesting framework, forgetfulness versus forgiveness, but it's a very complicated question once you get down to talking to people, and I think . . . there's not a clear answer."

**Peter Willner, senior policy analyst,
Center for Court Excellence¹⁷⁰**

"I maintain that everything has a philosophical beginning. We practice many forms of religion in our country, but to a large extent, we are a Christian nation. . . . But at the base of Christianity is this concept of redemption. I mean at the base of it is the idea that there can be redemption. . . . If we have this redemptive notion, then it would say to me is that we believe that people can be transformed."

Congressman Danny K. Davis, Illinois¹⁷¹

Recommendation

VI. Individuals charged with a crime should have an opportunity to avoid conviction and the collateral consequences that accompany it.

- ❖ Diversion and deferred adjudication should be available for all but the most serious crimes, and prosecutors and courts should be encouraged to use them.
- ❖ Successfully completed diversion and deferred adjudication conditions result in an eventual non-conviction disposition, and non-conviction dispositions should never trigger any collateral consequences.
- ❖ Sealing or expungement should be available for all successfully diverted or deferred prosecutions, and decision-makers should be barred from asking about or using these non-convictions.
- ❖ Where avoidance of a conviction is not feasible, all parties should take collateral consequences into account at every stage of the case:
 - ◆ Defense lawyers should advise clients charged with a crime about potentially applicable collateral consequences and assist them in exploring opportunities to avoid them through creative plea bargaining and effective sentencing advocacy;
 - ◆ Prosecutors should structure charges and negotiate pleas to allow defendants to avoid severe collateral consequences that serve no public safety purpose; and
 - ◆ Courts should ensure that defendants have been advised about applicable collateral consequences before any guilty plea or trial, and should take collateral consequences into account at sentencing.

The best way to relieve a person of the many harsh consequences of a criminal conviction is to avoid the conviction in the first place. There are far too many charges brought in the nation's criminal courts, and far too many individuals with criminal records in this country. While there is great need for reform at the policing level to stem this flood into courts at its inception, once a case is in court, individuals should have the opportunity to avoid a conviction by satisfying appropriate conditions.

There are two general ways to avoid a conviction once charges are filed. Diversion or deferred prosecution is usually controlled by the prosecutor and involves a pre-plea agreement with conditions of fulfillment. A deferred adjudication may or may not require an up-front guilty plea, with the judgment or execution of the judgment suspended to give the defendant an opportunity to complete terms of probation.¹⁷² Successful completion of either diversion or deferred adjudication conditions generally leads to dismissal

of the charges, and thus no conviction. Another approach is to “knock down” a felony conviction to a misdemeanor upon successful completion of probation, as California has permitted for many years with its so-called “wobbler” offenses (Cal. Penal § 17(b)(1) and (b)(3)), and as Colorado and Indiana have recently made a part of their new relief schemes (Colo. Rev. Stat. § 18-1.3-103.5 and Ind. Stat. § 35-50-2-7(d)). However, dismissal does not always mean the defendant can seal or expunge the record, and even where sealing or expungement is available, it is not generally automatic.

“[W]e shouldn’t discuss, think about, imagine remedies for convictions without first looking at, acknowledging, asking how the conviction came to be in the very first place. . . . If there were no conviction in the first place, there would be no problem with what to do after the conviction.”

**Professor Steve Zeidman,
CUNY Law School¹⁷³**

Although most states have some form of diversion or deferred adjudication (but not the federal criminal justice system, other than for a first misdemeanor drug possession), many are limited in the types of charges that qualify.¹⁷⁴ Such mechanisms should be more broadly available to more defendants. Further, prosecutors and judges must make greater use of existing diversion and deferral mechanisms to give more individuals the opportunity to earn an eventual dismissal. It is significant that in recent reforms addressing collateral consequences, many have expanded the menu of non-conviction options.

Judge Paul Biebel, who presides over the Criminal Division of the Cook County Circuit Court in Illinois, explained why his jurisdiction’s “delayed not guilty” approach actually offers more structure than a conviction, *and* the benefit of giving individuals relief from collateral consequences. Under this approach, a defendant is “on supervision, maybe [with] some conditions for a year, and at the end of the year, you’ve done what

they said, it’s a not guilty, the case is dropped, but it’s expungeable, it’s not a conviction.” By contrast, Judge Biebel stated, “In that very same case, if that magic word, supervision, wasn’t used and you had a \$20 fine, you had a straight conviction, and I can’t give you the [expungement] relief.”¹⁷⁵

Model Legislation: A new Colorado law authorizes prosecutors to establish pretrial diversion for all but specified serious sex offenses, where successful completion means dismissal and no conviction. The law’s stated purpose is “to ensure defendant accountability while allowing defendants to avoid the collateral consequences associated with criminal charges and convictions.”¹⁷⁶ Another Colorado law requires judges to reduce low-level felony drug convictions to a misdemeanor conviction if the defendant successfully completes probation and meets other statutory conditions.¹⁷⁷ The legislature described the law as a way “to reduce the significant negative consequences of [a] felony conviction” and to provide “an additional opportunity for those drug offenders who may not otherwise have been eligible for or successful in other statutorily created programs that allow the drug offender to avoid a felony conviction, such as diversion or deferred judgment.”¹⁷⁸ Of course, Colorado prosecutors and judges have to use these laws in order to fulfill their intended purpose.

A Cautionary Tale About Diversion

Deferred or diverted charges or prosecutions may still lead to certain consequences, even where state law does not treat the deferred charge as a conviction. For example, courts have found that “a first-time simple drug possession offense expunged under a state rehabilitative statute is a conviction” under federal immigration law, meaning that it can still lead to mandatory deportation.¹⁷⁹ Even some “youthful offender” adjudications have been deemed “convictions” for immigration law purposes.¹⁸⁰ In some states, convictions that are “set aside” may still be considered for such things as recidivist sentencing

statutes or driver’s license suspension.¹⁸¹ For example, under federal banking law, a misdemeanor shoplifting charge that is dismissed under a diversionary statute without any admission of guilt can result in a 10-year ban from any type of employment — from a teller to a janitor to a third-party vendor — at any bank or other FDIC-insured employer.¹⁸² Such was the case of Jennifer Smith, who sued the bank for rescinding the employment offer. While her lawsuit was unsuccessful, Federal District Judge Jack Weinstein criticized both her defense lawyer for failing to warn about the consequence of accepting diversion and the option of applying for a waiver of the employment bar, and the federal law that frustrated her “second chance for a lawful life.”¹⁸³

Recommendation

VII. Employers, landlords and other decision-makers should be encouraged to offer opportunities to individuals with criminal records, and unwarranted discrimination based on a criminal record should be prohibited.

- ❖ There should be meaningful tax credits for hiring or housing those with convictions.
- ❖ There should be free bonding to provide insurance covering employee dishonesty for those who hire individuals with convictions.
- ❖ Decision-makers should be immune from negligent hiring liability relating to an opportunity or benefit given to an individual with a conviction 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.
- ❖ Jurisdictions should enact clear laws prohibiting unwarranted discrimination based upon an individual’s criminal record, and should provide for effective enforcement and meaningful review of discrimination claims.

Jim Andrews, who owns Felony Franks and other Chicago businesses, hires many people with criminal records because he sees the benefit of offering such opportunities. He testified about the work ethic of individuals with criminal records and how they “work harder. They have to prove themselves to society. They come in. They work very hard to prove themselves.”¹⁸⁴ Government at all levels must find creative ways to give employers, landlords and other decision-makers affirmative incentives to offer opportunities to those with convictions.

Decision-Makers That Make Responsible Hiring Decisions and Comply with Laws Limiting Access to and Use of Criminal Records Should Be Immune from Negligent Hiring Liability

Luz Norwood was asked if giving employers immunity from negligent hiring liability would help her re-entry program place people. “That is the first issue that we get” from employers, she testified, stating that immunity “would be another tool. Absolutely.”¹⁸⁵

Some employers are concerned about being sued for negligent hiring if they hire individuals with criminal records. Landlords and other decision-makers may have similar concerns. There is no evidence that such lawsuits are common, and indeed they appear to be quite rare.¹⁸⁶ However, to take this obstacle off the table, decision-makers who follow non-discrimination and any other applicable law, regulations or policies for the exercise of discretion and limiting the access to and use of criminal records should be immune from negligent hiring and other liability for offering an opportunity or benefit to an individual with a criminal record. A number of states already offer different versions of such immunity.¹⁸⁷

Employers Who Hire or House Individuals with Convictions Should Get Meaningful Tax Incentives and Bonding for Insurance Purposes

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.¹⁸⁸ There is also a federal bonding program providing insurance for employee dishonesty to similarly encourage employers to offer opportunities.¹⁸⁹

Several states and localities also offer tax incentives and bonding to employers hiring people with criminal records. For example, Carol Morris

testified about the Re-entry Employment Service Program she managed for the state of Illinois. It offers tax incentives and bonding for insurance for employers who hire individuals with convictions, and does outreach and education to employers and individuals with convictions.¹⁹⁰

However, the Task Force heard testimony from Everett Gillison, deputy mayor for public safety and chief of staff for the mayor of Philadelphia, that many employers do not take immediate advantage of tax and other hiring incentives.¹⁹¹ Tax incentives must be meaningful to attract employers and data must be collected to see if they are working to open up more opportunities for applicants with criminal histories. If so, federal, state, and local governments should extend these incentives to private landlords who offer housing to individuals with convictions. Any tax or bonding incentive should be available only to those in full compliance with federal, state, and local laws and policies limiting the use of criminal records and with standards governing the exercise of discretion in discretionary decision-making.

Jurisdictions Should Prohibit Discrimination Based on an Individual’s Criminal History and Effectively Enforce Such Prohibitions

Only four states have comprehensive laws prohibiting discrimination against individuals with criminal records in licensing and in public and private employment. New York, Wisconsin and Hawaii include these prohibitions in their fair employment law; Pennsylvania does not, however, have any mechanism for administrative enforcement of its law, leaving enforcement to the courts through any lawsuits filed.¹⁹²

Patricia Warth, co-director of justice strategies at the Center for Community Alternatives, testified that “since the early 1970s, New York State has led the nation in enacting and implementing legislation and policies that discourage employers from discriminating against people with past criminal justice involvement.”¹⁹³ A variety of

New York laws combine to:

- ❖ Prohibit employers and licensing agencies from rejecting an applicant based on a conviction unless there is either a direct relationship between the conviction and the specific job or license sought or granting the license or employing the person would involve an unreasonable risk to property or the safety of individuals. The “direct relationship” test is set out in eight factors related to the applicant, the job duties and the conviction.¹⁹⁴
- ❖ Allow a limited “safe harbor” against negligent hiring claims for employers who document their compliance with the law.¹⁹⁵
- ❖ Prohibit employers from asking about or considering applicants’ sealed arrests or conditionally sealed convictions.¹⁹⁶
- ❖ Offer Certificates of Relief from Disabilities and Certificates of Good Conduct that relieve mandatory barriers to employment and create a presumption of rehabilitation under the state fair employment practices law.¹⁹⁷
- ❖ Offer state law protections that supplement federal Fair Credit Reporting Act protection for individuals when an employer relies on a private background checking company to take an adverse action.¹⁹⁸

“So we’re fortunate to be in a state [New York] that has these protections that most states do not enjoy,” testified Sally Friedman, the legal director of the Legal Action Center. “The challenge, of course, is in the enforcement, and I think that employer awareness of the laws has improved in the last few years, especially since a law was created to require employers to give employees copies of the law. But the law is routinely violated, and employers sometimes have explicit policies about not hiring people with felony convictions or other types of convictions.”¹⁹⁹

In addition to including provisions like those listed above from New York, non-discrimination laws should include civil penalties for any violation and should be rigorously enforced by an appropriately funded agency. For example, the EEOC recently filed lawsuits against the automaker BMW for its blanket exclusion of employees with criminal records and against Dollar General for revoking a job offer to a woman convicted of drug possession. In both cases, the EEOC alleges that the companies improperly used criminal background checks to bar potential employees, resulting in a disparate impact on African-American applicants.²⁰⁰

Finally, non-discrimination laws should clearly prohibit discretionary decision-makers from inquiring about or considering a non-conviction record.

Recommendation

VIII. Jurisdictions should limit access to and use of records for non-law enforcement purposes and should ensure that records are complete and accurate.

Accuracy of Records

- ❖ State repositories, court systems and other agencies that collect criminal records should have in place mechanisms for ensuring that official records are complete and accurate, and should facilitate opportunities for individuals to correct any inaccuracies or omissions in their own records.
- ❖ Records must be provided in a form that is easy to understand and that does not mislead.
- ❖ Records that indicate no final disposition one year after charges are filed should be purged from all records systems.

- ❖ The FBI must ensure that information relating to state relief, such as expunged and sealed records, is reflected in its criminal record repository.

Access to Records

- ❖ State and federal authorities should limit access to their central repositories to those with a legitimate need to know.
- ❖ Court records should be available only to those who inquire in person, in order to balance public access to records with privacy concerns for individuals with a criminal record, and access to online court system databases should be strictly limited.
- ❖ Law enforcement records (non-judicial) should never be publicly disseminated.
- ❖ Criminal records that do not result in a conviction should be automatically sealed or expunged, at no cost to their subject.
- ❖ Jurisdictions should prohibit non-law enforcement access to conviction records after the passage of a specified period of time, depending upon the nature and seriousness of the offense, and should authorize courts to prohibit access in cases where it is not automatic. Any exceptions should be justified in terms of public safety, and persons who disclose records in violation of limitations on access should be subject to substantial civil penalties.

Use of Records

- ❖ Employers and other decision-makers should be prohibited from asking about or considering a criminal record to which access has been limited by law or court order.
- ❖ Employers should be prohibited from inquiring about an applicant's criminal

record until after they make a contingent offer of employment.

- ❖ For accessible records, decision-makers should follow applicable standards for the exercise of discretion and non-discrimination laws in considering any relevant and recent criminal records.

Data Company Regulation

- ❖ Jurisdictions should never sell criminal records and should strictly regulate private companies that collect and sell records.
- ❖ Federal law should be amended to prohibit credit reporting agencies from reporting any record of a closed case that did not result in conviction, or any record of a conviction that is more than seven years in the past.
- ❖ States should enact their own restrictions on credit reporting companies to the extent permitted by federal preemption.
- ❖ Jurisdictions should provide for effective enforcement of laws governing credit reporting agencies.

Criminal records are everywhere, and they are not just used for law enforcement purposes or to check someone's prior criminal history for charging or sentencing decisions. Some state court systems put them online.²⁰¹ Large private data companies use them to do background checks for employers and landlords.²⁰² A variety of "mugshot" websites post arrest photos and information and then charge individuals seeking to take down erroneous records.²⁰³ With a few clicks, people can view photos of those on the sex offense registry in their zip code through a state website²⁰⁴ or can get on a commercial site to run a quick check on someone they want to date.²⁰⁵

Yet many of these sources have incorrect information about a person's record, and they are also sometimes used for unlawful purposes. To protect individuals from these problems, and to help

people move beyond their convictions, in this section NACDL offers a number of recommendations to promote accuracy in as well as limits on accessing, using, and selling criminal records.

This country's long tradition of constitutional protections surrounding full and open access to court proceedings and records further complicates the matter. But there is a balance that can and should be struck between the public's right to know about an individual's criminal record and society's interest in allowing people to move on and protecting those whose arrests never lead to a conviction.²⁰⁶ Jurisdictions should 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 individuals' privacy interests.²⁰⁷

Official Records Must Be Complete, Accurate and Easy to Understand

With approximately one in four adults in the United States having an arrest or conviction record, the implications of the various uses of these records are enormous. Yet the FBI's criminal record repository, which 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,"²⁰⁸ is 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."²⁰⁹ The FBI database was used for almost 17 million background checks for employment and licensing in 2012 and, with more than 1,600 state laws mandating FBI background checks, this number is sure to remain high.²¹⁰ State criminal record repositories, which the FBI uses to compile its data, are only somewhat better, with state rates for reporting final dispositions on an arrest record ranging from 60 percent to 80 percent.²¹¹

As an important new report noted, "The failure to update records to reflect the outcome of a case fol-

lowing the report of an arrest is hardly inconsequential." Approximately one in three felony arrests never lead to a conviction. For individuals who are eventually convicted, "nearly 30 percent were convicted of a different offense than the one for which they were originally charged, often a lesser misdemeanor conviction." Finally, there are cases that were "overturned on appeal, expunged, or otherwise resolved in favor of the worker without ever being reflected on the FBI rap sheet."²¹²

Indeed, a number of witnesses described such problems. NYC Probation Commissioner Vincent Schiraldi testified about how cleaning up rap sheets is important for individuals under his department's supervision: "Stuff is on there that people didn't get convicted of. They go to court with four felonies. They get convicted of one misdemeanor. All four felonies are still on their rap sheet. . . . Either a clerk didn't do what they were supposed to do or DCJS didn't do what they were supposed to do. I don't even care who's at fault, though. We're just trying to come out the other end with a clean, correct rap sheet."²¹³ Ron Tonn, chief operating officer of the North Lawndale Employment Network in Illinois, when asked whether his organization's clients are ever victims of faulty background checks, stated that it "happens all the time." The re-entry collaborative that he works with is thus recommending "more strict enforcement of the guidelines that govern those private organizations that conduct background checks and make them accountable for false information or illegal or improperly disclosed information when that handicaps somebody in their job search."²¹⁴

Rebecca E. Kuehn, vice president and senior regulatory counsel at Core Logic, testified about her company's nationwide "SafeRent" tenant screening company. While Kuehn's company, unlike some others, gets records directly from courthouses around the nation, she noted that "[t]he real challenge for SafeRent [and] for anybody who deals in criminal records is that there seems to be an uneven availability of [expungement and sealing] orders and an uneven updating of the criminal records themselves where expungements are affected."²¹⁵ In addition, the company will pick up — and thus pass on to landlords — in-

formation about a pardon, a Certificate of Relief from Disabilities, or another similar certificate only if that “information is captured within the criminal record system as associated with the consumer and is available within the public record,” meaning that it must be on the same docket as the original charges and conviction.²¹⁶



“[T]here is a simple and effective solution to the serious problems with the FBI database: clean up the records before they are sent to the agencies that rely on them to make hiring and licensing decisions.”

Wanted: Accurate FBI Background Checks for Employment at 7
(National Employment Law Project 2013)

There is some movement towards change. 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.²¹⁷ The Fairness and Accuracy in Employment Background Checks Act aims to clean up incomplete FBI background checks for employment. For example, the FBI would have to remove from its database any arrests that are more than a year old that do not have a disposition reported, as well as “non-serious” juvenile and adult offenses. Supporters of the Act note how the FBI is able to quickly track down incomplete records when conducting background checks for firearms purchases.²¹⁸ Although firearms checks end with the first disqualifying conviction while mandatory employment back-

ground checks require more complete inquiry, there is much to commend in this bill that would bring more accuracy and efficiency into the FBI records system. Also introduced in 2013, the Accurate Background Check Act would require the FBI to find missing information on past arrests for individuals applying to work in the federal government.²¹⁹

Limiting Access: Sealing or Expungement Should Be Available for All Non-Conviction and Some Conviction Records

In the electronic era, it is difficult, if not impossible, to truly hide arrest and conviction records from public view. Even if a person’s court record is sealed, his mug shot may be on the Internet. Even if an arrest was never prosecuted, the local newspaper story of that arrest may come up in a Google search. Still, limiting access to criminal records through sealing or expungement rules can be of great benefit to individuals seeking equal opportunities in employment, housing, education, and other core areas. For example, if an individual has a sealed misdemeanor conviction and is in a jurisdiction that successfully regulates credit reporting agencies (CRAs) so that they remove sealed records from their databases, employers will not see that sealed record when they run a criminal background check through a CRA or when they directly check court records. That individual will then have an equal opportunity to compete for that job. This example illustrates how several sources of regulation are needed to make limited access to records meaningful.

Using a dictionary definition, when a record is expunged, it is destroyed; when it is sealed, it is not publicly accessible. However, in almost every state “expunged” records are still on the books and available at least to law enforcement and sometimes even to the public.²²⁰ Since these terms are variously defined in different states, it is important to read the relevant statute closely to determine whether and to what extent a particular record is truly withheld from public view or destroyed. Beth Johnson, an attorney at Cabrini-Green Legal Aid in Chicago, told the

Task Force how Illinois' sealing statute offers limited relief to her clients: "Any agency that by law has to conduct a background check has access to a sealed record. And even in Illinois, if your conviction is pardoned, they say you can expunge it, but it's only sealed. It is still released to anyone that does a fingerprint-based background check."²²¹

Despite these thorny issues relating to sealing and expungement, several states have recently considered or passed laws that limit access to records, including conviction records, through some type of sealing or expungement. For example, the chief justice of New York State's high court, in his 2014 State of the Judiciary address, announced:

I will shortly be submitting legislation to make New York's criminal history record policies fairer and more rational. First, the proposed legislation will expunge, by operation of law, a misdemeanor conviction of an individual who has not been re-arrested within 7 years from the date of such conviction. Second, it will permit a court,

upon application and in the interest of justice, to expunge a non-violent felony conviction if the applicant has no previous felony convictions and has not been re-arrested within 10 years of the date of the felony conviction or release from incarceration, whichever is later. This expungement will result in the sealing of all court and related law enforcement records.²²²

Many states limit access to conviction records. Twenty-two state laws provide some way to expunge a variety of misdemeanor convictions and a limited number of felonies — often non-violent, non-serious, felonies.²²³ Eight other states allow certain records to be sealed.²²⁴ Though any limit on access to criminal records is significant to individuals with records, most current laws require applicants to wait for years, often more than 10 years after completing a felony sentence without obtaining any new charges, before the applicant can apply to have the record expunged or sealed.²²⁵ Four jurisdictions limit eligibility for expungement based on the age of the applicant when the offense was committed.²²⁶

Indiana's Significant New Law Limiting Access to and Use of Criminal Records, Including Conviction Records

In 2013, the Indiana Legislature enacted a comprehensive scheme offering significant protections for individuals with criminal records.²²⁸ Under the new Indiana law, non-convictions and most conviction records are eligible for expungement, which imposes strict limits on the use to which the records can be put. In addition, once expunged, non-conviction and misdemeanor records are sealed from public view. Eligibility waiting periods range from one year (for non-conviction records) to five years (for misdemeanors and less serious felonies) to eight or 10 years (for more serious felonies).²²⁹ The only felony convictions not eligible for expungement are those involving serious violence, official misconduct, human or sex trafficking, or sex crimes. The term "expungement" is somewhat misleading, as felony records are marked "expunged" but "remain public records."²³⁰ But importantly, any expunged conviction — whether hidden from public view or not — is subject to a number of protections in Indiana, including prohibitions against discrimination based on the conviction, with criminal penalties for such discrimination; prohibitions against asking a person about an expunged record, although it is permissible to ask about an arrest, which is highly problematic; full restoration of all civil rights, including firearm rights under state law; protections from liability for decision-makers in lawsuits alleging negligence;²³¹ and prohibitions on credit reporting agencies publishing expunged records.²³² The procedures for expungement are relatively straightforward, and the court system has posted sample expungement petitions online.²³³

"In the last 10 years, I have done approximately 40,000 expungements or sealings in chambers. We hear them every day in my court. We have two afternoon calls on Tuesdays and Thursdays every week where other judges hear these. . . . And I tell you this: I am rigorous in my examination of these people."

**Presiding Judge Paul Biebel,
Cook County Circuit Court,
Criminal Division.²²⁷**

Congressman Danny Davis, who represents Illinois' 7th District, told the Task Force that he has "testified for a number of people who have been trying to get their records expunged. And some of the things for which they were tried, convicted, and have a record are just unbelievable." Davis told the story of a "young woman who has a doctoral degree from the University of Illinois, and she had gotten into an altercation on behalf of her boyfriend at a football game, and she couldn't get a teaching certificate because she had a conviction and she couldn't do a lot of things. And she was one of the brightest people that I've known, and rational, logical, but she and her boyfriend had gotten into this altercation with the security guard at a football game, and they were charged with disturbing the peace."²³⁴ Ohio State Senator Shirley Smith, explaining legislation she introduced that would allow expungement of multiple felonies, "[w]hen they've paid that time, I expect that they should come out and become a citizen, a normal citizen, but that's not what happens."²³⁵

Non-Conviction Records Should Be Automatically Sealed or Expunged, and Decision-Makers Should Be Prohibited from Asking about Them

"When [employers] run the background check, it's the case numbers that come up, [and] . . . they don't really care what happened. All they know [is] that you were arrested for this offense. And they don't look at the next line, they just stop right there. . . . Why does it have to be on the arrest record, why? If it was thrown out, why are you saving it for later? What are you saving it for? And that's the biggest issue that I run up against."

Johnnie Jenkins, a township employment manager in Lake County, Illinois, testifying about how an arrest record can unfairly haunt a person.²³⁶

The presumption of innocence is a bedrock principle in the American criminal justice system. Without a conviction, a judge cannot impose a sentence. Similarly, a case that is closed without a conviction should end the matter of any collateral consequence. There are no strong practical or political objections to closing off non-conviction records from public view.

Non-conviction records should be:

- ❖ Automatically sealed or expunged upon the conclusion of the matter, with no need to apply or to pay a fee; and
- ❖ Inaccessible to non-law enforcement entities except with a court order, and not subject to inquiry for any purpose. Further, law enforcement access to non-conviction records should be strictly limited to instances where there is a substantial public safety need for the information.

Non-conviction records include: arrests that never become criminal charges; charges that are dismissed before or after a plea or trial; juvenile delinquency adjudications;²³⁷ and convictions that are vacated or reversed on appeal and not reprosecuted.²³⁸

Although sealing and expungement may or may not be sufficient to allow individuals effective relief from a conviction, they are an important part of a necessarily multi-faceted approach.

There are also law enforcement records that are not official court records, such as sheriff's booking photos. These should never be made publicly available through online databases.

Limiting Use: Use of Criminal Records Should Be Limited Whether or Not Access Has Been Limited

If a criminal record is inaccessible under a jurisdiction's law or a court order, then employers and other decision-makers should be prohibited from asking about it or considering it, unless specifically authorized by law. For example, under Illinois law expunged or sealed records "may not be considered by any private or public entity in employment matters, certification, licensing, revocation of certification or licensure, or registration." There are exceptions for public school employment as well as employment for which a background check is required by state or federal law.²³⁹

Even when records are accessible under the relevant law, decision-makers should follow applica-

ble standards of relevance and the requirements of non-discrimination laws in considering any criminal records (standards of relevance for discretionary decision-makers are set out in detail in Recommendation III).

Regulating Access: Jurisdictions Should Never Sell Criminal Records and Should Strictly Regulate Private Companies That Collect and Sell Records

There are essentially two types of private companies that collect and publish criminal records. Large data collection companies generally run background checks for employers, landlords and other entities that are required or allowed to consider a criminal record. These companies are regulated by the Fair Credit Reporting Act (FCRA) as Consumer Reporting Agencies. Many of these data brokers have their own databases that they fail to update by removing expunged or sealed cases. These databases must be tightly regulated, with the goals of accuracy, transparency and better enforcement of the law. The second type of company, so-called "mug shot websites," are operated by private entities that gather information from a variety of publicly available sources, including law enforcement agency sales and Freedom of Information Act requests. While restrictions on

Requiring Data Companies to Update Their Records Regularly to Omit Those That Have Been Expunged

The Administrative Office for Pennsylvania Courts has a unique approach to pushing data brokers to remove expunged cases from their databases. While Pennsylvania takes the unfortunate step of selling its records to bulk data companies, it makes updating a term of the contract. Pennsylvania also provides the industry with a list of expunged cases. While some brokers have ignored these lists, Pennsylvania's approach is a step forward in the fight to keep records accurate and current.²⁴³ A pending bill in Texas would create a list of database companies so that notices of expungements can be directed to them.²⁴⁴ Some of the more responsible data-resellers refresh their databases periodically by downloading court data in full on a regular basis. This helps ensure that expunged records don't reappear. Courts should require anyone who gets bulk data from them to follow this practice and should impose penalties against those that fail to do so.

these types of websites raise some unresolved constitutional questions,²⁴⁰ there are nonetheless steps that can be taken to limit their harmful effect.

“Florida law clearly states that most juvenile records are confidential, including juvenile arrest records. Unfortunately . . . [the] Florida Department of Law Enforcement has taken the wrong position that the statute that applies to them allows them . . . not only to release the record, but to charge for the record. . . . A misdemeanor charge, you could actually, right now, purchase every juvenile record for 24 bucks in the state of Florida, even if it was a seven-year old, even if it was dismissed. It doesn’t matter. You can get the record.”

Carlos Martinez, Public Defender for Miami-Dade County (Miami Day 1 at 150)

Courts, law enforcement, and central record repositories should not sell any criminal records, although they might collect administrative fees to cover costs of maintaining records from those

who are allowed access based on a legitimate need to know about a record. Jurisdictions should ban the sale or dissemination of any arrest records, except for law enforcement purposes, and should strictly enforce such bans.²⁴²

“[I]t was only a matter of time before the Internet found a way to monetize the humiliation that came with an arrest.”

New York Times article discussing “mugshot” websites²⁴¹

The Fair Credit Reporting Act, which regulates Consumer Reporting Agencies (CRAs) that sell criminal records, should be amended to 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, should strengthen enforcement efforts. States without a fair credit reporting law should enact one and enforce it against companies providing criminal background information.

Recommendation

IX. Defense lawyers should consider avoiding, mitigating and relieving collateral consequences to be an integral part of their representation of a client.

- ❖ Avoiding, mitigating and relieving collateral consequences at every stage of a criminal case should be an integral part of a defense lawyer’s representation of a client.
- ❖ Defense lawyers should assist clients in obtaining relief from the court at sentencing and during the period of the sentence.
- ❖ Defense counsel should advise clients about available post-sentence relief, and wherever feasible they should assist clients in seeking such relief.
- ❖ If representation is not feasible, defense counsel should refer clients seeking post-sentence relief to organizations or individuals that can provide such representation.
- ❖ Agencies that fund indigent defense services should make resources available for representation in connection with seeking restoration of rights and status.

"I've had a lot of conversations with public defenders and other criminal defense attorneys who do not think re-entry is their work and don't see why it's so important. . . To be a really good criminal defense attorney, you need to know what the re-entry consequences are."

Eliza Hersh, Director, Clean Slate Practice, East Bay Community Law Center²⁴⁵

Defense counsel have both an opportunity and an obligation to help clients avoid or mitigate collateral consequences at the front end of the criminal process and to relieve them at the end of the process. In order to optimize defense counsel's role, NACDL recommends the following:

To Help Clients Avoid and Mitigate Collateral Consequences, Counsel Must First Understand Which Consequences Apply to Which Convictions

Bar associations and defender organizations and offices should sponsor, and counsel should participate in, trainings and continuing legal education about collateral consequences.²⁴⁶ Counsel should also make use of available resources that compile information on potential collateral consequences. For example, the American Bar Association maintains a National Inventory of Collateral Consequences that can be accessed online,²⁴⁷ and state websites list requirements for occupational licenses.²⁴⁸ Counsel should use this data when advising about collateral consequences that may matter to the client. Dennis Terez, the federal public defender for the Northern District of Ohio, testified to the importance of using his state's collateral consequences database when counseling clients: "That tool is huge, in that in a glance you can see, at least on a state level, . . . what that conviction will mean to that person's life."²⁴⁹

Defense Counsel Must Learn about Which Consequences Are Important to a Particular Client

Defense counsel should interview clients for detailed background information so that the effect of particular collateral consequences can be fully explained to and considered by the client before any final disposition.

Defense Counsel Should Fully Advise Clients about All Potentially Applicable Collateral Consequences Well in Advance of Plea Negotiations, And Should Discuss Available Relief after Conviction

"[W]e would like those people who stand behind us and argue for our liberties and our rights to tell us as much of the truth . . . they know. . . . [T]he decisions that we're making when we're standing beside you to take a bargain . . . not only impact the amount of time that we serve, it impacts the rest of our entire lives. It impacts our children's lives, and it impacts our grandchildren's lives."

**Dorsey Nunn, Executive Director,
Legal Services for Prisoners with Children
(SF Day 1 at 15-16)**

Nellie King, president of the Florida Association of Criminal Defense Lawyers, stressed the importance of discussing the consequences of a plea, especially those related to immigration, early: "I have asked the public defender in our circuit on this issue of deportation, since they're the first people that come in contact with these folks, to . . . [inform individuals that] you do have rights and that your immigration consequences can be affected by anything you say and do in this building and after you walk out of it."²⁵⁰ Counseling must also include the longer term

consequences of any conviction, particularly in the area of employment where many clients may not be aware of the myriad formal and informal barriers based on a criminal record. This counseling process must include explaining to clients that a time-served plea is not without consequence. Kionne McGhee, a defense attorney in Florida, explained that “[i]f you get credit for time served on a felony charge without even serving a day in jail, you’ve essentially lost your civil rights here within the state of Florida because that is a conviction without serving one day in jail. . . . [I]ndividuals who simply, because [] they didn’t want to miss work, they decided to take a simple plea of credit time served, which in the end has come back to haunt them tremendously.”²⁵¹

Defense Counsel Should Assist Clients in Obtaining Relief from the Court at Sentencing and During the Period of the Sentence

Counsel should advise clients about available post-sentence relief, including sealing, expungement, certificates of relief or good conduct, and pardon. Whenever feasible they should assist clients in seeking such relief. If representation is not feasible, they should refer clients seeking post-sentence relief to organizations or individuals that can provide such representation.

“I would like to . . . reinforce the notion [that the] front-end players have to take responsibility for what’s happening to people on the back end, and we can’t think that it’s just the responsibility of probation and parole.”

**April Frazier Camara, Director,
Community Re-entry Program,
D.C. Public Defender Service²⁵²**

Defense Counsel Should Assist Clients in Cleaning up Erroneous Or Incomplete Criminal Records and in Sealing And Expunging Eligible Records

Carey Haughwout, the public defender for Palm Beach County, recommended conducting a needs analysis of convicted clients so that they can work toward rehabilitative next steps while incarcerated. She also helped create a system “in each of the public defender offices so [that] they can get warrants withdrawn, clean up records, [and] figure out what needs to be done so that when [an individual] walk[s] out of the doors, they really can feel that they are free.”²⁵³

Jurisdictions Should Extend the Right to Counsel to Indigent Defendants Charged with Any Crime, as All Levels of Conviction Can Result in Serious Collateral Consequences

Adam Monreal, chair of the Prisoner Review Board for the state of Illinois, testified about the far-reaching consequences of not having access to counsel: “Many people who have never been involved in the criminal justice system plead guilty to minor misdemeanors without ever consulting an attorney and are unaware of the legal consequences surrounding that conviction. Many people believe that they can pay a fine or plead guilty for the time served, believing that they are done with the criminal justice system. Unfortunately, they are awakened to the harsh realities concerning their conviction and their criminal record.”²⁵⁴ Similarly, Steve Zeidman, a professor and director of the Criminal Defense Clinic at CUNY School of Law, testified that serious collateral consequences can “flow from misdemeanor convictions, even from convictions on reduced charges, whether they’re called violations or offenses. . . . [It] seems to me [this] is the greatest problem concerning post-conviction rights and status. It’s true the majority of these

cases do not involve jail or prison. So you're not talking about re-entry in that way, but they impact people's lives. . . ."²⁵⁵

The Federal Government, States and Localities That Fund Indigent Defense Services Should Make Resources Available for Representation in Connection with Restoration Of Rights and Status

Vincent N. Schiraldi, New York City's probation commissioner, testified about the importance of Certificates of Relief from Disabilities in allowing individuals to obtain jobs and become licensed: "This is completely roulette. If you're lucky enough to have a lawyer that pays attention to this, you may get one. If you're lucky enough to have a judge that's sort of on it, you get one. . . . If you don't get it out of the chute, you have to go back to court. . . ."²⁵⁶ Cook County Circuit

Court Presiding Judge Paul Biebel testified: "I do know the [public defender] is not involved in the expungement process because it's a civil entity, and they can't by statute in Illinois do that."²⁵⁷ Other states, including California, permit public defenders to assist with the restoration process.²⁵⁸ Aleem Raja, deputy public defender for the city and county of San Francisco, testified that the city funded his office's "Clean Slate" program because it agreed that facilitating re-entry and employment for released prisoners would be a net financial gain.²⁵⁹ If there is any law or policy disallowing defender office involvement in the restoration process, or limiting funding for such involvement, defenders should challenge it for violating the Sixth Amendment right to counsel and the principles set out in *Padilla v. Kentucky*.

Defender offices also should collect data related to avenues of relief from convictions, relief representation and client demand, and the effect of barriers to relief and the restoration of rights and status.

Recommendation

X. NACDL will initiate public education programs and advocacy aimed at curtailing collateral consequences and eliminating the social stigma that accompanies conviction.

NACDL resolves to use all of its resources, particularly the dedication of its members who are on the front lines fulfilling the mandates of the Sixth Amendment, to implement the preceding nine principles. The nation's criminal defense bar must be in the vanguard of the effort to make the full restoration of rights and status after conviction a reality for all who successfully fulfill the terms of a sentence. NACDL's leadership on this issue will include engaging with the bar to ensure that all actors in the system, including defense counsel, prosecutors and judges, recognize that they have a duty to promote the restoration of rights and status. This effort will also include proposing new, and refining existing, professional standards of practice and ethical rules.

After more than three decades of enormous growth in America's highly punitive criminal justice system, the nation is starting to appreciate the many short- and long-term problems produced by overcriminalization and mass incarceration. People from all walks of life and across the political spectrum — liberal, conservative, activists, law enforcement, corrections officials, labor unions, and others — are coming together to call for reform of the nation's criminal justice system.²⁶⁰ Policy-makers at the state and federal levels are reconsidering current charging and sentencing practices in an attempt to be "right on crime" or "smart on crime."²⁶¹ Slowly and through the misfortune of millions of individuals and families, the United States is recognizing that "success" in the criminal justice system must be defined as "improving public safety without needless social costs."²⁶²

NACDL and the defense community will help create and lead a national movement to be smart and right about what happens after the criminal case ends, working to repeal or modify collateral consequences that serve no justifiable public safety purpose and to ensure accessible, effective avenues of relief from conviction-related legal disabilities and stigma. The media has highlighted stories of people unfairly denied jobs because of a dated arrest record or faced with deportation because of a decades-old misdemeanor conviction.²⁶³ Legislators have started to act, passing the Second Chance Act in 2008 to

fund agencies and organizations that help people returning home after incarceration.²⁶⁴ Two 2013 bills seek major reform in the way the FBI collects and shares criminal record information.²⁶⁵ States all over the nation — from Georgia to Colorado to New York — have passed or are considering legislation to deal with the crisis created by massive numbers of individuals whose criminal records have made them second class citizens.²⁶⁶ NACDL will work to see these and other similar reform measures enacted throughout the country to realize America's promise as the land of second chances.

Overcriminalization and overincarceration tell only part of the story of the “War on Crime.” Through this destructive war, the nation has also systemically demonized individuals with convictions, branding them as “criminals” who must be relegated to second-class citizenship long after their sentence ends. This troubling trend has resulted in thousands of laws, regulations and policies at the federal, state and local levels that require or allow employers, licensing agencies, landlords, and other decision-makers to discriminate against applicants with criminal records. In addition, the thick web of barriers to work, housing, education, and other aspects of daily life falls particularly heavily upon, and unfairly discriminates against, people and communities of color.

The United States is not a nation of criminals, and most collateral consequences do not advance public safety. Instead, they serve only to perpetuate a kind of societal alienation that undermines public safety. The fact is that denying individuals with criminal records the opportunity to move on and move up makes recidivism more likely, and so hurts the nation as a whole. It is also profoundly unfair. The United States must solve the collateral consequences crisis in order to compete with other nations in the rapidly changing global workplace. It is the smart thing to do and it is the right thing to do.

The United States is a nation of individuals subjected to the collateral consequences of the failed “War on Crime,” but there is a way out of this quagmire. The best solution for this crisis is to stop punishing people after they have fulfilled their sentence in the criminal case. Punishment should end when the terms of a criminal sentence are fulfilled. Ideally, collateral consequences should be repealed, but, until that happens, there must be a coherent national approach to the restoration of rights and status after conviction. For individuals trying to live with a criminal record, and for society’s own good, there must be simple, widely available ways to get relief from the lingering effects of an adverse encounter with the justice system in order to fully and productively participate in society. NACDL will help lead this reform effort by enthusiastic promotion of the recommendations in this report.

I. **The United States should embark on a national effort to end the second-class legal status and stigmatization of persons who have fulfilled the terms of a criminal sentence.**

- ❖ The three branches of government, on the federal, state and local levels, should undertake a comprehensive effort to promote restoration of rights and status after conviction. This effort should include enactment of laws to circumscribe or repeal existing collateral consequences and a resolve to stop enacting new ones.
- ❖ Government entities, the legal profession, the media, and the business community must promote a change in the national mindset to embrace concepts of redemption and forgiveness, including a public education campaign to combat erroneous and harmful stereotypes and labels applied to individuals who have at one point or another committed a crime.
- ❖ The United States and its states and territories 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.
- ❖ Defender organizations and the legal profession as a whole should propose and support efforts to repeal collateral consequences and to enact effective ways to relieve any remaining collateral consequences. They should participate in efforts to catalogue collateral consequences and make them available in a form that is useful and educational to lawyers, courts, government agencies, researchers, and the public at large.
- ❖ The legal profession should work to change the way people with a criminal record are depicted in the media and discourage the use of disparaging labels such as “felon” and “criminal” that reinforce fear-inducing stereotypes and perpetuate discriminatory laws and policies.
- ❖ Members of the legal profession should participate in efforts to educate the public about the broad range of conduct that can result in conviction and the harmful effects of permanently burdening those who are convicted. Further, they should support efforts to provide equal opportunity to people with a criminal record, including in their own employment policies and practices.

II. **All mandatory collateral consequences should be disfavored and are never appropriate unless substantially justified by the specific offense conduct.**

- ❖ 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.
- ❖ Most mandatory collateral consequences should be repealed, including the loss of voting and other civil and judicial rights, which have no public safety purpose at all.

A Roadmap to Restore Rights and Status After Arrest or Conviction

- ❖ For those few mandatory consequences that can be justified in terms of public safety, sentencing courts should be authorized to relieve them on a case-by-case basis at sentencing and while a person is under sentence.
- ❖ 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.

III. Discretionary collateral consequences should be imposed only when the offense conduct is recent and directly related to a particular benefit or opportunity.

- ❖ Where a decision-maker is authorized but not required to deny or revoke a benefit or opportunity based upon a conviction, it should do so only where it reaches an individualized determination that such action is warranted based upon the facts and circumstances of the offense.
- ❖ States and the federal government should develop and enforce clear relevancy standards for considering a criminal record by discretionary decision-makers, requiring them 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 should be required to specify and justify the types of 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 should never be denied based upon a criminal record that did not result in conviction.

IV. Full restoration of rights and status should be available to convicted individuals upon completion of sentence.

- ❖ After completion of their sentence, individuals should have access to an individualized process to obtain full restoration of rights and status, either from the executive or from a court, by demonstrating rehabilitation and good character.
- ❖ The relief process should be transparent and accountable, and accessible to those without means. Standards for relief should be clear and attainable, high enough to make relief meaningful but not so high as to discourage deserving individuals.
- ❖ A pardon or judicial certificate should relieve all mandatory collateral consequences, and decision-makers should give full effect to a pardon or judicial certificate where a collateral consequence is discretionary.
- ❖ Jurisdictions should give their residents with convictions from other jurisdictions access to their relief procedures, and should also give effect to relief granted by other jurisdictions.

V. Congress and federal agencies should provide individuals with federal convictions with meaningful opportunities to regain rights and status, and individuals with state convictions with mechanisms to avoid collateral consequences imposed by federal law.

- ❖ Congress should expand non-conviction dispositions for federal crimes, and federal prosecutors should be encouraged to offer them wherever appropriate.
- ❖ Individuals convicted of federal crimes should have an accessible and reliable way of regaining rights and status, through the courts or through reinvigoration of the federal pardon process.
- ❖ Congress should provide for limiting access to and use of federal criminal records, through judicial expungement, set-aside, or certificates of relief from disabilities.
- ❖ Congress should authorize state and federal

courts to dispense with mandatory collateral consequences arising under federal law.

- ❖ State legislatures should provide individuals with federal convictions a way to avoid consequences arising under state law.
- ❖ Federal courts and agencies should recognize and give effect to state relief.
- ❖ Federal agencies should provide incentives to public and private employers to offer equal opportunity to persons with a criminal record. The federal government should fund research into whether relief mechanisms help individuals reintegrate into society and reduce recidivism.

VI. Individuals charged with a crime should have an opportunity to avoid conviction and the collateral consequences that accompany it.

- ❖ Diversion and deferred adjudication should be available for all but the most serious crimes, and prosecutors and courts should be encouraged to use them.
- ❖ Non-conviction dispositions should be sealed or expunged and never trigger collateral consequences. Decision-makers should be barred from asking about or considering them.
- ❖ Collateral consequences should be taken into account at every stage of the case by all actors in the criminal justice system.
- ❖ Defense lawyers should advise clients about collateral consequences and explore opportunities to avoid them through creative plea bargaining and effective sentencing advocacy.
- ❖ Prosecutors should structure charges and negotiate pleas to enable defendants to avoid collateral consequences that cannot be justified.
- ❖ Courts should ensure that defendants have been advised about applicable collateral consequences before accepting a guilty plea, and should take collateral consequences into account at sentencing.

VII. Employers, landlords and other decision-makers should be encouraged to offer opportunities to individuals with criminal records, and unwarranted discrimination based on a criminal record should be prohibited.

- ❖ Government at all levels should find creative ways to give employers, landlords and other decision-makers affirmative incentives to offer opportunities to those with convictions. There should be meaningful tax credits for hiring or housing those with convictions and free bonding to provide insurance for any employee dishonesty.
- ❖ Decision-makers should be immune from negligent hiring liability relating to an opportunity or benefit given to an individual with a conviction 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.
- ❖ Jurisdictions should enact clear laws prohibiting unwarranted discrimination based upon an individual's criminal record, and should provide for effective enforcement and meaningful review of discrimination claims.

VIII. Jurisdictions should limit access to and use of criminal records for non-law enforcement purposes and should ensure that records are complete and accurate.

- ❖ State repositories, court systems and other agencies that collect criminal records should have in place mechanisms for ensuring that official records are complete and accurate, and should facilitate opportunities for individuals to correct any inaccuracies or omissions in their own records. Records must be provided in a form that is easy to understand and that does not mislead.
- ❖ Records that indicate no final disposition one year after charges are filed should be purged

from all records systems. The FBI must ensure that information relating to state relief, such as expunged and sealed records, is reflected in its criminal record repository.

- ❖ State and federal authorities should limit access to their central repositories to those with a legitimate need to know. Court records should be available only to those who inquire in person, in order to balance public access to records with privacy concerns for individuals with a criminal record, and access to online court system databases should be strictly limited. Law enforcement records (non-judicial) should never be publicly disseminated.
- ❖ Criminal records that do not result in a conviction should be automatically sealed or expunged, at no cost to their subject.
- ❖ Jurisdictions should prohibit non-law enforcement access to conviction records after the passage of a specified period of time, depending upon the nature and seriousness of the offense, and should authorize courts to prohibit access in cases where it is not automatic. Any exceptions should be justified in terms of public safety, and persons who disclose records in violation of limitations on access should be subject to substantial civil penalties.
- ❖ Employers and other decision-makers should be prohibited from asking about or considering a criminal record to which access has been limited by law or court order. For accessible records, decision-makers should comply with applicable relevance and non-discrimination standards.
- ❖ Employers should be prohibited from inquiring about an applicant's criminal record until after a contingent offer of employment has been made.
- ❖ Jurisdictions should never sell criminal records and should strictly regulate private companies that collect and sell records.
- ❖ Federal law should prohibit credit reporting agencies from disclosing records of closed cases that did not result in conviction, and con-

victions that are more than seven years in the past. States should enact their own restrictions on credit reporting companies to the extent permitted by federal preemption. Jurisdictions should provide for effective enforcement of laws governing credit reporting agencies.

IX. Defense lawyers should consider avoiding, mitigating and relieving collateral consequences to be an integral part of their representation of a client.

- ❖ Defense counsel should consider avoiding and mitigating collateral consequences as an integral part of their representation of a client, both at and after sentencing. If post-sentence representation is not feasible, defense counsel should refer clients to organizations or individuals that can provide such representation.
- ❖ Agencies that fund indigent defense services should fund representation in connection with restoration of rights and status.

X. NACDL will initiate public education programs and advocacy aimed at curtailing collateral consequences and eliminating the social stigma that accompanies conviction.

- ❖ NACDL resolves to use all of its resources, particularly the dedication of its members who are on the front lines fulfilling the mandates of the Sixth Amendment, to implement the preceding nine principles. The nation's criminal defense bar must be in the vanguard of the effort to make the full restoration of rights and status a reality for all who successfully fulfill the terms of a sentence.
- ❖ NACDL and the defense community will lead efforts to repeal or modify existing collateral consequences that cannot be justified in terms of public safety, to avoid enacting any additional ones, and to implement meaningful restoration procedures both during and after the conclusion of the criminal case.

APPENDIX A — DEFINITIONS OF KEY TERMS

71

Background check: *See* Criminal background check.

Ban-the-box: A policy, generally of a state or a municipal government, calling for employers to eliminate the “box” that asks applicants for employment to disclose a criminal record, postponing this inquiry to a later stage in the hiring process.

Business necessity: The showing an employer must make in order to defeat a claim of unlawful discrimination under Title VII of the Civil Rights Act of 1964. Under EEOC Enforcement Guidance, an employer may show “business necessity” by using validated standards, a “targeted” screen, and an individualized assessment of an applicant’s qualifications.

Certificate of good conduct or relief from disabilities: A form of relief from collateral consequences generally issued by a court or corrections agency, which may result in general dispensation from all collateral consequences or may have a more limited purpose and effect. Certificates of employability are targeted to employment consequences, while certificates of restoration of rights may address only civil rights.

Clemency: *See* Executive clemency.

Collateral consequence: A penalty, disability or disadvantage that is authorized or required by state or federal law or local ordinance as a direct result of an individual’s conviction but is not part of the sentence ordered by the court.

Commutation of sentence: A form of executive clemency that reduces the sentence imposed by the court. As distinguished from a pardon, it does not imply forgiveness or absolve the individual from other consequences of the crime.

Credit reporting agency (or consumer reporting agency): Commercial vendors of criminal history records and other information about individuals’ backgrounds, whose methods of collection and dissemination are regulated by federal and state law.

Criminal background check: The process of collecting and reporting some or all of an individual’s criminal history records from various sources, including courts and criminal record repositories.

Criminal history records: Law enforcement and court records of arrest and subsequent disposition of a criminal case can be made available to the public through a variety of sources, including individual court records, state-level criminal record repositories and private commercial vendors (including credit reporting agencies), correctional agencies, and police blotters. Different laws and policies for the collection, use and dissemination of criminal records may apply to each of these sources and vary by jurisdiction.

Criminal record repository: A central storage location of criminal history records, often maintained by the state police and often in electronic form. All states and the federal government, through the FBI, have central criminal record repositories.

Deferred adjudication or deferred sentencing: An authorized disposition of criminal charges intended to avoid conviction and collateral consequences, which may or may not require a guilty plea. Upon successful completion of a court-imposed term of probation, the charges are dismissed and any plea is vacated. Like diversion or deferred prosecution, it is intended as a means of avoiding conviction and collateral consequences.

Discretionary collateral consequence: A collateral consequence that a civil court, or administrative agency or official is authorized, but not required, to impose on grounds related to an individual's conviction.

Diversion or deferred prosecution: A pre-plea disposition of criminal charges that is generally controlled by the prosecutor, which results in dismissal of charges if an individual satisfies certain agreed-upon conditions. Like deferred adjudication or deferred sentencing, it is intended as a means of avoiding conviction and collateral consequences.

EEOC Enforcement Guidance: Issued in 2012, the Equal Employment Opportunity Commission Guidance reaffirms that an employer's use of an individual's criminal record in making employment decisions may violate Title VII, requires individualized determinations, and the guidance sets forth "best practices" for making those determinations.

Executive clemency: The range of actions that may be taken by a chief executive or, in some jurisdictions, an administrative agency to reduce or eliminate the punishment imposed as a result of a criminal conviction.

Expungement: Generally, a court-administered process for closing public access to criminal records that ranges from limited shielding to actual destruction. It may involve an individualized determination or be automatic, and is frequently used interchangeably with the term "sealing." Law enforcement agencies generally retain access to sealed records.

Fair Credit Reporting Act: A federal or state statute that regulates credit reporting agencies in the collection and dissemination of criminal history records.

Informal collateral consequences: Policies and practices based on social custom and cultural attitude, as opposed to law or formal policy. Although frequently unwritten, they can be just as harmful as restrictions that are formally adopted and enforced. The term actualizes the social stigmatization visited upon those with a criminal record.

Mandatory collateral consequences: A collateral consequence that applies automatically by operation of law or rule with no determination of its applicability and appropriateness in individual cases.

Negligent hiring: A common law or statutory tort that involves employer liability for negligence in hiring or retaining someone who injures a customer or co-worker.

Non-conviction record: Any court record that relates to an individual's arrest and subsequent experience in the criminal justice system that did not result in a conviction. It may include dispositions such as a dismissal of charges, reversal or acquittal, or set-side.

Pardon: A form of executive clemency that absolves the pardoned individual from some or all of the consequences of a crime. A pardon may be full or conditional but generally implies forgiveness of the crime. In some jurisdictions a pardon may lead to judicial expungement of the record.

Post-sentence relief: Any form of relief from the consequences of conviction during or after the term of the court-imposed sentence.

Protected class: Under non-discrimination laws, any class of persons whose characteristics afford them protection from unwarranted adverse treatment based upon their membership in the class, including racial and ethnic minorities and women. Persons with a criminal record are generally not recognized as a protected class.

Rap sheet: An official description of a person's criminal record.

Recidivism: The repetition of criminal behavior after punishment, generally used to measure the rate at which individuals are rearrested for crime after a prior conviction.

Re-entry: The return to society after a period of incarceration.

Relief mechanisms: Mechanisms for relief from collateral consequences discussed in this report include dispositions that avoid a conviction such as deferred adjudication; legislative mechanisms that provide for automatic termination of a collateral consequence after a specified period of time; individual restoration mechanisms such as pardon or expungement that usually involve an individualized determination of rehabilitation or other basis for relief; and systemic relief mechanisms that place general procedural or substantive limits on consideration of conviction in allocating benefits and opportunities.

Restoration of rights: A term that generally refers to a limited form of relief from collateral consequences involving restoration of specified civil and judicial rights, which may or may not include the right to bear arms. *See also* Restoration of rights and status.

Restoration of rights and status: As used throughout this report, this signifies a fuller form of relief from collateral consequences that generally restores the convicted person to full legal rights and removes the stigma of conviction. A full and unconditional pardon is typically the fullest form of relief available, though certain forms of judicial relief may also accomplish this return to the full rights of citizenship.

Sealing: A court-administered process for closing public access to criminal records that differs from jurisdiction to jurisdiction. It may be automatic or involve an individualized determination, and is frequently used interchangeably with the term "expungement." Law enforcement agencies generally retain access to sealed records.

Set-aside: A form of judicial relief that, when entered post-conviction, has the effect of vacating the record of conviction. A set-aside generally restores the person to full rights of citizenship lost as a result of conviction.

Stigmatization or Stigma: See Informal collateral consequences.

A Roadmap to Restore Rights and Status After Arrest or Conviction

APPENDIX B — WITNESS LIST BY CATEGORY

74

Affected Community

Ronald R. Acevedo, Of Counsel, Scoppetta
Seiff Kretz & Abercrombie
(*New York, Day 2*)

Jumaani Bates, Business Services Manager,
North Lawndale Employment Network
(*Chicago, Day 2*)

Cleveland Bell, Executive Director,
Riverside House
(*Miami, Day 1*)

Mr. C., Business Executive
(*San Francisco, Day 2*)

Lamont Carey, Spoken Word Artist,
Filmmaker, Author, and Speaker
(*DC, Day 2*)

Jessica Chiappone, Vice President, Florida
Rights Restoration Coalition
(*Miami, Day 1*)

Mansfield Frazier, Executive Director,
Neighborhood Solutions, Inc.
(*Cleveland, Day 1*)

Lamont Garrison, Personal Trainer, Radio
Co-Host (wrongfully convicted)
(*DC, Day 2*)

Marcia Grant, Assistant Project
Manager, Opa Locka Community
Development Corporation
(*Miami, Day 2*)

Charles Gunnell, Volunteer, What It Takes
(*Cleveland, Day 1*)

Kimberly Haven, Director of Public Policy
and Advocacy at Out for Justice, Founder
and Co-Director of the Maryland Justice
Reinvestment Initiative
(*DC, Day 2*)

Charles Ice, Solvent Recycler,
and featured in the documentary
“The Dhamma Brothers”
(*Chicago, Day 2*)

Johnnie Jenkins, Employment Manager,
Waukegan Illinois Township
(*Chicago, Day 2*)

Darrell K. Langdon, Sr., Engineer,
Chicago Public Schools
(*Chicago, Day 1*)

Glenn Martin, Vice President,
Fortune Society
(*New York, Day 2*)

Ralph Martin, President &
CEO, RKRM Consulting, Inc.
(*Miami, Day 1*)

Desmond Meade, President, Florida
Rights Restoration Coalition
(*Miami, Day 1*)

Dorsey Nunn, Executive Director, Legal
Services for Prisoners with Children
(*San Francisco, Day 1*)

Dr. Divine Pryor, Executive
Director, Center for NuLeadership
on Urban Solutions
(*New York, Day 3*)

Wayne Rawlins, Community Justice and
Economic Development Consultant
(*Miami, Day 1*)

Armani Smith, Kemba Smith’s
son, college student
(*DC, Day 3*)

Kemba Smith, Founder of the
Kemba Smith Foundation (granted
clemency by President Clinton)
(*DC, Day 3*)

Jose Torres, Judicial and Medical Terminology Spanish Language Interpreter
(Cleveland, Day 1)

Brenda Valencia Aldana, Administrative Assistant, Girls Advocacy Project
(Miami, Day 2)

Patricia Williams, Receptionist, St. Leonard's Ministries
(Chicago, Day 2)

Tyrone Werts, Consultant:
The Philadelphia Defenders Association,
The Inside-Out Prison Exchange Program;
Chairman and Co-Founder:
Public Safety Initiative (sentence commuted by Former Pa. Gov. Ed Rendell)
(New York, Day 3)

Jesse Wiese, Criminal Justice Policy Specialist, Prison Justice Fellowship
(New York, Day 2)

Ken Woods, Former Doctor and Registrant
(San Francisco, Day 2)

Background/Record Check Organizations

Frank Campbell, CEO of Highland Strategies, LLC
(DC, Day 3)

Rebecca E. Kuehn, Vice President and Senior Regulatory Counsel, Core Logic
(San Francisco, Day 1)

Montserrat Miller, Partner, Arnall, Golden, Gregory (Privacy and Consumer Regulatory, Immigration, and Government Affairs Practice Groups)
(DC, Day 3)

Legal Aid/Policy Advocacy

Janice Bellucci, State Organizer/President, California Reform Sex Offender Laws
(San Francisco, Day 2)

Judi Conti, Federal Advocacy Coordinator, National Employment Law Project
(DC, Day 1)

Edgardo Cortes, Director of the Advancement Project
Voting Rights Campaign
(DC, Day 3)

Julie Ebenstein, Policy & Advocacy Counsel, American Civil Liberties Union of Florida
(Miami, Day 2)

Maurice Emsellem, Policy Co-Director, National Employment Law Project
(San Francisco, Day 1)

Linda Evans, Organizer, Legal Services for Prisoners with Children
(San Francisco, Day 1)

Richael Faithful, Equal Justice Works Fellow at Advancement Project, Senior Member of Virginia Rights Restoration Program
(DC, Day 3)

Sally Friedman, Legal Director, Legal Action Center
(New York, Day 1)

Elizabeth Gaynes, Executive Director, Osborne Association
(New York, Day 3)

Molly Gill, Government Affairs Counsel, Families Against Mandatory Minimums (FAMM)
(DC, Day 3)

Janet Ginzberg, Senior Staff Attorney, Community Legal Services in Philadelphia, Employment Unit
(DC, Day 3)

Eliza Hersh, Director & Supervising Attorney, Clean Slate Practice, East Bay Community Law Center
(San Francisco, Day 1)

Nicole Austin-Hillery, Director and Counsel of the Washington Office of the Brennan Center for Justice
(DC, Day 3)

Ann Jacobs, Director, Prisoner Reentry Institute, John Jay College
(New York, Day 2)

Beth Johnson, Staff Attorney, Cabrini
Green Legal Aid
(Chicago, Day 1)

Roberta Meyers, Director, National
HIRE Network, Legal Action Center
(New York, Day 1)

Dorsey Nunn, Executive Director, Legal
Services for Prisoners with Children
(San Francisco, Day 1)

Hilary Shelton, Director of the NAACP's
Washington Bureau, Senior Vice President
for Policy and Advocacy
(DC, Day 3)

Kimberly Thomas Rapp, Executive
Director, Lawyers' Committee for Civil
Rights of the San Francisco Bay Area
(San Francisco, Day 1)

Dante Trevisani, Attorney and
Equal Justice Works Fellow
(Miami, Day 1)

Patricia Warth, Co-Director of Justice
Strategies, Center for Community
Alternatives
(New York, Day 2)

Judy Whiting, General Counsel,
Community Service Society
(New York, Day 2)

Mariko Yoshihara, Political Director,
California Employment Lawyers
Association
(San Francisco, Day 2)

Community-Based Service Provider

Joel Botner, Program Director,
Faith Works Reentry Program
(New York, Day 3)

Cecilia Denmark, Bridges of America
(Miami, Day 1)

Reverend Charles Dinkins, Hosanna
Community Church
(Miami, Day 1)

Bob Dougherty, Executive Director, St.
Leonard's Ministries
(Chicago, Day 2)

Roger Ehmen, Director of Community
Reentry and Employment Center,
Westside Health Authority
(Chicago, Day 2)

William Evans, Facility Director, Turning
Point Bridge Work Release Facility
(Miami, Day 1)

Reverend Valerie Everett, Lutheran Social
Services
(Chicago, Day 2)

John Fallon, Senior Program Manager,
Corporation of Supportive Housing
(Chicago, Day 2)

Deacon Edgardo Farias, Archdiocese of
Miami Detention Ministry
(Miami, Day 1)

David Freedman, Executive Director,
Transition, Inc.
(Miami, Day 1)

Illya McGee, Vice President,
Oriana House, Inc.
(Cleveland, Day 2)

Luz Norwood, Workforce Program
Supervisor, Transition, Inc.
(Miami, Day 1)

Iana A. Patterson, Facility Director,
Broward County Bridge TC/
Work Release Center
(Miami, Day 1)

Wayne Rawlins, Community Justice and
Economic Development Consultant
(Miami, Day 1)

David Rosa, Administrator,
St. Leonard's Ministries
(Chicago, Day 2)

Newton Sanon, President and CEO,
OIC of Broward County,
REXO-Project Second Chance
(Miami, Day 2)

Charles See, Executive Director,
Community Reentry Program, Cleveland
(Cleveland, Day 1)

Ellen Shores, Director,
Community Reentry Institute
(Cleveland, Day 1)

Patricia Williams, Receptionist, St.
Leonard's Ministries
(Chicago, Day 2)

Defense

April Frazier Camara, Director of the
Community Reentry Program,
D.C. Public Defender Service
(DC, Day 3)

Carey Haughwout, Public Defender for
Palm Beach County
(Miami, Day 2)

Nellie King, President, Florida Association
of Criminal Defense Lawyers
(Miami, Day 1)

Carlos J. Martinez, Public Defender for
Miami Dade County
(Miami, Day 1)

Kionne McGhee, Defense Attorney
(Miami, Day 2)

Aleem Raja, San Francisco Public Defender
Office, Clean Slate Director
(San Francisco, Day 1)

G. Terez, Federal Public Defender, Northern
District of Ohio
(Cleveland, Day 2)

Tyrone Werts, Consultant:
The Philadelphia Defenders Association,
The Inside-Out Prison Exchange Program;
Chairman and Co-Founder: Public Safety
Initiative (sentence commuted by
Former Pa. Gov. Ed Rendell)
(New York, Day 3)

Employer/Employment

Jim Andrews, Owner, Felony Franks
(Chicago, Day 2)

Jumaani Bates, Business Services Manager,
North Lawndale Employment Network
(Chicago, Day 2)

Lonnie Coplen, Project Manager, Director
of Sustainability, McKissack & McKissack
(New York, Day 2)

Steven Hyman, Partner,
McLaughlin & Stern
(New York, Day 2)

Johnnie Jenkins, Employment Manager,
Waukegan Illinois Township
(Chicago, Day 2)

Gary R. Siniscalco, Partner, Employment
Law, Orrick, formerly employed by EEOC
(San Francisco, Day 2)

Ron Tonn, COO, North Lawndale
Employment Network
(Chicago, Day 2)

Doug Wigdor, Founding Partner,
Thompson Wigdor LLP
(New York, Day 3)

Legislative/Executive Agency

Todd A. Cox, Director of the Office of
Communications and
Legislative Affairs, EEOC
(DC, Day 2)

Congressman Danny K. Davis,
7th District of Illinois
(Chicago, Day 1)

Natalia Delgado, Associate General
Counsel, Office of the Governor of Illinois
(Chicago, Day 2)

Marty Gelfand, Senior Counsel, Office of
Congressman Dennis J. Kucinich
(Cleveland, Day 1)

Everett Gillison, Deputy Mayor for
Public Safety and Chief of Staff for the
Mayor of Philadelphia, Office of the
Mayor of Philadelphia
(New York, Day 2)

Blaine Griffin, Director of Community
Relations, Office of Cleveland
Mayor Frank Jackson
(Cleveland, Day 2)

Pam Lawrence, Public Housing Revitalization Specialist and Grant Manager, HUD
(DC, Day 2)

Dr. Gabriela Lemus, Senior Advisor and Director of the Office of Public Engagement, Department of Labor
(DC, Day 2)

Vicki Lopez Lukis, Government and Public Affairs Consultant, former Chairman of Governor Jeb Bush's Ex-Offender Task Force
(Miami, Day 2)

Philip Maier, NYC Regional Director, Public Employment Relations Board
(New York, Day 3)

Mary McCarty, Former Palm Beach Commissioner
(Miami, Day 2)

Carol Morris, Statewide Program Manager, Illinois Department of Employment Security
(Chicago, Day 1)

Wendy Prudencio, Special Assistant for Policy Development, NY State Department of Labor
(New York, Day 3)

John Schomberg, General Counsel, Office of the Governor of Illinois
(Chicago, Day 2)

Melanie Scotto, Assistant Special Counsel, NY Department of Labor
(New York, Day 3)

Senator Shirley Smith, 21st District, Ohio State Senate
(Cleveland, Day 2)

Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Co-chair of the Federal Interagency Reentry Council Working Group
(DC, Day 2)

Bobby Vassar, Chief Counsel for the Minority, Subcommittee on Crime, Terrorism and Homeland Security, House Judiciary Committee
(DC, Day 2)

Pardons

The Honorable Robert L. Ehrlich, Jr., Senior Counsel in the Government Advocacy and Public Policy Practice Group, King & Spalding, former Governor of Maryland
(DC, Day 2)

Greg Massoni, Consultant with the Government Advocacy and Public Policy Practice Group, King & Spalding, former Press Secretary to Governor Ehrlich
(DC, Day 2)

Sam Morison, Appellate Defense Counsel, Department of Defense, former Staff Attorney in the Office of the Pardon Attorney
(DC, Day 2)

Erika Tindill, Chair, Connecticut Board of Pardons and Paroles
(New York, Day 2)

Judiciary

Judge Harold Baer, U.S. District Judge, Southern District of New York
(New York, Day 2)

Judge Paul Biebel, Presiding Judge, Cook County Circuit Court, Criminal Division
(Chicago, Day 1)

Judge Matthew J. D'Emic, 2nd Judicial District (Criminal Term), New York State Supreme Court
(New York, Day 3)

Judge Dan Polster, U.S. District Judge, Northern District of Ohio
(Cleveland, Day 2)

Judge Nancy Margaret Russo, Cuyahoga County Common Pleas Court (Ohio)
(Cleveland, Day 2)

Judge Joan Synenberg, Cuyahoga County
Common Pleas Court (Ohio)
(Cleveland, Day 2)

Law Enforcement/ Parole and Probation

Robert Ambroselli, Deputy Director,
Division of Adult Parole
Operations, California Department of
Corrections and Rehabilitation
(San Francisco, Day 2)

Kris Baumann, Head of the D.C. Police
Union, Police Officer with the Metropolitan
Police Department in Washington, D.C.
(DC, Day 2)

Ronald Davis, Police Chief and
Interim City Manager, East Palo Alto
(San Francisco, Day 1)

Cedric Hendricks, Associate Director, Court
Services and Offender Supervision Agency
(DC, Day 2)

Tamara Jackson, Coordinator; Wayne-
Holmes Reentry Coalition, Your Human
Resource Center
(Cleveland, Day 1)

Angela Jimenez, Deputy Commissioner,
Department of Corrections and
Community Supervision
(New York, Day 3)

Terry Tribe-Johnson, Re-Entry Coordinator,
Summit County
(Cleveland, Day 1)

Gary Mohr, Director, Ohio Department of
Rehabilitation and Correction
(Cleveland, Day 2)

Adam Monreal, Chair,
Prisoner Review Board
(Chicago, Day 2)

Jorge Montes, Attorney, Former Chair,
Illinois Prisoner Review Board
(Chicago, Day 1)

Vincent N. Schiraldi, Commissioner, NY
Department of Probation
(New York, Day 3)

Steve Vukmer, Regional Administrator,
Cleveland Parole and Probation
(Cleveland, Day 1)

Prosecution

Nancy O'Malley, Alameda County District
Attorney and Chair, California Sex Offender
Management Board
(San Francisco, Day 1)

Lance Ogiste, Counsel to the District
Attorney of Kings County (Brooklyn),
New York
(New York, Day 3)

Diane Smilanick, Assistant Prosecuting
Attorney, Cuyahoga County (Ohio)
(Cleveland, Day 1)

Social Science/Academia

Esta Bigler, Director, Labor and
Employment Law Programs, Cornell School
of Industrial and Labor Relations
(New York, Day 2)

Al Blumstein, Professor of Criminology,
Carnegie-Mellon
(Cleveland, Day 2)

Alec P. Boros, Ph.D., Research Manager,
Oriana House, Inc.
(Cleveland, Day 2)

Ronnie Dunn, Associate Professor Urban
Studies, Maxine Goodman Levin College of
Urban Affairs, Cleveland State University
(Cleveland, Day 2)

Jim Jacobs, Warren E. Burger Professor of
Law, New York University Law School
(New York, Day 3)

Stephen Johnson Grove, Deputy Director,
Ohio Justice Policy Center
(Cleveland, Day 1)

June Kress, Executive Director, Council for
Court Excellence
(DC, Day 1)

Mark Myrent, Director of Research, Illinois
Criminal Justice Information Authority
(Chicago, Day 1)

Charles Loeffler, Postdoctoral Scholar,
University of Chicago Crime Lab
(*Chicago, Day 1*)

John Maki, Executive Director, John
Howard Association of Illinois
(*Chicago, Day 2*)

Kiminori Nakamura, Assistant Professor,
Department of Criminology and Criminal
Justice, University of Maryland
(*Cleveland, Day 2*)

Vivian Nixon, Executive Director, College
& Community Fellowship
(*New York, Day 3*)

Dr. Divine Pryor, Executive
Director, Center for NuLeadership
on Urban Solutions
(*New York, Day 3*)

Mark Schlakman, Director of Florida State
University's Center for the Advancement of
Human Rights and former Special Counsel
on Clemency to Governor Lawton Chiles, Jr.
(*Miami, Day 1*)

Amy Shlossberg, Researcher, Fairleigh
Dickinson University
(*New York, Day 2*)

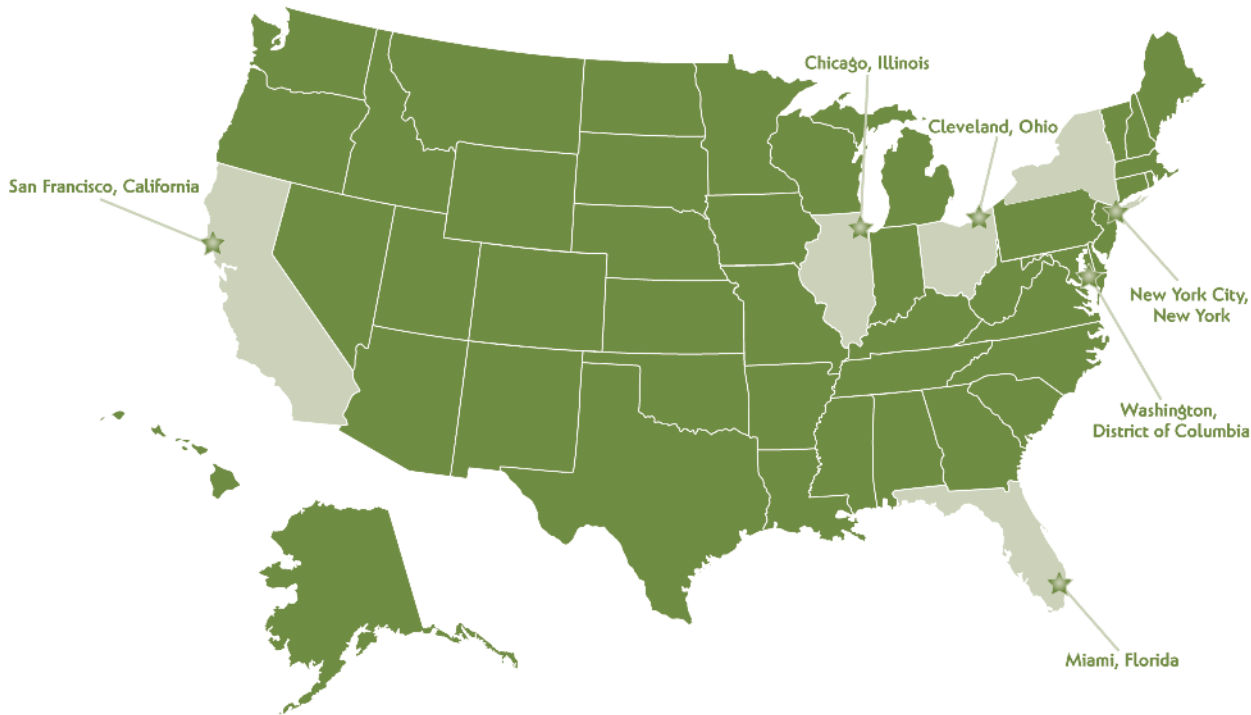
Dr. Faye S. Taxman, University Professor,
Criminology, Law & Society Department of
George Mason University, Director of the
Center for Advancing Excellence
(*DC, Day 2*)

Jeremy Travis, President, John Jay College
of Criminal Justice
(*New York, Day 1*)

Peter Willner, Senior Policy Analyst,
Council for Court Excellence
(*DC, Day 1*)

Steve Zeidman, Professor of Law and
Director, Criminal Defense Clinic Director,
CUNY School of Law
(*New York, Day 1*)

APPENDIX C — SITE VISITS



81

The Task Force visited facilities in several cities to examine re-entry programs and services. The Task Force would like to thank the following individuals for facilitating these visits:

Chicago — Bob Dougherty, Executive Director of the St. Leonard Ministries, for providing the Task Force with breakfast and a tour of the facility.

Ohio — The Honorable Nancy Margaret Russo, Cuyahoga County Common Pleas Court, for opening her court to members of the Task Force; **Maria Nemec**, LICDC, Board Administrator of the Cuyahoga Corrections Planning Board, for providing data on the Cuyahoga County Re-entry Court; **Ilyia McGhee**, Vice President of Correctional Programs in Cuyahoga County, and **Ms. Nicky Roberts**, Program Coordinator of North Star Neighborhood Reentry Resource Center, for coordinating a tour of the North Star Reentry Resource Center; and **Mike Randle**, Program Director for the Judge Nancy R. McDonnell Community Based Correctional Facility (CBCF), for coordinating a tour of the CBCF.

San Francisco — Carol Kizziah, Community Relations Manager of the Delancey Street Foundation, for hosting the Task Force and providing a tour of the Delancey Street Foundation.

New York — Max Lindeman, Senior Director of the Academy at The Fortune Society, for escorting the Task Force members on a tour of The Castle at The Fortune Society (The Castle); **John Runowicz**, Executive Assistant at The Fortune Society, for facilitating the appearance of **Glenn Martin** at the Task Force's New York hearings; and residents of The Castle **Richard Cobbs**, **Ervin Hunt**, and **William Olivo**, for allowing the Task Force members full access to their apartments and for leading a tour of the residential rooftop garden.

APPENDIX D — TASK FORCE MEMBER BIOGRAPHIES

82

Rick Jones (Co-Chair) — Rick Jones is the executive director and a founding member of the Neighborhood Defender Service of Harlem. He is a distinguished trial lawyer with more than 25 years' experience in complex multi-forum litigation. Rick is a lecturer in law at Columbia Law School, where he teaches the criminal defense externship and a trial practice course. He is also on the faculty of the National Criminal Defense College in Macon, Ga., and is frequently invited to lecture on criminal justice issues throughout the country. Rick currently serves as secretary of the NACDL. He has previously served NACDL as a two-term member of the board of directors, parliamentarian, and co-chair of both the Indigent Defense Committee and the Special Task Force on Problem-Solving Courts. Rick is a member of the New York State Bar Association Criminal Justice Section Executive Committee and the inaugural steering committee of the National Association for Public Defense. He also sits on the boards of the New York State Defenders Association and the Sirius Foundation and serves on the Editorial Board of the *Amsterdam News*.

Vicki H. Young (Co-Chair) — Vicki H. Young, a criminal defense attorney throughout her career, is Of Counsel to the Law Offices of Ephraim Margolin in San Francisco. She has a broad criminal defense practice in both federal and state courts, and also devotes significant time to the defense of the indigent. Her practice experience runs the gamut from capital defense to post-conviction litigation to attorney discipline matters. Vicki has served as a director of NACDL and has a long record of service to many other bar groups, including the California Attorneys for Criminal Justice. Vicki is also the 2012 recipient of NACDL's Robert C. Heeney Award.

Lawrence S. Goldman — Lawrence S. Goldman was the 44th president of the NACDL. Prior to his appointment, he was Secretary, Treasurer, First and Second Vice President and President-Elect. A Life Member of NACDL, he received the Robert C. Heeney Award in 1998. A veteran criminal defense lawyer of 30-plus years, he is a past president of the New York State Association of Criminal Defense Lawyers (NYSACDL) and the New York Criminal Bar Association.

Elissa B. Heinrichs — Elissa B. Heinrichs is a partner at Cevallos & Wong, LLP in Newtown, Pa., where she represents criminal defendants in state courts throughout Eastern Pennsylvania and parents in juvenile court proceedings following the removal of their children arising from allegations of abuse and neglect. Elissa's legal career includes stints as legislative counsel to New York Assemblyman Vito Lopez and counsel in the New York City Comptroller's Office, as well as serving as an assistant district attorney in the Bucks County District Attorney's Office. She also clerked for King's County Criminal Court Judge Wayne Saitta. Elissa is active in many bar associations, and has been recognized by Thomson Reuters and *Pennsylvania Magazine* with the Pennsylvania Rising Star Award, and by the Bucks County Bar Association with the Arthur B. Walsh, Jr. Pro Bon Publico Award.

Margaret Colgate Love — Margaret Love practices law in Washington, DC, specializing in executive clemency and restoration of rights, and sentencing and corrections policy. She has written and lectured widely on the collateral consequences of a criminal conviction, and is co-author of the treatise *Collateral Consequences of Criminal Convictions: Law, Policy and Practice* (NACDL/West 2013). Ms. Love chaired the drafting committee for the ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, served as ABA liaison to the Uniform Law Commission's Collateral Consequences project, and directed the NIJ-funded ABA collateral consequences compilation effort. Before establishing her private practice in 1998, Ms. Love served in the U.S. Justice Department for 20 years, from 1978 to 1997, including as U.S. Pardon Attorney (1990-97).

Penelope S. Strong — Penelope Strong is a lifelong criminal and civil rights practitioner, based in Billings, Mont., but with a Midwest upbringing and background. With over 31 years of criminal justice experience, she has represented in both criminal and civil courts the disenfranchised and down-trodden of our society. Currently, Native Americans represent a large sector of her clients. She is the former chief public defender for Yellowstone County and was a first assistant public defender in Wisconsin. She has also litigated with the Montana ACLU and the National Prison Project in achieving prison reform in Montana.

Geneva Vanderhorst — Geneva Vanderhorst has her own criminal defense practice in Washington, DC. Primarily, she represents persons accused of criminal offenses on the Felony II, Accelerated Felony Trial, Mental Health Court, Domestic Violence Court, Community Court, Drug Court, Traffic and general misdemeanor calendars. Prior to opening her practice, she was a Judicial Law Clerk in D.C. Superior Court, a Dean Scholar Instructor at George Mason University School of Law (GMUSL) and a Howard T. Brooke Fellow in the Office of the Public Defender in Alexandria, Va. Ms. Vanderhorst is a graduate of Old Dominion University, where she was named among the “Who’s Who Among American College Students.” She is the current Chair of NACDL’s Diversity Task Force. She also serves as Vice President of the D.C. Association of Criminal Defense Lawyers and a board member of the Superior Court Trial Lawyers Association. She is also a former president of the Charlotte E. Ray American Inns of Court.

Christopher A. Wellborn — Christopher Wellborn, a longtime NACDL member, practices in Rock Hill, S.C. He is a past president of the York County Bar Association and the South Carolina Association of Criminal Defense Lawyers, an NACDL affiliate that he helped found. Chris has also served as chair of the Criminal Law Section of the South Carolina Bar Association. M.

Jenny Roberts (Reporter) — Jenny Roberts is a professor of Law at American University, Washington College of Law and co-director of the Criminal Justice Clinic. Her research focuses on the regulation of actors in the criminal justice system through constitutional law, statute, rules of professional responsibility, professional standards, and culture. Her articles have been cited by the U.S. Supreme Court, a number of state high courts and lower federal courts, and in numerous briefs to the Supreme Court and other courts. She is co-author of the treatise *Collateral Consequences of Criminal Convictions: Law, Policy and Practice* (NACDL/West 2013). Prof. Roberts is co-president of the Clinical Legal Education Association, the nation’s largest association of law teachers, and sits on the board of the Mid-Atlantic Innocence Project. She previously taught at Syracuse University and in NYU’s Lawyering Program. Prior to teaching, Prof. Roberts was a senior research fellow at NYU Law School’s Center for Research in Crime & Justice, a public defender in Manhattan, and a law clerk in the Southern District of New York.

1. All witnesses are identified by the title they held at the time they testified.
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. The 65 million figure was derived from a 2008 Bureau of Justice Statistics survey showing "there were 92.3 million people with criminal records on file with the states, including those individuals fingerprinted for serious misdemeanors and felony arrests." *Id.* (citing U.S. BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2008 at Table 1 (Oct. 2009)). This number was then reduced by 30 percent to "account for individuals who may have records in multiple states and other factors." *Id.* The estimate that one in four Americans has a criminal record is "consistent with a Department of Justice finding that about '30 percent of the Nation's adult population' has a state rap sheet." *Id.* (citing U.S. DEPT. OF JUSTICE OFFICE OF THE ATTORNEY GENERAL, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 51 (June 2006)); *see also* Robert Brame, Michael G. Turner, Raymond Paternoster & Shawn D. Bushway, *Cumulative Prevalence of Arrest From Age 8 to 23 in a National Sample*, PEDIATRICS, Jan. 2012, at 21-27 (reporting that almost one-third of American adults by age 23 have been arrested for adult or juvenile offenses, not including minor traffic offenses).
3. Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013); *Every Door Closed: Barriers Facing Parents With Criminal Records*, Center for Law and Social Policy & Community Legal Services (2002), *available at* <http://www.clasp.org/resources-and-publications/archive/0092.pdf>; BARBARA MULÉ & MICHAEL YAVINSKY, SAVING ONE'S HOME: COLLATERAL CONSEQUENCES FOR INNOCENT FAMILY MEMBERS, *available at* <http://www.nycourts.gov/ip/partnersinjustice/Saving-Home.pdf>.
4. Constance L. Hays, *Martha Stewart's Sentence: The Overview*, N.Y. TIMES (July 17, 2004), *available at* <http://www.nytimes.com/2004/07/17/business/martha-stewart-s-sentence-overview-5-months-jail-stewart-vows-ll-be-back.html>; *Stewart Begins Serving Jail Term*, NBC NEWS (Oct. 8, 2004), *available at* http://www.nbcnews.com/id/6205192/ns/business-corporate_scandals/t/stewart-begins-serving-jail-term/#.UwdgmIXVdqA.
5. Larry Kudlow, *A Second Chance*, NATIONAL REVIEW ONLINE (Dec. 10, 2004), *available at* <http://www.nationalreview.com/articles/213102/second-chance/larry-kudlow>.
6. Press Release, U.S. Securities and Exchange Commission, Martha Stewart and Peter Bacanovic Settle SEC's Insider Trading Charges (Aug. 7, 2006), *available at* <http://www.sec.gov/news/press/2006/2006-134.htm>.
7. *Martha Stewart Back at Work*, NBC NEWS (March 5, 2005), *available at* http://www.nbcnews.com/id/7078053/ns/business-us_business/t/martha-stewart-back-work/#.Uwdkx4XVdqA ("A beaming Martha Stewart returned to work on Monday, blowing a kiss and waving as she arrived to speak to cheering employees.").
8. *Martha Stewart Profit Up*, N.Y. TIMES (March 1, 2007), *available at* <http://www.nytimes.com/2007/03/01/business/media/01martha.html>.
9. Lauren Pollack, *Martha Stewart Rejoins Board of Namesake Company*, MARKETWATCH (Sept. 26, 2011), *available at* <http://www.marketwatch.com/story/martha-stewart-rejoins-board-of-namesake-company-2011-09-26-13480>.
10. Kristin Jones, *Martha Stewart Named Nonexecutive Chairman*, WALL ST. J. (May 23, 2012), *available at* <http://online.wsj.com/news/articles/SB10001424052702304707604577422301821671144>.
11. Chris Mortensen, Sal Paolantonio & Len Pasquarelli, *Vick, Eagles Agree to 2-Year Deal*, ESPN (Aug. 14, 2009), *available at* <http://sports.espn.go.com/nfl/news/story?id=4397938>.
12. Peter King, *Week 16 in the NFL Had a Little Bit of Everything*, SPORTS ILLUSTRATED (Dec. 27, 2010), *available at* http://sportsillustrated.cnn.com/2010/writers/peter_king/12/26/week-16/1.html (reporting Lurie's description of his conversation with President Obama).
13. Perry Bacon Jr., *Obama Weighs In On Michael Vick, and Other Cultural Issues*, WASH. POST (Dec. 28, 2010), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/27/AR2010122704579.html>.
14. Miami Task Force Hearing Transcript Day 1 at 36, *available at* www.nacdl.org/restoration/roadmapreport [hereinafter Miami].
15. Chicago Task Force Hearing Transcript Day 1 at 144-61, *available at* www.nacdl.org/restoration/roadmapreport [hereinafter Chicago].
16. San Francisco Task Force Hearing Transcript Day 2 at 382, *available at* www.nacdl.org/restoration/roadmapreport [hereinafter SF]. Although he can take a tour of the White House, Mr. C. cannot enter his own business's hospitality units because they are at an airport.

17. See Miami Day 2 at 488-90; Telephone conversation with Brenda Aldana (Feb. 21, 2014) for further details on Miami hearing testimony (notes on file with NACDL). In 2011, Florida decoupled civil rights restoration from employment restrictions in state jobs that require certification and state occupational and professional licenses. Before that, individuals needed the governor to act to lift these restrictions. However, Florida remains at the bottom of the barrel in terms of voting rights, with long waiting periods before a person can even apply for the pardon or restoration of rights to be granted to regain civil rights lost as a result of a felony conviction. Floridians must also get such restoration to deal with barriers in many non-state jobs and licensing, such as a law license. Margaret Love, NACDL Restoration of Rights Project, NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS, Chart #5 (*Consideration of Criminal Record in Licensing and Employment*), available at https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Consideration_of_Criminal_Record_in_Licensing_And_Employment.pdf [hereinafter Love, NACDL Rights Restoration Project].

18. Testimony of Steve Zeidman, NYC Day 1 at 28; see also *Smith v. Bank of Am. Corp.*, 865 F. Supp. 2d 298 (E.D.N.Y. 2012) (New York adjournment in contemplation of dismissal in shoplifting case held disqualifying, notwithstanding state laws barring unreasonable discrimination based on criminal record) and note 182, *infra*.

19. NAT'L INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, available at <http://www.abacollateralconsequences.org>.

20. See note 2, *supra*.

21. *Drug and Crime Facts*, BUREAU OF JUSTICE STATISTICS, available at <http://www.bjs.gov/content/dec/enforce.cfm> ("In 2007, according to the UCR, law enforcement agencies nationwide made an estimated 14 million arrests for all criminal infractions except traffic violations."); Testimony of Al Blumstein, Cleveland Task Force Hearing Transcript Day 2 at 336, available at www.nacdl.org/restoration/roadmapreport [hereinafter Cleveland].

22. SARAH SHANNON ET AL., GROWTH IN THE U.S. EX-FELON AND EX-PRISONER POPULATION, 1948-2010 at 12 and figure 4 (April 18, 2011), available at <http://csgjusticecenter.org/nrrc/publications/growth-in-the-u-s-ex-felon-and-ex-prisoner-population-1948-to-2010-2/>.

23. *U.S. State and Federal Prison Population, 1925-2012*, THE SENTENCING PROJECT, available at <http://www.sentencingproject.org/template/page.cfm?id=107>. While rates of those in prison have fallen for three years beginning in 2009, those rates do not count incarceration in local jails. Further, 15,035 of the 27,770 drop in prisoners from 2011 to 2012 were in California, where the Public Safety Realignment policy moved "nonserious, nonsex, nonviolent offenders" from state prisons to local jails. *U.S. Prison Population Declined for Third Consecutive Year During 2012*, BUREAU OF JUSTICE STATISTICS (July 25, 2013), available at <http://www.bjs.gov/content/pub/press/p12acpr.cfm>.

24. ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST (10th ed.), available at http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf; see also JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, CTR. FOR ECON. AND POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION (June 2010) ("The United States has the highest incarceration rate in the world and also the highest rate in its history, with about 753 people per 100,000 in prison or jail in 2008.").

25. *Genesis* 4:14-16 ("Behold, You have driven me this day from the face of the ground; and from Your face I will be hidden, and I will be a vagrant and a wanderer on the earth, and whoever finds me will kill me.' And the Lord said unto him, 'Therefore whosoever slayeth Cain, vengeance shall be taken on him sevenfold.' And the Lord set a mark upon Cain, lest any finding him should kill him. Then Cain went out from the presence of the Lord. . . .").

26. 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>; Stan Alcorn, 'Check Yes or No': The Hurdles of Job Hunting with a Criminal Past, NATIONAL PUBLIC RADIO (Jan. 31, 2013), available at <http://www.npr.org/2013/01/31/170766202/-check-yes-or-no-the-hurdles-of-employment-with-criminal-past>; Stan Alcorn, *Job Seekers with Criminal Record Face Higher Hurdles*, WNYC NEWS (Jan. 17, 2013), available at <http://www.wnyc.org/story/262814-blog-job-seekers-with-criminal-record-face-higher-hurdles/>.

27. AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS at 8-9 (2013), available at <https://www.aclu.org/criminal-law-reform/war-marijuana-black-and-white-report> [hereinafter ACLU Marijuana Report]; see also ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASSOC. CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009).

28. See Recommendation VIII of this report, discussing criminal records reform.

29. ACLU Marijuana Report at 37 (of the 1,717,064 drug arrests in the United States in 2010, 889,133, or 52 percent were for marijuana, and 784,021, or 46 percent were for marijuana possession).

30. ACLU Marijuana Report at 9.

31. TANYA COKE, CRIMINAL JUSTICE IN THE 21ST CENTURY: ELIMINATING RACIAL AND ETHNIC DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 22 (2013 report co-sponsored by NACDL), available at <https://www.nacdl.org/reports/eliminatedisparity/>.

32. WE ARE ALL CRIMINALS, available at <http://www.weareallcriminals.com/about/>.

33. Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS OF THE AMER. ACAD. 195, 199 (2009).

34. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 960 (2003).

A Roadmap to Restore Rights and Status After Arrest or Conviction

35. Robert Brame, Shawn D. Bushway, Ray Paternoster & Michael G. Turner, *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 1 CRIME & DELINQUENCY (Jan. 2014).
36. Testimony of Jeremy Travis, New York City Task Force Hearing Transcript Day 1 at 79, available at www.nacdl.org/restoration/roadmapreport [hereinafter NYC].
37. Testimony of Vincent Schiraldi, NYC Day 3 at 28.
38. See Miranda Boone, *Judicial Rehabilitation in the Netherlands: Balancing Between Safety and Privacy*, 3 EUROPEAN J. PROBATION 63, 66-68 (2011) (describing how the Netherlands strictly limits access to criminal records and allows private employers only to review a “Conduct Certificate,” which has limited information about a person’s criminal history); Martine Herzog-Evans, *Judicial Rehabilitation in France: Helping with the Desisting Process and Acknowledging Achieved Desistance*, 3 EUROPEAN J. PROBATION 4, 7-8 (2011) (describing how French criminal records are divided into three “bulletins,” with access to each bulletin strictly limited); Christine Morgenstern, *Judicial Rehabilitation in Germany — The Use of Criminal Records and the Removal of Recorded Convictions*, 1 EUROPEAN J. PROBATION 1, 25-27 (2011) (describing how the German “registry,” which contains a person’s comprehensive criminal history, is not available to private individuals and how a “certificate of conduct” can be requested by employers but includes only limited criminal history information); James B. Jacobs & Elena Larrauri, *Are Criminal Convictions a Public Matter? The USA and Spain*, 14 PUNISHMENT & SOCIETY 3, 11 (2012) (noting how in Spain, “[t]he vast majority of penal judgments, unless they involve a notorious case widely reported in the media, never become known”); see also Testimony of James Jacobs, NYC Day 3 at 160 (describing how in Spain, trials are open to the public but the judgment itself is not announced in open court and published opinions are stripped of identifying information so that “they have no connection to the defendant”).
39. NYC Day 3 at 161.
40. Suzanne Daley, *On Its Own, Europe Backs Web Privacy Fights*, N.Y. TIMES (August 9, 2011), available at http://www.nytimes.com/2011/08/10/world/europe/10spain.html?pagewanted=all&_r=0.
41. Miami Day 1 at 62.
42. 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); cf. WENDY ERISMAN & JEANNE BAYER CONTARDO, INST. FOR HIGHER EDUC. POLICY, LEARNING TO REDUCE RECIDIVISM: A 50-STATE ANALYSIS OF POSTSECONDARY CORRECTIONAL EDUCATION 5 (November 2005), available at <http://www.ihep.org/assets/files/publications/g-l/LearningReduceRecidivism.pdf> (finding “a correlation between educational attainment and recidivism” and suggesting that correctional education programs provide individuals with more opportunities for employment after release from prison).
43. SF Day 1 at 148.
44. Miami Day 1 at 28.
45. Miami Day 1 at 95-96.
46. OHIO CMTY. CORR. ASS’N, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION FUNDED COMMUNITY CORRECTIONS FACT SHEET (Feb. 6, 2013), available at http://www.occaonline.org/pdf/fact_sheet/Fiscal%20Year%202012%20Fact%20Sheet%20Combined%20.pdf.
47. CHRISTIAN HENRICHSON & RUTH DELANEY, CTR. ON SENTENCING AND CORR., THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 8, figure 3 (July 20, 2012), available at http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf. This study included “prison costs outside the corrections budget [that] fall under three categories: (1) costs that are centralized for administrative purposes, such as employee benefits and capital costs; (2) inmate services funded through other agencies, such as education and training programs; and (3) the cost of underfunded pension and retiree health care plans.” *Id.* at 3. The full price of prisons to taxpayers — including costs that fell outside the corrections budgets — was \$39 billion, \$5.4 billion more than the states’ aggregate corrections department spending, which still totaled a staggering \$33.5 billion. *Id.* at 6.
48. Remarks as Prepared for Delivery by Deputy Attorney General James Cole at the New York State Bar Association Annual Meeting, available at <http://www.justice.gov/iso/opa/dag/speeches/2014/dag-speech-140130.html>.
49. See OFFICE OF THE DEPUTY MAYOR FOR PUB. SAFETY, CITY OF PHILADELPHIA, ECONOMIC BENEFITS OF EMPLOYING FORMERLY INCARCERATED INDIVIDUALS IN PHILADELPHIA (September 2011), available at http://economyleague.org/files/ExOffenders_-_Full_Report_FINAL_revised.pdf; MAYORAL POLICY CAUCUS ON PRISONER REENTRY, REBUILDING LIVES, RESTORING HOPE STRENGTHENING COMMUNITIES: BREAKING THE CYCLE OF INCARCERATION AND BUILDING BRIGHTER FUTURES IN CHICAGO 4 (Jan. 2006), available at <http://www.nelp.org/page/-/SCLP/2011/ChicagoReportofMayoralCaucusonReentry.pdf?nocdn=1>.
50. SF Day 1 at 155. Mr. Davis was interim city manager and chief of police for the city of East Palo Alto when he testified at the Task Force’s San Francisco hearings. In November 2013, Davis was appointed director of the Office of Community Oriented Policing Services (COPS), part of the U.S. Department of Justice. See *Meet the Director*, COMMUNITY ORIENTED POLICING SERVICES, U.S. DEPARTMENT OF JUSTICE, available at <http://www.cops.usdoj.gov/default.asp?Item=2305>.

51. SF Day 1 at 153-56. Davis did not claim that the re-entry center caused these results.

52. SF Day 1 at 155-56, 159.

53. NYC Day 3 at 19.

54. Cleveland Day 2 at 382.

55. Cleveland Day 2 at 388.

56. Cleveland Day 2 at 386-87; *see also* OHIO REV. CODE ANN. §§ 2961.21-.24 (Certificates are available to eligible individuals who complete various programs and have good behavior while incarcerated or on supervision.). Importantly, issuance of a Certificate “constitutes a rebuttable presumption that the person’s criminal convictions are insufficient evidence that the person is unfit for the license or certification in question.” OHIO REV. CODE ANN. § 2961.23.

57. David Willoughby, *ODRC Issues First ‘Certificates of Achievement and Employability’*, THE EXAMINER (July 15, 2012), *available at* <http://www.examiner.com/article/odrc-issues-first-certificates-of-achievement-and-employability>.

58. *See* ILLINOIS PUBLIC ACT 96-0593, originally signed in 2009 and amended in 2012 (20 ILCS 5000).

59. ILL. CRIMINAL JUSTICE INFO. AUTH., INVENTORYING EMPLOYMENT RESTRICTIONS TASK FORCE FINAL REPORT 5-7 (June 28, 2013), *available at* <http://www.icjia.org/IERTF2013>.

60. U.S. CENSUS, 2011 PUBLIC EMPLOYMENT AND PAYROLL DATA, ILLINOIS STATE GOVERNMENT, *available at* <http://www2.census.gov/govs/apes/11stil.txt>.

61. *See* ILL. DEP’T OF EMP’T SEC., RE-ENTRY EMPLOYMENT SERVICES PROGRAM: REDUCING RECIDIVISM THROUGH EMPLOYMENT, *available at* <http://www.ides.illinois.gov/page.aspx?item=965>.

62. Chicago Day 1 at 96.

63. *See, e.g.*, Letter from Attorney General Eric Holder to Vermont State Attorney General, April 18, 2011, *available at* <http://onlawyering.com/wp-content/uploads/2011/05/VT-Attorney-General-Sorrell.0001-1.pdf>.

64. *Attorney General Eric Holder Speaks at the National Second Chance Act Conference*, U.S. DEP’T OF JUSTICE (May 22, 2012), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120522.html>.

65. Chicago Day 1 at 84-85 (“Does expungement allow individuals to gain employment, housing, child custody? It almost certainly does, but how often does it, and how effectively does it allow that? We don’t know. We could look at something like criminal case sealing, which is another important remedy here in Illinois as well as elsewhere, and say does it, you know, facilitate productive participation in society. Again, we’re not sure.”).

66. Cleveland Day 2 at 366. Mark Myrent, research director for the Illinois Criminal Justice Information Authority, similarly testified that “the laws that are passed oftentimes are reactionary. Th[is] may be . . . the result of a particular incident where someone was harmed, and then a law gets passed that these people need to be looked at more closely prior to hiring.” Chicago Day 1 at 114-15. There is, however, hope for change. For example, under a Colorado law enacted in 2013, the General Assembly must determine “[w]hether the agency through its licensing or certification process imposes any disqualifications on applicants based on past criminal history and, if so, whether the disqualifications serve public safety or commercial or consumer protection interests.” COLO. REV. STAT. § 24-34-104(9)(b)(VIII.5). To implement this program, the department of regulatory agencies must prepare an analysis including “data on the number of licenses or certifications that were denied, revoked, or suspended based on a disqualification and the basis for the disqualification.” *Id.* Any proposal to regulate a new profession or occupation must include “[a] description of any anticipated disqualifications on an applicant for licensure, certification, relicensure, or recertification based on criminal history and how the disqualifications serve public safety or commercial or consumer protection interests.” COLO. REV. STAT. § 24-34-104.1(2)(f); *see also id.* at (4)(b)(IV) (factors to be considered in deciding whether regulation is necessary include “Whether the imposition of any disqualifications . . . based on criminal history serves public safety or commercial or consumer protection interests”).

67. SF Day 1 at 193, 210 (discussing individuals convicted of sex offenses in California and non-graduation of registry); *see also* Testimony of Pamela Lawrence, public housing revitalization specialist and grant manager at the Department of Housing and Urban Development, Washington, DC, Task Force Hearing Transcript Day 2 at 26, *available at* www.nacdl.org/restoration/roadmapreport [hereinafter DC] (“We’re challenged. . . by the lack of housing-specific data, trend analysis, and research, and we welcome any information you can provide around housing barriers, recidivism, re-entry, and housing models that are working.”).

68. Cleveland Day 2 at 344; *see also* 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>; Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQUENCY 64 (2007) (analyzing juvenile and adult aggregate data for 670 males born in 1942 and finding that the risk of these males recidivating approximates that of a person without a criminal record after seven years); Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL’Y 483 (2006) (studying Philadelphia police records to conclude that six to seven years after an initial arrest, re-arrest risk of individuals studied was approximately the same as that of someone who has never been arrested).

69. DC Day 2 at 7.

70. See iCORI, MASSACHUSETTS DEPARTMENT OF CRIMINAL JUSTICE INFORMATION SERVICES, *available at* <https://icori.chs.state.ma.us/icori/ext/global/landing.action?page=1&bod=1394836595081&m=presentLanding>.

71. Chicago Day 1 at 95.

72. NYC Day 3 at 29-30.

73. Miami Day 1 at 100.

74. Chicago Day 1 at 89.

75. Alfred Blumstein & Kiminori Nakamura, *Paying a Price, Long After the Crime*, N.Y. TIMES (Jan. 9, 2012), *available at* http://www.nytimes.com/2012/01/10/opinion/paying-a-price-long-after-the-crime.html?_r=0.

76. Miami Day 1 at 72, 115. Norwood went on to describe how her organization had four job fairs last year. “Two, I call[ed] an ‘offender job fair’; not one employer showed up. The other two were community job fairs. I had more employers than I had chairs for.” Miami Day 1 at 115.

77. “Language has been one of the first battlegrounds” among disabled people in objections to the way they are portrayed in media and popular culture. “[P]erson with a disability’ (or ‘who is deaf,’ or ‘who has cognitive disabilities’)” is preferable “since it emphasizes the individual before the condition.” Joseph P. Shapiro, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 32-33 (1993); *see also* Paul Colford, *‘Illegal Immigrant’ No More*, ASSOCIATED PRESS: THE DEFINITIVE SOURCE (April 2013), *available at* <http://blog.ap.org/2013/04/02/illegal-immigrant-no-more>.

78. Margaret Colgate Love, *What’s in a Name? A Lot, When the Name is “Felon,”* THE CRIME REPORT (March 13, 2012), *available at* <http://www.thecrimereport.org/viewpoints/2012-03-whats-in-a-name-a-lot-when-the-name-is-felon>; *see also* Testimony of Jeremy Travis, NYC Day 1 at 94 (“We have language problems that get in the way a lot. We label people. . . . [T]he use of the words inmate or offender. . . becomes problematic. I was very careful a moment ago to say incarcerated individual. I’m finding myself increasingly just to make a point to use the words our fellow citizens who are in prison. So there are messaging issues that are really powerful. There are messaging opportunities that are really powerful.”). This report uses words like “offender” or “felon” only in quotes from witnesses or sources.

79. See VA. CODE ANN. § 18.2-471; § 47.1-4; *see also* NATIONAL INVENTORY OF COLLATERAL CONSEQUENCES, *available at* <http://www.abacollateralconsequences.org> (showing 146 mandatory consequences relating to employment in search of Virginia database).

80. CIVIL IMPACTS OF CRIMINAL CONVICTIONS UNDER OHIO LAW, *available at* <http://civiccoho.org/> (search of “mandatory” on Feb. 20, 2014, results in 533 consequences).

81. See, e.g., Letter from Attorney General Eric Holder to Vermont state Attorney General, April 18, 2011, *available at* <http://onlawyering.com/wp-content/uploads/2011/05/VT-Attorney-General-Sorrell.0001-1.pdf>.

82. Chicago Day 1 at 142.

83. UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT § 10 (2010), *available at* http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf [hereinafter UCCCA].

84. MODEL PENAL CODE: SENTENCING § 6x.04(b) (Council Draft No. 4, Sept. 25, 2013) (on file with NACDL) [hereinafter MPC Sept. 2013 Draft].

85. N.Y. Correct. Law § 702. See Love, NACDL Rights Restoration Project (New York profile) *available at* https://nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_ny.pdf.

86. The statute has a number of exceptions for jobs in education, law enforcement, and other sensitive areas. See Love, NACDL Rights Restoration Project, Colorado profile, *available at* https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_co.pdf.

87. Testimony of Patricia Warth, NYC Day 2 at 41-48; Testimony of Roberta Meyers, NYC Day 1 at 11; *see also* N.Y. CORRECTION LAW §§ 701(1) and 703-a(1), which both state that a certificate may be granted to “relieve an eligible offender of any forfeiture or disability, or to remove any bar to employment, automatically imposed by law by reason of his conviction.”

88. Cleveland, Day 2 at 523-24.

89. *Felony Disenfranchisement*, THE SENTENCING PROJECT, *available at* <http://www.sentencingproject.org/template/page.cfm?id=133>.

90. Attorney General Eric Holder Delivers Remarks on Criminal Justice Reform at Georgetown University Law Center, U.S. DEP’T OF JUSTICE (Feb. 11, 2014), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140211.html>; *see also* CHRISTOPHER UGGEN, SARAH SHANNON & JEFF MANZA, THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 at 2 (2012), *available at* http://www.sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.

91. SF Day 1 at 10-11; *see also* Testimony of Lamont Carey, spoken word artist, filmmaker, and author, DC Day 2 at 303 (“So for me, once I realized that I had the power to vote, that immediately made me feel more powerful. I began to express myself verbally and when I go into that booth.”); Testimony of Wayne Rawlins, community justice and economic development consultant, Miami Day 1 at 28-29 (“You know what is a fundamental [right] to an American? Power of the vote. And when you take that away from a person, you’ve pretty much left them hopeless.”).

92. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012) (noting the decline of ‘civil death’ during the mid-twentieth century as policy makers began to recognize that “convicted persons eventually re-join society”); ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED

PERSONS, Standard 19-2.6(a) (3d ed., June 2004), *available at* (“Jurisdictions should not impose the following collateral sanctions: (a) deprivation of the right to vote, except during actual confinement”).

93. AM. CIVIL LIBERTIES UNION, *OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 1* (May 2006), *available at* <http://www.procon.org/sourcefiles/aclu-felon-voting-report-2006.pdf>; *see also* Testimony of Julie Ebenstein, policy and advocacy counsel, ACLU of Florida, Miami Day 2 at 379; *cf.* Aleks Kajstura & Peter Wagner, *Importing Constituents: Prisoners and Political Clout in California*, PRISON POLICY INITIATIVE (March 2010), *available at* <http://www.prisonersofthecensus.org/ca/report.html> (noting that prisoners are counted for census purposes, regardless of their ability to vote).

94. *See, e.g.*, 18 U.S.C. § 922(g); CAL. PENAL CODE § 29800. Some misdemeanor convictions, most notably those meeting the definition of a crime of domestic violence, also result in a loss of firearms rights. *See, e.g.*, 18 U.S.C.A. § 921(a)(20)(A); 11 DEL. CODE § 1448 (loss of rights for conviction for “crime of violence involving physical injury to another”).

95. 18 U.S.C. §§ 922(g), 924(a)(2).

96. *See, e.g.*, *Blackwell v. Haslam*, 2013 WL 3379364 (Tenn. Ct. App. 2013) (remanding for consideration whether Georgia pardon restoring firearms privileges to individual with drug conviction should be given full faith and credit in Tennessee, in light of new Tennessee law authorizing expungement of pardoned drug convictions); *see also* *Blackwell v. Haslam*, 2012 Tenn. App. LEXIS 23 (Tenn. Ct. App. 2012).

97. Love, NACDL Restoration of Rights Project at Chart #2 (*State Law Relief from Federal Firearms Act Disabilities*), *available at* <https://www.nacdl.org/ResourceCenter.aspx?id=25277&libID=25246>.

98. NYC Day 3 at 155. For a full explanation of the various issues relating to the loss of firearms rights and avenues for restoration of those rights, *see* MARGARET COLGATE LOVE, JENNY ROBERTS & CECILIA KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* §§ 2:29-37 & Appendix A (NACDL/West 2013).

99. Cleveland Day 1 at 173-75.

100. Cleveland Day 1 at 208.

101. OFFICE OF THE DEPUTY MAYOR FOR PUB. SAFETY, CITY OF PHILADELPHIA, *ECONOMIC BENEFITS OF EMPLOYING FORMERLY INCARCERATED INDIVIDUALS IN PHILADELPHIA 5* (Sept. 2011), *available at* http://economyleague.org/files/ExOffenders_-_Full_Report_FINAL_revised.pdf (“Connecting the formerly incarcerated to employment has been shown to reduce recidivism and results in three different types of positive economic impacts: (1) *increased earnings*, (2) *increased tax revenues* from employment, and (3) *avoided costs* in the form of avoided spending on criminal justice agencies, social services, and government cash transfers, as well as prevented victim costs.”).

102. NYC Day 2 at 263.

103. *See* SOC’Y FOR HUMAN RES. MGMT., *BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3* (2010), *available at* <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx>. (describing survey where 92 percent of responding employers performed criminal background checks on some or all job candidates, and 73 percent performed checks on all job candidates).

104. *Gregory v. Litton Systems*, 472 F.2d 631, 632 (9th Cir. 1972); *Green v. Missouri Pac. R. Co.*, 523 F.2d 1290 (8th Cir. 1975).

105. Love, NACDL Restoration of Rights Project at Chart #5 (*Consideration of Criminal Record in Licensing and Employment*), *available at* https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Consideration_of_Criminal_Record_in_Licensing_And_Employment.pdf.

106. UCCCA, § 8.

107. Chicago Day 1 at 110-11.

108. EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. §§ 2000e et seq., No. 915.002 (April 25, 2012), *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm [hereinafter EEOC GUIDELINES]. The EEOC Guidance is discussed in LOVE, ROBERTS & KLINGELE, *COLLATERAL CONSEQUENCES* § 6:5.

109. LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, THE LEGAL ACTION CTR., & NAT’L WORKRIGHTS INST., *BEST PRACTICE STANDARDS: THE PROPER USE OF CRIMINAL RECORDS IN HIRING* (2013), *available at* <http://www.lawyerscommittee.org/newsroom/publications?id=0037>.

110. N.Y. CORRECTION LAW § 753(2).

111. NAT’L EMP’T LAW PROJECT, *STATEWIDE BAN THE BOX: REDUCING UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS* (Feb. 2014), *available at* <http://www.nelp.org/page/-/SCLP/ModelStateHiringInitiatives.pdf?nocdn=1>; *see also* LOVE, ROBERTS & KLINGELE, *COLLATERAL CONSEQUENCES* § 6:17.

112. EEOC GUIDELINES.

113. Letter from Ronald L. Davis, chief of police, city of East Palo Alto, California, to Roger Dickinson (March 23, 2012) (on file with NACDL).

114. NYC Day 3 at 25-26.

115. *Ban the Box: Some Companies Stop Asking Job Applicants About Criminal History*, NPR (Nov. 5, 2013), *available at* <http://www.npr.org/templates/story/story.php?storyId=243213641>.

116. *See generally* Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545 (2005).

117. Miami Day 1 at 232.

118. Chicago Day 2 at 330, 290.

119. 42 U.S.C. §§ 13663 & 1437n.

120. 24 C.F.R. § 960.204(a).

121. 24 C.F.R. § 982.553.

122. *HUD v. Rucker*, 535 U.S. 125 (2002) (upholding HUD's "one strike policy").

123. NYC Day 1 at 15.

124. FORMERLY INCARCERATED & CONVICTED PEOPLE'S MOVEMENT, COMMUNITIES, EVICTIONS, AND CRIMINAL CONVICTIONS (April 18, 2013), available at <http://ficmpmovement.wordpress.com/2013/04/18/new-report-on-public-housing-communities-evictions-and-criminal-convictions/>.

125. Letter from Shaun Donovan, Secretary of Housing and Urban Development, to Public Housing Authority executive directors (June 17, 2011), available at <http://nhlp.org/files/Rentry%20letter%20from%20Donovan%20to%20PHAs%206-17-11.pdf> (reminding public authorities of the broad discretion available when considering admissions); Letter from Shaun Donovan, Secretary of Housing and Urban Development, to private owners of HUD-assisted properties (March 14, 2012), available at <http://nhlp.org/files/HUD%20Letter%203.14.12.pdf> (calling on owners "to seek a balance between allowing ex-offenders to reunite with families that live in HUD subsidized housing, and ensuring the safety of all residents").

126. DC Day 2 at 19-20.

127. Testimony of Pamela Lawrence, public housing revitalization specialist and grant manager at the Department of Housing and Urban Development, DC Day 2 at 22; see also Testimony of Linda Evans, staff attorney with Legal Services for Prisoners with Children, SF Day 1 at 41-42 (describing "Moms Program" and "Pops Program" run by Oakland, public housing authority that gave public housing to men and women otherwise ineligible due to drug-related felony convictions).

128. David T. Baker, *HANO Adopts New Criminal Background Policy*, LA. WEEKLY (May 28, 2013), available at <http://www.louisianaweekly.com/hano-adopts-new-criminal-background-policy>.

129. Mireya Navarro, *Ban on Former Inmates in Public Housing is Eased*, N.Y. TIMES (Nov. 14, 2013), available at http://www.nytimes.com/2013/11/15/nyregion/ban-on-former-inmates-in-public-housing-is-eased.html?ref=todayspaper&_r=0.

130. SF Day 1 at 88-89.

131. SF Day 1 at 90-91.

132. SF Day 1 at 105.

133. SF Day 1 at 92.

134. DC Day 2 at 231-32.

135. NYC Day 3 at 26-27.

136. DC Day 2 at 228.

137. Robert L. Ehrlich, Jr., *Obama's Unpardonable Neglect of Clemency*, THE BALTIMORE SUN (Jan. 13, 2013), available at <http://www.baltimoresun.com/news/opinion/bs-ed-ehrllich-pardons-20130113,0,5517792.column>.

138. *The Quality of Mercy, Strained*, Editorial, N.Y. TIMES (Jan. 5, 2013), available at http://www.nytimes.com/2013/01/06/opinion/sunday/the-quality-of-mercy-strained.html?ref=opinion&_r=0.

139. Margaret Colgate Love, *Governor's Pardon Power Used Too Rarely*, S.F. GATE (Dec. 28, 2012), available at <http://www.sfgate.com/opinion/openforum/article/Governor-s-pardon-power-used-too-rarely-4153130.php> (criticizing California Gov. Jerry Brown).

140. Bob Ortega, *Rarely Granted Clemency: Governor Seldom Uses Sentencing 'Safety Valve'*, THE ARIZONA REPUBLIC (May 12, 2012), available at http://www.azcentral.com/arizonarepublic/news/articles/2012/04/12/20120412arizona-prison-clemency.html?nclick_check=1.

141. The Obama administration recently called upon the bar to help identify individuals with low level, non-violent convictions serving unduly harsh sentences who should be considered for clemency. While this is a positive development from a Justice Department that has shown great reluctance to recommend any type of clemency, the commutation of a sentence will not ameliorate the collateral consequences that individuals will face when released from prison. Further, the administration specifically distinguished this commutation initiative from the granting of pardons or forgiveness, which is the type of federal action that would truly allow individuals with low-level convictions to move on with their lives. See *Remarks as Prepared for Delivery by Deputy Attorney General James Cole at the New York State Bar Association Annual Meeting*, U.S. DEP'T OF JUSTICE, available at <http://www.justice.gov/iso/opa/dag/speeches/2014/dag-speech-140130.html>.

142. Chicago Day 1 at 59.

143. Chicago Day 2 at 430-31.

144. Testimony of John Schomberg, Chicago Day 2 at 192-93.

145. DC Day 2 at 86.

146. DC Day 2 at 87.

147. DC Day 2 at 96-97.

148. NYC Day 2 at 163.

149. See also LOVE, ROBERTS & KLINGELE, COLLATERAL CONSEQUENCES § 7:23.

150. UCCCA § 11.

151. See testimony of Judge Paul Biebel, Beth Johnson, and Darrell Langdon at Chicago Day 1; see also Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L. J. 753, 760-764 (2011).

152. See, e.g., testimony of Federal District Court Judge Dan Polster, Cleveland Day 2 at 501-07.

153. MPC, Sept. 2013 draft, § 6x.06.

154. Chicago Day 1 at 34-35.

155. Chicago Day 1 at 47.

156. NYC Day 2 at 63. Jesse Wiese, who has a criminal record and recently graduated from law school, spoke of the importance of having a ceremony when individuals are beginning the re-entry process — as important to rehabilitation, as a recognition of violation of trust, serving penance, and welcoming back and restoring membership. NYC Day 2 at 157.

157. See U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 5 (Aug. 2013) available at <http://www.justice.gov/ag/smart-on-crime.pdf> (stating how “the consequences of a criminal conviction can remain long after someone has served his or her sentence . . . , making a proper transition into society difficult” and recommending that “[i]f the rules imposing collateral consequences are found to be unduly burdensome and not serving a public safety purpose, they should be narrowly tailored or eliminated.”).

158. Attorney General Eric Holder Delivers Remarks at the National Association of Women Judges Midyear Meeting and Leadership Conference, U.S. DEP'T OF JUSTICE (March 14, 2014), available at <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140314.html>.

159. National Reentry Resource Center — Federal Interagency Reentry Council, JUSTICE CENTER, <http://www.nationalreentryresourcecenter.org/reentry-council>.

160. DC Day 2 at 8.

161. See Letter from Shaun Donovan, secretary of Housing and Urban Development, to Public Housing Authority executive directors (June 17, 2011), available at <http://nhlp.org/files/Rentry%20letter%20from%20Donovan%20to%20PHAs%206-17-11.pdf> (reminding public authorities of the broad discretion available when considering admissions); Letter from Shaun Donovan, secretary of Housing and Urban Development, to private owners of HUD-assisted properties (March 14, 2012), available at <http://nhlp.org/files/HUD%20Letter%203.14.12.pdf> (calling on owners “to seek a balance between allowing ex-offenders to reunite with families that live in HUD subsidized housing, and ensuring the safety of all residents”); EEOC GUIDANCE.

162. As of January 2014, President Obama had granted 52 pardons and denied 1,487 applications. See *Clemency Statistics*, U.S. DEP'T. OF JUSTICE, <http://www.justice.gov/pardon/statistics.htm>.

163. DC Day 2 at 232.

164. DC Day 3 at 322-23.

165. NYC Day 3 at 46-7.

166. Cleveland Day 1 at 135.

167. NYC Day 2 at 47.

168. NYC Day 3 at 45-46.

169. DC Day 1 at 74-75.

170. DC Day 1 at 75-76.

171. Chicago Day 1 at 16-17.

172. LOVE, ROBERTS & KLINGELE, COLLATERAL CONSEQUENCES § 7:22.

173. NYC Day 1 at 24 (noting how “the crisis of the consequences of convictions on people’s lives rarely seems to lead to discussions about the entry point of the problem, the underlying conviction itself, and that inquiry is the how and why of the underlying conviction.”).

174. Love, NACDL Restoration of Rights Project, Chart #4 (*Judicial Expungement, Sealing, and Set Aside*), available at http://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Judicial_Expungement_Sealing_and_Set-Aside.pdf.

175. Chicago Day 1 at 60.

176. COLO. REV. STAT. § 18-1.3-101; see also Love, NACDL Restoration of Rights Project, Colorado profile, available at https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_co.pdf.

177. COLO. REV. STAT. § 18-1.3-103.5.

178. *Id.*

179. *In re Salazar-Regino*, 23 I. & N. Dec. 2223, 235 (B.I.A. 2002).

180. *Uritsky v. Gonzales*, 399 F.3d 728 (6th Cir. 2005).

181. See, e.g., MO. REV. STAT. § 610.140(7) (allowing expunged convictions to be used to enhance subsequent sentences, and to be given predicate effect).

182. Testimony of Doug Wigdor, NYC Day 3 at 146-47; see also 12 U.S.C.A. § 1829.

183. *Smith v. Bank of Am. Corp.*, 865 F. Supp. 2d 298 (E.D.N.Y. 2012) (New York ACD in shoplifting case held disqualifying, notwithstanding state laws barring unreasonable discrimination based on criminal record). Commenting on “New York’s much-admired

adjournment in contemplation of dismissal (“ACD”) program,” Judge Jack B. Weinstein noted that:

“The ACD [adjournment in contemplation of dismissal] process is designed to avoid persons charged with minor offenses being permanently designated as criminals. It provides a second chance for a lawful life. The federal statute mandated the defendant bank’s refusal to hire plaintiff because of a shoplifting prosecution that was nullified by an ACD. Otherwise, it would have employed her. The federal statute and its administration should be revised to bring them into line with the highly laudable state policy.”

865F. Supp. 2d at 300.

184. Chicago Day 2 at 533.

185. Miami Day 1 at 113-15.

186. See Testimony of Esta Bigler, NYC Day 2 at 182-83 (“Our results show . . . negligent hiring cases do not occur frequently enough for any employer to be worried about them. So this is the big sell about negligent hiring, that they do not occur, and it is not a reason to discriminate based on criminal records. It certainly should not be the primary reason to conduct background checks by 55 percent of the employers.”).

187. See, e.g., COLO. REV. STAT. § 8-2-201(b) (providing negligent hiring protection for convictions not “directly related” to employment or that have been sealed or pardoned); 730 ILL. COMP. STAT. 5/5-5.5-15(f) (issuing negligent hiring protection where employer relied on certificate of relief from disabilities).

188. *Work Opportunity Tax Credit Amounts*, U.S. DEP’T OF LABOR, available at <http://www.doleta.gov/business/incentives/opptax/benefits.cfm> (listing maximum benefits); *Work Opportunity Tax Credit, Eligible New Hires*, U.S. DEP’T OF LABOR, available at <http://www.doleta.gov/business/incentives/opptax/eligible.cfm> (listing “ex-felons” among eligible new hires).

189. *Highlights of the Federal Bonding Program*, THE FED. BONDING PROGRAM: A U.S. DEP’T OF LABOR INITIATIVE, available at <http://www.bonds4jobs.com/highlights.html>.

190. Chicago Day 1 at 96; ILL. DEP’T OF EMP’T SEC., RE-ENTRY EMPLOYMENT SERVICES PROGRAM: REDUCING RECIDIVISM THROUGH EMPLOYMENT, available at <http://www.ides.illinois.gov/page.aspx?item=965>.

191. NYC Day 2 at 237, 251, 262.

192. Love, NACDL Restoration of Rights Project, Chart #5 (*Consideration of Criminal Record in Licensing and Employment*), available at https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Consideration_of_Criminal_Record_in_Licensing_And_Employment.pdf.

193. See Patricia Warth written testimony submitted to Task Force, posted at www.nacdl.org/restoration/roadmapreport.

194. N.Y. CORRECTION LAW § 752. For other state laws with model multi-factor tests to determine if there is any direct relationship between a conviction and the employment sought, see MINN. STAT. § 364.03 (governing public employment and occupational licensing); VA. CODE ANN. § 54.1-204 (governing applications for “a license, certificate or registration to practice, pursue, or engage in any regulated occupation or profession”).

195. N.Y. EXECUTIVE LAW § 296(15) (“there shall be a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any person, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, or supervising a hiring manager, if after learning about an applicant or employee’s past criminal conviction history, such employer has evaluated the factors set forth in section seven hundred fifty-two of the correction law, and made a reasonable, good faith determination that such factors militate in favor of hire or retention of that applicant or employee.”).

196. N.Y. EXECUTIVE LAW § 296(16).

197. N.Y. CORRECTION LAW § 753.

198. *Know the Law, Employers*, N.Y. DEP’T OF LABOR, available at <http://www.labor.ny.gov/careerservices/ace/employers.shtm> (“All types of criminal records and background checks may contain errors. When you are considering denying employment based on a background check, you should, at a minimum: (1) provide the applicant with a copy of the background check received, and (2) give the applicant an opportunity to identify and correct errors or otherwise explain what is listed on the background check.”). But cf. Testimony of Judy Whiting, NYC Day 2 at 176 (“So not only are background check companies required to make sure their records are accurate and up-to-date, but federal law requires that if an employer is going to use a background check, a commercial background check, in whole or in part to make an employment decision or take an adverse employment action, they have to give the person the background check in advance of doing the deed and give the person a chance to look at the thing . . . but employers almost never do that.”).

199. NYC Day 1 at 18.

200. *EEOC v. BMW Manufacturing Co. Ltd.*, No. 13 Civ. 1583 (D. S.C.), docket no. 1 (Complaint); *EEOC v. Dolgencorp LLC*, No. 13 Civ. 4307 (N. D. Ill.), docket no. 1 (Complaint); see also Tess Stynes, *EEOC Files Suits Against BMW Manufacturing, Dollar General*, WALL ST. J. (June 11, 2013), <http://online.wsj.com/article/BT-CO-20130611-706879.html>; Scott Thurm, *Employment Checks Fuel Race Complaints*, WALL ST. J. (June 12, 2013), available at <http://online.wsj.com/news/articles/SB10001424127887323495604578539283518855020>.

201. See, e.g., D.C. COURTS, *available at* <http://www.dccourts.gov/internet/CCO.jsf>.
202. See, e.g., CORE LOGIC, *available at* <http://www.corelogic.com/>.
203. David Segal, *Mugged by a Mug Shot Online*, N.Y. TIMES (Oct. 5, 2013), *available at* http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html?pagewanted=all&_r=0
204. *Maryland Sex Offender Registry Search*, MD. DEP'T OF PUB. SAFETY & CORR. SERV., *available at* <http://www.dpscs.state.md.us/sorSearch/>.
205. INSTANT CHECKMATE, *available at* <http://www.instantcheckmate.com/?src=GLE&mdm=search&cmp=TAKBS&cnt=SPI&s4=check+criminal+background>.
206. There is a presumed right of access to criminal and civil court records. See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”). However, “the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes” and can “weigh[] the interests advanced by the parties in light of the public interest and the duty of the courts in exercising that power. *Id.* at 598, 602; see also *United States v. Rosenthal*, 763 F.2d 1291 (11th Cir. 1985) (“[W]hile the presumption in favor of common-law right of access must always be kept in mind, trial court may properly balance this right against important competing interests, including whether records are sought for such illegitimate purposes as to *promote public scandal or gain unfair commercial advantage.*”) (emphasis added).
207. LOVE, ROBERTS & KLINGELE, COLLATERAL CONSEQUENCES § 5:5.
208. Testimony of Frank Campbell, DC Day 3 at 222.
209. 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>.
210. *Wanted* report at 5-7.
211. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2010 at 3 (Nov. 2011), *available at* <https://www.ncjrs.gov/pdffiles1/bjs/grants/237253.pdf>.
212. *Wanted* report at 12.
213. NYC Day 3 at 22-23.
214. Chicago Day 2 at 426-27.
215. SF Day 1 at 96.
216. SF Day 1 at 98.
217. Representative Bobby Scott (D-VA) introduced the Fairness and Accuracy in Employment Background Checks Act, which aims to clean up incomplete FBI background checks for employment. Fairness and Accuracy in Employment Background Checks Act of 2013, HR 2865, 113th Cong. (2013), *available at* <https://www.govtrack.us/congress/bills/113/hr2865/text>.
218. NAT'L EMP'T LAW PROJECT, SUPPORT THE FAIRNESS & ACCURACY IN EMPLOYMENT BACKGROUND CHECKS ACT, *available at* <http://www.nelp.org/page/-/SCLP/2010/FBIBillFactSheet.pdf?nocdn=1>.
219. ABC Act of 2013, HR 2999, 113th Cong., 2013, *available at* <https://www.govtrack.us/congress/bills/113/hr2999/text>.
220. See, e.g., IND. CODE § 35-38-9-7(b) (records of more serious felonies “remain public records” after expungement, although they must be “clearly and visibly marked or identified as being expunged”).
221. Chicago Day 1 at 142-43.
222. Chief Judge Jonathan Lippman, New York State Court of Appeals, 2014 State of the State of the Judiciary Address (Feb. 11, 2014), *transcript available at* <https://www.nycourts.gov/ctapps/soj.htm> (noting that “[s]ex offenses, public corruption cases, and DWI related offenses will not be eligible for expungement.”).
223. Love, NACDL Restoration of Rights Project, Chart #4 (*Judicial Expungement, Sealing, and Set-Aside*), *available at* http://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Judicial_Expungement_Sealing_and_Set-Aside.pdf; LOVE, ROBERTS & KLINGELE, COLLATERAL CONSEQUENCES § 7:17.
224. Love, NACDL Restoration of Rights Project, Chart #4 (*Judicial Expungement, Sealing, and Set-Aside*), *available at* http://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Judicial_Expungement_Sealing_and_Set-Aside.pdf.
225. *Id.*
226. See N.M. STAT. ANN. § 30-31-28(D); N.C. GEN. STAT. §§ 15A-145 et seq.; W. VA. CODE § 61-11-26; WIS. STAT. § 973.015.
227. Chicago Day 1 at 24-27.
228. See IND. CODE 35-38-9-1 et seq. The new Indiana expungement scheme is discussed in detail at Love, NACDL Restoration of Rights Resource, Indiana profile, *available at* https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_in.pdf.
229. *Id.*
230. *Id.* at § 35-38-9-7(b).
231. *Id.* at § 35-38-9-10(a) through (g).

232. IND. CODE § 24-4-18-6(a).

233. *Civil Forms*, JUDICIAL BRANCH OF INDIANA, <http://www.in.gov/judiciary/2706.htm>.

234. Chicago Day 1 at 19-20.

235. Cleveland Day 2 at 379.

236. Chicago Day 2 at 438.

237. The Department of Labor, in offering \$26 million in grant funds to improve long-term labor market prospects of youth in the juvenile justice system, required that grants must include a diversion and/or expungement component. Press Release, U.S. Dep't of Labor, U.S. Department of Labor Announces Availability of Nearly \$26 Million in Grants to Help Juvenile Offenders Gain the Skills Necessary to Enter the Workplace (April 1, 2013), *available at* <http://www.dol.gov/opa/media/press/opa/OPA20130591.htm>.

238. Jack Healy, *Wrongfully Convicted Often Find Their Record, Unexpunged, Haunts Them*, N.Y. TIMES (May 5, 2013), *available at* <http://www.nytimes.com/2013/05/06/us/wrongfully-convicted-find-their-record-haunts-them.html>.

239. 20 ILL. COMP. STAT. 2630/12(a).

240. *Compare* Gene Policinski, 'Mug shot' Sites Pose First Amendment Dilemma, FIRST AMENDMENT CTR., *available at* <http://www.firstamendmentcenter.org/mug-shot-sites-pose-first-amendment-dilemma> ("There's the rub: Those public-spirited companies like Mugshots.com suddenly turn self-serving in demanding from \$99 to \$399 to take down a photo. Critics call the practice 'unfair' or 'extortion.' But given that the postings are done by private companies, not public officials, legal cures proposed thus far seem as bad as the ailment.") with Jillian Stonecipher, *Florida Bill Targets "Mugshot Websites," Hits Crime Reporting*, DIGITAL MEDIA LAW PROJECT (Feb. 21, 2013), *available at* <http://www.dmlp.org/blog/2013/florida-bill-targets-%E2%80%9Cmugshot-websites%E2%80%9D-hits-crime-reporting> ("Unlike many organizations that file [Freedom of Information Act] requests and provide the open records to the public, mugshot websites do not seek to provide a public service. Instead, these sites exploit laws created to protect open government and free speech for the same reason they exploit people trying to get their mugshots removed- to make a profit. Even staunch free speech advocates recognize that these mugshot companies are, at the very least, distasteful."). Although Freedom of Information Act litigation involves statutory rather than constitutional principle, there are also different approaches to the release of mugshots on this basis. *Compare Karantsalis v. Dept. of Justice*, 635 F.3d 497 (2011) (affirming U.S. Marshall Service's determination that it must withhold mugshot to protect individual from unwarranted invasion on his privacy interests, where there was no overriding public interest in accessing the shot) with *Detroit Free Press v. Dept. of Justice*, 73 F.3d 93, 97 (6th Cir. 1996) (holding that, in some circumstance, booking photographs must be disclosed to the media upon FOIA request even if doing so does not serve a law enforcement purpose).

241. David Segal, *Mugged by a Mug Shot Online*, N.Y. TIMES, Oct. 5, 2013, *available at* http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html?pagewanted=all&vsmid=20&_r=0.

242. *See, e.g.*, UTAH CODE ANN. 1953 § 17-22-30 (Utah law stating that "A sheriff may not provide a copy of a booking photograph in any format to a person requesting a copy of the booking photograph if: (a) the booking photograph will be placed in a publication or posted to a website; and (b) removal of the booking photograph from the publication or website requires the payment of a fee or other consideration.").

243. Email from Sharon Dietrich, National Employment Law Project (July 23, 2013) (on file with NACDL).

244. S.B. 990, 2007 Leg., 80R (Tex. 2007) *available at* <http://www.legis.state.tx.us/billlookup/text.aspx?LegSess=80R&Bill=SB990>.

245. SF Day 1 at 230-32.

246. For example, the National Association of Criminal Defense Lawyers hosted a "Collateral Consequences Conference & Midwinter Meeting" in March 2014. *See* <https://www.youtube.com/watch?v=rSS3r9P9DPw> (video presentation).

247. NAT'L INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, *available at* <http://www.abacollateralconsequences.org/>; *see also* CIVIL IMPACTS OF CRIMINAL CONVICTIONS UNDER OHIO LAW, *available at* <http://civiccohoio.org/>.

248. *See, e.g.*, *Boards*, VA. DEP'T OF PROF'L & OCCUPATIONAL REGULATION, *available at* <http://www.dpor.virginia.gov/Boards> (listing Virginia regulatory boards for long list of professions).

249. Cleveland Day 2 at 521.

250. Miami Day 1 at 216-17.

251. Miami Day 2 at 355-56.

252. DC Day 3 at 141.

253. Miami Day 2 at 328.

254. Chicago Day 2 at 196.

255. NYC Day 1 at 26-27.

256. NYC Day 3 at 20-21.

257. Chicago Day 1 at 46.

258. CAL. PENAL § 4852.08.

259. SF Day 1 at 29.

260. *See, e.g.*, Wesley Lowery, *Conservatives Try to Make Criminal Justice Reform a Signature Issue*, WASH. POST (March 7, 2014), *available at* <http://www.washingtonpost.com/politics/conservatives-try-to-make-criminal-justice-reform-a-signature-issue/2014/03/07/4b006368->

a626-11e3-84d4-e59b1709222c_story.html; Testimony of NYC Probation Commissioner Vincent Schiraldi, NYC Day 3 at 17-30; *Missouri: Implementation of HB 1647 in Jeopardy!*, Nat'l Rifle Ass'n Inst. of Legislative Action (June 26, 2012), available at <http://www.nra.org/legislation/state-legislation/2012/6/missouri-implementation-of-hb-1647-in-jeopardy.aspx?s=&st=10489&ps> (encouraging individuals to contact Gov. Jay Nixon and “urge him to sign [Missouri House Bill 1647 — Public Safety, <http://www.house.mo.gov/billtracking/bills121/sumpdf/HB1647T.pdf>] into law”); *Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association’s House of Delegates*, U.S. Dep’t of Justice (Aug. 12, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html> (“calling on every member of our profession to question that which is accepted truth; to challenge that which is unjust; to break free of a tired status quo; and to take bold steps to reform and strengthen America’s criminal justice system — in concrete and fundamental ways”); Josh Eidelson, *AFL-CIO Pledges Prison Reform, Partnerships, and Accountable Organizing Plans*, THE NATION (Sept. 10, 2013), available at <http://www.thenation.com/blog/176093/afl-cio-pledges-prison-reform-partnerships-and-accountable-organizing-plans> (“‘Mass incarceration is a betrayal of the American promise,’ [AFL-CIO President Richard] Trumka told the crowd before taking comments from the floor. ‘The practice hurts our people and our communities, it keeps wages low, it suppresses democracy, and we can’t afford to imprison so many people. Nor can our families, our communities or our country afford the loss of productivity of these people.’”); see also AFL-CIO, 2013 Convention Resolution and Amendments, Res. 17: Prison and Profits — The Big Business Behind Mass Incarceration, available at <http://www.aflcio.org/About/Exec-Council/Conventions/2013/Resolutions-and-Amendments/Resolution-17-Prisons-and-Profits-The-Big-Business-Behind-Mass-Incarceration>.

261. See *Reform Offenders*, RIGHT ON CRIME, available at <http://www.rightoncrime.com/the-conservative-case-for-reform/reform-offenders/> (“Breaking the cycle of crime and turning lawbreakers into law-abiding citizens is a conservative priority because it advances public safety, the rule of law, and minimizes the number of future victims.”); AFL-CIO, 2013 CONVENTION RESOLUTION AND AMENDMENTS, RES. 17: PRISON AND PROFITS — THE BIG BUSINESS BEHIND MASS INCARCERATION, available at <http://www.aflcio.org/About/Exec-Council/Conventions/2013/Resolutions-and-Amendments/Resolution-17-Prisons-and-Profits-The-Big-Business-Behind-Mass-Incarceration>; THE SMART ON CRIME COAL., RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS, 247-249 (2011), available at <http://www.besmartoncrime.org/pdf/Complete.pdf> (recommending various executive and legislative changes to deal with bars to employment for individuals with criminal records).

262. INIMAI M. CHETTIAR, LAUREN-BROOKE EISEN, NICOLE FORTIER & TIMOTHY ROSS, BRENNAN CENTER FOR JUSTICE, REFORMING FUNDING TO REDUCE MASS INCARCERATION, (Nov. 22, 2013), available at <http://www.brennancenter.org/publication/reforming-funding-reduce-mass-incarceration>.

263. See, e.g., Jack Healy, *Wrongfully Convicted Often Find Their Record, Unexpunged, Haunts Them*, N.Y. TIMES (May 5, 2013), available at http://www.nytimes.com/2013/05/06/us/wrongfully-convicted-find-their-record-haunts-them.html?_r=0; Alfred Blumstein & Kiminori Nakamura, Editorial, *Paying a Price, Long After the Crime*, N.Y. TIMES (Jan. 9, 2012), available at http://www.nytimes.com/2012/01/10/opinion/paying-a-price-long-after-the-crime.html?_r=1&ref=opinion; see also Daniel Kanstroom, Editorial, *Deportation Nation*, N.Y. TIMES (Aug. 30, 2012), available at <http://www.nytimes.com/2012/08/31/opinion/deportation-nation.html>; David Zucchino, *Immigrants’ Minor Offenses Can Ruin Hope for Deportation Waiver*, L.A. TIMES (Aug. 19, 2012), available at <http://articles.latimes.com/2012/aug/19/nation/la-na-immigrant-20120819>; Nina Bernstein, *How One Marijuana Cigarette May Lead to Deportation*, N.Y. TIMES (March 30, 2010), available at <http://www.nytimes.com/2010/03/31/nyregion/31drug.html?pagewanted=all>.

264. Second Chance Act of 2007, Pub. L. No. 110-199.

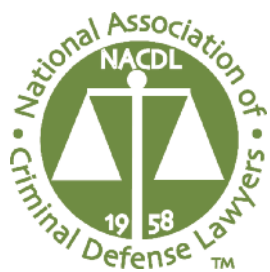
265. Representative Bobby Scott (D-VA) introduced the Fairness and Accuracy in Employment Background Checks Act, which aims to clean up incomplete FBI background checks for employment. Fairness and Accuracy in Employment Background Checks Act of 2013, HR 2865, 113th Cong. (2013), available at <https://www.govtrack.us/congress/bills/113/hr2865>. Representative Keith Ellison (D-MN) introduced the Accurate Background Check (ABC) Act, which would require the FBI to do everything within its power to find any missing information on past arrests for Americans applying to work in the federal government. ABC Act of 2013, HR 2999, 113th Cong., available at <https://www.govtrack.us/congress/bills/113/hr2999>.

266. See, e.g., GA. CODE ANN. § 35-3-37; COLO. REV. STAT. § 18-1.3-103.5; Chief Judge Jonathan Lippman, New York State Court of Appeals, 2014 State of the State of the Judiciary Address (Feb. 11, 2014), transcript available at <https://www.nycourts.gov/ctapps/soj.htm>.

NOTES

96

This publication is available online at www.nacdl.org/restoration/roadmapreport



NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

1660 L Street NW, 12th Floor

Washington, DC 20036

Phone: 202-872-8600

www.nacdl.org