

# Civil Rights Impacts from Collateral Consequences in West Virginia



A Report of the  
West Virginia Advisory Committee to the  
U.S. Commission on Civil Rights

September 2019

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This report is the work of the West Virginia State Advisory Committee to the U.S. Commission on Civil Rights. The views expressed in this report and the findings and recommendations contained herein are those of all of the West Virginia Advisory Committee members and do not necessarily represent the views of the Commission or its individual members, or the policies of the U.S. Government.



## Letter of Transmittal

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U.S. Commission on Civil Rights

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The West Virginia Advisory Committee, as part of its responsibility to advise the Commission on civil rights issues within the state, submits this report, *The Collateral Consequences that a Felony Record Can have on West Virginians Access to Employment, Housing, Professional Licensing and Public Benefits*. Briefings were conducted via conference call, on May 4, 2018, and in Charleston, WV on July 19, 2018. The report was adopted by all nine Advisory Committee members on September 19, 2019.

Sincerely,

Tara N. Martinez, Chairperson  
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## **I. Introduction**

The West Virginia Advisory Committee to the U.S. Commission on Civil Rights submits this report regarding the civil rights impacts of collateral consequences in West Virginia. The contents of this report are based on testimony the Committee heard during two public briefings, as well as other documents cited throughout this report.

As discussed herein, the state of West Virginia has promulgated and enforces sundry laws that affect the prospects of those individuals with a criminal record. These laws create a web of difficulties in that individual's ability successfully to pursue employment opportunities, occupational licenses, adequate housing, and public benefits.

This report offers background information on the scope of collateral consequences nationally and describes general policy concerns surrounding the issue. It describes the legal scope of collateral consequences in West Virginia and explores the barriers that collateral consequences impose on those individuals with a criminal record as they attempt to re-enter society to become productive citizens. It focuses on the evidence regarding the effect of collateral consequences on employment prospects, occupational-licensing, access to housing, and access to public benefits. It also describes the current efforts in the West Virginia State Legislature to ameliorate the effects of collateral consequences. The report concludes by making specific recommendations as to how to further lessen the effect of collateral consequences.

Throughout this report, persons subject to collateral consequences will be referred to interchangeably as "individuals with a criminal record" or "returning citizens." The Committee chose to use this latter term to provide a name to individuals with a criminal record that would treat such persons with dignity and respect and to suggest that such persons are due equal dignity with other citizens who do not have a record of arrest or conviction. The Committee acknowledges that some may criticize this term. However, the Committee intends this term to be broadly inclusive of all persons within the United States and West Virginia in particular who suffer from the collateral consequences of being associated with a criminal record and to acknowledge their efforts to achieve full and productive participation in their communities.

## **II. Collateral Consequences of a Criminal Record—Overview**

Often referred to simply as "collateral consequences," the collateral consequences of a criminal record are the legal and regulatory sanctions or penalties imposed on a person because that person possesses a criminal conviction, or arrest record, or any other record of adjudication in the criminal justice system. These penalties are "collateral" in the sense that they are imposed on persons returning from or completing a term of arrest, imprisonment, parole, probation, or otherwise participating in a supervised release program *after* serving jail time as punishment for that crime.<sup>1</sup> These individuals with a criminal record suffer from collateral consequence not directly as punishment for the crime, but because of their record as arrestees, misdemeanor violators, or

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<sup>1</sup> In the case of arrest, there may be no jail time.

former felons. These consequences are not a part of the formal sentence of punishment or record of detainer that those individuals with a criminal record had imposed upon them by a court or an arresting authority. Thus, they are collateral or separate from, but necessarily related to, the individuals' criminal record.

The definition of collateral consequences intentionally highlights the fundamental unfairness of the problem.<sup>2</sup> Any individual who possesses any criminal record—no matter the crime's age, the individual's age at the time of the crime, or other mitigating circumstances—suffers some collateral consequences as a result of that individual's past misconduct even though that misconduct has already been punished.<sup>3</sup> Individuals with a criminal record, therefore, are no longer full citizens with the full panoply of citizenship rights and privileges. Instead, they are relegated to a lower status. Never will these individuals regain full citizenship irrespective of guilt, time served, or remorse. These collateral consequences also stigmatize those individuals with a criminal record, who are forced to wear that criminal record on their chests, bearing it as a badge of their past mistakes much like Hester Prynne, required to wear the scarlet letter "A" for life, publicly bore the shame and humiliation of having committed the crime of adultery.<sup>4</sup> Taken together, these laws, by stripping individuals with a criminal past of their full citizenship and otherwise stigmatizing them, lower the dignity of some of our most vulnerable, just when they need help. They become convict first, American citizen, second.

With these fundamental principals in mind, the Committee narrowed its study to reviewing laws that impose employment, licensing, housing, and public benefits consequences for having a record of arrest on suspicion of committing a crime, a misdemeanor criminal conviction, or a felony criminal conviction. While the Committee recognizes that there are myriad political and social collateral consequences, it chose to focus on economic consequences—specific laws that may exclude individuals with a criminal record from economic reintegration—and to collect data and narratives that address the economic impact. With that purpose in mind, we reviewed the following questions: Do those individuals with a criminal record domiciled in West Virginia face legal obstacles to economic reintegration because of legal barriers to employment opportunities, occupational-licensing, housing, or public benefits? Furthermore, while the report may primarily discuss felony convictions, the Committee recognizes that arrest and misdemeanor conviction records may also carry collateral consequences.

### **A. Collateral Consequences – National**

According to the National Inventory of Collateral Consequences of Conviction (NICCC), over 44,000 different federal and state laws and rules qualify as laws that impose "collateral

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<sup>2</sup> See Sarah Berson, "Beyond the Sentence—Understanding Collateral Consequences," *NIJ Journal No. 272*, May 2013, <https://www.nij.gov/journals/272/Pages/collateral-consequences.aspx>.

<sup>3</sup> Ibid.

<sup>4</sup> Nathaniel Hawthorne, *The Scarlet Letter* (Boston: Ticknor, Reed & Fields, 1850).

consequences” on individuals with a criminal record.<sup>5</sup> These laws affect at least 5.6 million U.S. adults who have a felony record of conviction (or approximately 1 in 37 American residents).<sup>6</sup> At least one other study suggests that among all 50 states and all American territories, there are over 100 million criminal history records (including arrests and convictions).<sup>7</sup>

The laws that inflict collateral consequences levy a broad range of penalties. These laws exclude individuals with a criminal record from participating in political society by excluding them from the ability to vote and to serve on juries in many of the fifty states. These laws also exclude individuals with a criminal record from civil life by imposing barriers to integrating into their communities. And most relevant for this report, laws that impose collateral consequences exclude individuals with a criminal record from economic participation by making it difficult to obtain employment by imposing background checks and other means of screening out such individuals. These laws also limit or wholly exclude individuals with a criminal record from obtaining occupational licenses necessary to carry out many trades and crafts. And these laws limit the ability to obtain stable housing and governmental benefits such as subsidies for paying for housing, food, education, and other items essential for formerly imprisoned citizens to integrate into the economic life of their communities.

These laws have detrimental effects on those individuals with a criminal record and the communities where they live. Individuals with a criminal record are already in a fragile economic

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<sup>5</sup> See NICCC, *Council of State Governments Justice Center*, “National Inventory of Collateral Consequences of Conviction,”

[https://niccc.csgjusticecenter.org/database/results/?jurisdiction=&consequence\\_category=&narrow\\_category=&triggering\\_offense\\_category=&consequence\\_type=&duration\\_category=&page\\_number=1](https://niccc.csgjusticecenter.org/database/results/?jurisdiction=&consequence_category=&narrow_category=&triggering_offense_category=&consequence_type=&duration_category=&page_number=1) (last accessed July 12, 2019).

<sup>6</sup> See United States Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics [hereinafter cited as United States Dep’t of Justice, Office of Justice Programs], *FAQ Detail*, “How many persons in the U.S. have ever been convicted of a felony?”, <https://www.bjs.gov/index.cfm?ty=qa&iid=404> (last accessed July 4, 2019). These records from 2001 are the most recent the Bureau of Justice Statistics offered on their website on this question. For a myriad of reasons, including budget cutbacks and changes in tracking methodology, definitive numbers for persons either convicted of a felony in the United States are difficult to obtain.

<sup>7</sup> See U.S. Department of Justice, Office of Justice Programs, *Survey of State Criminal History Information Systems*, 2012, <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf> (last accessed July 11, 2019). These records may reflect multiple offenders in one or more states, but this statistic should give some idea as to the number of people affected by having a criminal record. See also John G. Malcolm, Vice President, Institute for Constitutional Government, Heritage Foundation, Washington, DC, Written Statement for the West Virginia State Advisory Committee to the United States Commission on Civil Rights, May 4, 2018, at 1–2 [hereinafter cited as Malcolm Statement] (“millions of people” including those not sent to prison, will be affected by collateral consequences regimes upon return to society).



state.<sup>8</sup> These rules—which often prevent or deter others from hiring,<sup>9</sup> licensing,<sup>10</sup> housing,<sup>11</sup> or providing government benefits<sup>12</sup> to those with a criminal record—frustrate the citizens’ integration into their communities by further destabilizing their precarious economic state and further villainizing the social stigma of their status as a former convict. These collateral consequences also have tertiary effects on those individuals with a criminal record and third parties by stressing the individual, his or her family, and other community members. Individuals with a criminal record suffering under the weight of collateral consequences such as job and income insecurity are at heightened risk of recidivism, thereby reigniting the crime-conviction-incarceration cycle.

Moreover, laws that impose collateral consequences frustrate the ability for those individuals with a criminal record to make a living once their corrective supervision has been completed. Indeed, as Attorney Margaret Love pointed out in testimony to the Committee, “housing and employment are the most important determinants of successful reentry and rehabilitation.”<sup>13</sup> By frustrating the ability of those individuals with a criminal record to obtain adequate housing, income, and employment, collateral consequences frustrate their efforts to become fully participating and productive members of their communities.

These consequences have a disparate effect on persons already at the margins in American society. It is well known that racial and ethnic minorities are disproportionately represented in the criminal justice system.<sup>14</sup> Additionally, as more women become subject to correctional control, they too are

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<sup>8</sup> This may also be true of the individual with an arrest record who served no jail time because some employers will lawfully fire employees who are arrested regardless of the employee’s innocence. *See Williams v. Precision Coil*, 459 S.E.2d 329, 340, (W.Va. 1995) (explaining that “West Virginia law provides that the doctrine of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law”).

<sup>9</sup> *See, e.g.*, W. VA. Code § 12-2-6.

<sup>10</sup> *See, e.g.*, W. VA. Code § 30-27-20.

<sup>11</sup> *See, e.g.*, W. VA. Code § 5-11A-8.

<sup>12</sup> *See, e.g.*, W. VA. Code § 9-3-6.

<sup>13</sup> Margaret Love, Executive Director, Collateral Consequences Resource Center, Washington, DC, Written Statement for the West Virginia State Advisory Committee to the United States Commission on Civil Rights, May 4, 2018, at 6 [hereinafter cited as Love Statement].

<sup>14</sup> U.S. Commission on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities*, June 2019, <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf>, at 19–20 (explaining that “[p]eople of color are more likely to be arrested, convicted, and sentenced more harshly than are white people, which amplifies the impact of collateral consequences on this population.”) (hereinafter cited as USCCR, *Collateral Consequences*).

affected by collateral consequences.<sup>15</sup> Additionally, Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ) are affected by collateral consequences.<sup>16</sup>

While collateral consequences have a broad impact on all phases of the life of individuals with a criminal record, this report focuses on barriers erected relating to economic participation. The Committee chose this focus primarily because collateral consequences compound the difficulties that West Virginians with a criminal record have in relation to their already precarious economic status. These problems are further magnified as many West Virginian citizens obtain records of criminal conviction due to the burgeoning opioid crisis. Thus, someone in unfortunate circumstances may end up lacking the ability to re-establish their life due to the impact of collateral consequences and thus end up permanently removed from the ability to obtain a gainful livelihood.

Because collateral consequences are imposed by a broad patchwork of state and federal laws, the federal and state legislatures have the broad legislative power to amend the laws and remedy or ameliorate the problem. Until recently, however, state legislatures have been unwilling to do so. The imposition of collateral consequences has been a product as much of creating aspects of the heightened combat against criminal behavior of late. This move towards more punitive laws has been coupled by the fact that collateral consequences are “civil” in nature, that is, as discussed above, related to civil penalties imposed outside of the criminal punishment given for a particular crime.<sup>17</sup> Moreover, historically, when pressed for reform, all too often there has been a lack of political will to follow through on such reforms.

However, a consensus has begun to emerge across the political spectrum that these consequences impose more harm than good,<sup>18</sup> and therefore should be addressed. Reform efforts, in particular, have combined “forgiveness” approaches to addressing collateral consequences (that is, effectively pardoning or erasing an individual’s criminal record) with “forgetting” approaches to ameliorating collateral consequences (e.g., allowing a record to remain intact, but passing initiatives that forbid employers or state agencies to inquire into a past criminal record except for limited circumstances).<sup>19</sup> Examples of these changes include (1) Making consequences more transparent; (2) providing more commonly used mechanisms of relief from consequences; (3) limiting the use of background checks for employment purposes; (4) the so-called “Ban the Box” movement that

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<sup>15</sup> See The Sentencing Project, *Incarcerated Women and Girls*, June 6, 2019, <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> (explaining that “between 1980 and 2017 the number of incarcerated women increased by more than 750%” and that overall, “over 1.3 million women are under supervision of the criminal justice system”).

<sup>16</sup> USCCR, *Collateral Consequences*, at 22. See also Naomi G. Goldberg, *Written Testimony of the Movement Advancement Project Before the U.S. Commission of Civil Rights, Hearing on Collateral Consequences of Incarceration*, May 19, 2017 (describing heightened and particular impact of collateral consequences on lesbian, gay, bisexual, and transgender people).

<sup>17</sup> See Malcolm Statement, at 3–4.

<sup>18</sup> *Ibid.*, 8.

<sup>19</sup> *Ibid.*, 7.

forbid employers to inquire about past criminal history; (5) the growing acceptability of pardons and commutations to effectively erase the effect of criminal convictions.<sup>20</sup>

As this report will show, there have been recent efforts in West Virginia to implement some forms of limited “forgiving” and “forgetting” of criminal records. This report will discuss these efforts to ameliorate the effects of collateral consequences after discussing the nature, scope, created barriers, and effects of collateral consequences in West Virginia. It will end by making recommendations to policymakers to further ameliorate the effects. It is to the problem of collateral consequences in West Virginia that this report will now turn.

## **B. Collateral Consequences – West Virginia**

According to the National Collateral Consequences Inventory, as early as 2019, there are over 800 laws in the West Virginia State Code that impose collateral consequences on West Virginians with a criminal record in some form.<sup>21</sup> Thus, according to the Bureau of Justice Statistics, over 629,000 returning West Virginian citizens who have some form of criminal record are potentially limited in their ability to obtain employment, housing, and governmental benefits.<sup>22</sup> These laws range from exclusion from a wide variety of occupations (ranging from crane operator<sup>23</sup> to barbering and cosmetologist<sup>24</sup>) disqualification from deducting business expenses,<sup>25</sup> background check requirements for a number of jobs, ineligibility for protection under the West Virginia Fair Housing Act for control substance offences,<sup>26</sup> to the denial of benefits under the Temporary Assistance for Needy Families (TANF) program, that is denial of federal food stamps.<sup>27</sup>

Collateral consequences cut across the life prospects of citizens returning to West Virginia. Testimony at the Advisory Committee’s Briefings emphasized that these harms are cumulative. For example, the inability to obtain employment may affect the ability to obtain quality housing. And thus, the lack of stable housing may then affect the ability to obtain gainful employment.

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<sup>20</sup> Ibid.

<sup>21</sup> See NICCC, *Council of State Governments Justice Center*, “National Inventory of Collateral Consequences of Conviction: West Virginia,” [https://niccc.csgjusticecenter.org/database/results/?jurisdiction=176&consequence\\_category=&narrow\\_category=&triggering\\_offense\\_category=&consequence\\_type=&duration\\_category=&page\\_number=1](https://niccc.csgjusticecenter.org/database/results/?jurisdiction=176&consequence_category=&narrow_category=&triggering_offense_category=&consequence_type=&duration_category=&page_number=1) (last accessed July 12, 2019). Some of these laws have likely been changed due to recent legislative action. The report will discuss recent legislative changes below.

<sup>22</sup> See U.S. Department of Justice, Office of Justice Programs, *Survey of State Criminal History Information Systems*, 2012, <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf> (last accessed July 12, 2019) (data in Table 2 regarding number of persons in West Virginia who have a criminal history file).

<sup>23</sup> W. VA. Code § 21-3D-7.

<sup>24</sup> W. VA. Code § 30-27-20.

<sup>25</sup> *Id.*

<sup>26</sup> W. VA. Code § 5-11A-8(b)(4).

<sup>27</sup> W. VA. Code § 9-2-3.



Alternatively, the inability to obtain public benefits may include the inability to receive funding for education to obtain better employment prospects.

The effects of collateral consequences are not only cumulative but also intersectional. They affect West Virginia citizens from all demographic groups and represented identity groups, and cause harm to these citizens and their communities. Moreover, these laws impact the West Virginia economy, compounding an already difficult economic situation West Virginian face.

The next part of the report focuses on how collateral consequences impede the economic opportunities of individuals with a criminal record to obtain their livelihoods in four areas: (1) the ability to gain employment generally, (2) the ability to gain an occupational license and access to jobs which require licensure; (3) the ability to obtain housing; and (4) the ability to obtain public benefits such as housing subsidies, financing for education, subsidies for food and sustenance, and other forms of support that come from the federal and state governments.

### **III. Barriers to Effective Community Re-Entry—What the Advisory Committee Learned**

#### **A. Employment**

Upon release from prison, formerly incarcerated people immediately need to arrange for the basic human needs, food, clothing, shelter to re-enter free society. Those needs in the short term might be met by family or friends. But a significant number of these individuals with a criminal record want to become productive, self-reliant, law-abiding members of society, capable of supporting themselves and their families.<sup>28</sup> In the long-run, reintegration and independence means finding a job. Individuals with a criminal record often commence their job search well behind the starting line because many have “substance abuse issues, limited education, and even more limited job skills and experience.”<sup>29</sup> Some may be undereducated. Some were imprisoned before they could gain much, if any, job experience.<sup>30</sup> Some, who have been confined for years, may possess rusty or obsolete skills, especially in this era of rapid technological development. All face the stigma of having a criminal record.

Employers often view jobseekers who possess criminal records with suspicion. In some instances, skepticism about such individuals is understandable. For example, the rational employer seeking to hire a cashier or bank teller and faced with a choice between hiring similarly situated individuals—one with a record of conviction for theft and the other with no such conviction—will likely chose the one with the clean record. Similarly, a daycare center would not hire a person

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<sup>28</sup> John G. Malcolm, Vice President, Institute for Constitutional Government, Heritage Foundation, Washington, DC, Testimony before the West Virginia State Advisory Committee to the U.S. Commission on Civil Rights, briefing, Washington, DC, via conference call, May 4, 2018, Transcript (*Conference Call Briefing Transcript*), p. 3, [hereinafter cited as *Malcolm Testimony*]; Malcolm Statement, at 1–2.

<sup>29</sup> Malcolm Testimony, *Conference Call Briefing Transcript*, p. 3; Malcolm Statement, at 1.

<sup>30</sup> Malcolm Testimony, *Conference Call Briefing Transcript*, p. 3.

convicted of child abuse. However, employers—and the law—have often given a wry look to jobseekers with criminal records where there is no relation between the job and the past crime.<sup>31</sup> These actions and laws fundamentally thwart on a permanent and indiscriminate basis the ability of individuals with a criminal record to reintegrate into society.<sup>32</sup>

Employer skepticism is historically rooted in the stigmatized status of individuals with a criminal record who face enormous barriers to finding any job. Sixty to 70 percent of the more than 48,000 federal and state civil laws and regulations that restrict the activities of ex-offenders and curtail their liberties after they are released from confinement or probation are employment-related.<sup>33</sup> Taken together with the thousands of similar restrictions found in local ordinances,<sup>34</sup> more than 30,000 rules restrict the employment opportunities for ex-offenders after they have served their prison sentence, thereby essentially serving as additional punishment for their crime.<sup>35</sup>

### **1. Ordinary Citizens Should Care About Employment Opportunities for Individuals with a Criminal Record Because Unemployment is Correlated with Recidivism**

Employment is a significant predictor of successful re-entry into free society.<sup>36</sup> Several sources, including the American Bar Association<sup>37</sup> and the National Council of State Governments,<sup>38</sup> found that collateral consequences may frustrate the chance of successful reentry into the community because individuals with a criminal record often cannot find a job. Unemployment and lack of productive employment opportunities is correlated with recidivism.<sup>39</sup> Individuals with a criminal

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<sup>31</sup> W. VA. Code § 17-29-13 (mandatorily imposed).

<sup>32</sup> Love Testimony, *Conference Call Briefing Transcript*, p. 3 (citing *Employment Can Improve Reentry Outcomes*, accessed at <https://niccc.csgjusticecenter.org/2018/03/29/reentry-essentials-an-overview-of-employment-and-correctional-education/>) (last accessed July 14, 2019).

<sup>33</sup> Malcolm Testimony, *Conference Call Briefing Transcript*, pp. 3–4.

<sup>34</sup> Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 Ohio St. L.J. I (2014); Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 Fed. Probation II, 14–15 (1996) (“[An] analysis of state legal codes reveals an increase between 1986 and 1996 in the extent to which states restrict the rights of convicted felons.... [T]here was an increase in the number of states restricting six rights; voting, holding office, parenting, divorce, firearm ownership, and criminal registration increased.”); Jeremy Travis, *Invisible Punishment*, in *The Collateral Consequences of Mass Imprisonment* 18 (Marc Mauer & Meda Chesney-Lind eds., 2002).

<sup>35</sup> Malcolm Statement, at 1.

<sup>36</sup> Betsy Jividen, Commissioner, WV Dep’t of Corrections, Testimony, *Charleston Briefing Transcript*, p. 75.

<sup>37</sup> Malcolm Testimony, *Conference Call Briefing Transcript*, p. 3; “Internal Exile: Consequences of Collateral Convictions,” ABA DC Public Defender Services (2009).

<sup>38</sup> Jividen Testimony, *Charleston Briefing Transcript*, p. 75 (citing <https://niccc.csgjusticecenter.org/2019/04/22/occupational-licensing-vague-moral-character-requirements-leave-workers-with-records-on-uncertain-ground>).

<sup>39</sup> *Ibid.*

record who cannot find gainful employment, or provide for their immediate needs, may return to the criminal life to survive. And, thus, the unemployment-crime-prison cycle continues resulting in wasted lives, ruined families and more crime. Like the criminal conviction itself, civil sanctions carry real consequences that can be injurious and demoralizing.

## **2. Increased Use of Background Checks Post-9/11 and the Development of the Internet Without Corresponding Development of Privacy Protections Have Exacerbated the Problem of Finding a Job for Individuals with a Criminal Record**

Among the most problematic laws are those that restrict eligibility for employment and licensure. For example, background checks, which were rare twenty years ago, now “control access to almost every area of endeavor” including employment.<sup>40</sup> Use of background checks has increased for three reasons. First, post-9/11 anxiety has augmented the demand for background checks.<sup>41</sup> Second, better access to information through the Internet has increased the supply of information. Third, laws intended to protect individuals’ privacy are not well enforced. For example, enforcement of the Fair Credit Reporting Act, which regulates background screening companies is lax.<sup>42</sup> Further, Title VII has been extended to limit employment discrimination based on arrest or conviction, but there are few EEOC enforcement actions.<sup>43</sup> EEOC’s and HUD’s efforts to extend the fair employment and housing laws are laudable (because collateral consequences have a profound impact on communities of color), but those efforts are like trying to place a square peg in a round hole (because “the standards that apply to record-based discrimination are necessarily different from those that apply to racial and ethnic discrimination”<sup>44</sup>).

### **B. Licensing**

As stated earlier, the first two out of three years convicted felons are released from incarceration, recidivism rates are highest.<sup>45</sup> These individuals face an added burden related to state prohibitions on awarding licenses to those with a criminal record. Many states give licensing boards added power to reject applications based on criminal history and “good character” provisions.<sup>46</sup>

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<sup>40</sup> Love Statement, at 5.

<sup>41</sup> Ibid.

<sup>42</sup> 15 U.S.C. § 1681.

<sup>43</sup> EEOC, Enforcement Guidance No. 915.002, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, Apr. 25, 2012, [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) (last accessed July 14, 2019).

<sup>44</sup> Love Statement, at 5.

<sup>45</sup> Stephen Slivinski, “Turning Shackles into Bootstraps, Why Occupational Licensing Reform is the Missing Piece of Criminal Justice Reform,” Center for the Study of Economic Liberty at Arizona State University, November 7, 2016, p. 1, <https://research.wpcarey.asu.edu/economic-liberty/wp-content/uploads/2016/11/CSEL-Policy-Report-2016-01-Turning-Shackles-into-Bootstraps.pdf> (last accessed July 14, 2019).

<sup>46</sup> Ibid., 2–3.

A 2012 Institute for Justice report reviewing 102 low-income occupations revealed the discrepancy and irrationality of states requiring licensure for specific occupations.<sup>47</sup> Public safety is a major cause for occupational licensure, however, consistency across states is not apparent.<sup>48</sup> Licensing requirements vary and are unclear from state to state for the same occupations. Occupations licensed in one or a few states have very onerous licensing requirements creating a double hurdle for those individuals.<sup>49</sup>

Three changes to licensing were made from the 2012 Institute for Justice Study:

- Recognize occupations, based upon the Bureau of Labor Statistics, making less than the national average and requiring a license in at least one state.
- Improve approach to recording contractor licenses within construction trades i.e., dividing general contractor licensing into residential and commercial across states.
- Focus on requirements by a sole proprietor in each occupation.<sup>50</sup>

West Virginia has a very low workforce participation rate.<sup>51</sup> Limiting occupational-licensing further depresses the rate. Safety considerations, if narrowly tailored, could justify some licensing limitations. However, using issues of public safety related to moral turpitude to limit occupational licensing continues to punish our working community.<sup>52</sup>

West Virginia is ranked the 14th most broadly and onerously licensed state in the nation as determined by combining requirements for licensing and number of occupations requiring a license—70 out of 102 low income occupations.<sup>53</sup> As of June 2018, West Virginia has one of the

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<sup>47</sup> Dick Carpenter, Lisa Knepper, Kyle Sweetland, and Jennifer McDonald, “License to Work—a National Study of Burdens from Occupational Licensing,” p. 10, [https://ij.org/wp-content/themes/ijorg/images/lw2/License\\_to\\_Work\\_2nd\\_Edition.pdf](https://ij.org/wp-content/themes/ijorg/images/lw2/License_to_Work_2nd_Edition.pdf) (last accessed July 14, 2019) [hereinafter cited as Carpenter].

<sup>48</sup> *Ibid.*, 8.

<sup>49</sup> *Ibid.*, 24, 26.

<sup>50</sup> *Ibid.*, 10.

<sup>51</sup> According to the May 2019 data, West Virginia’s labor force participation rate of 54.5 percent is significantly below the national labor force participation rate of 62.8 percent. *Compare* “Local Area Unemployment Statistics: Civilian Noninstitutional Population and Associated Rate and Ratio Measures for Model-Based Areas,” U.S. Dep’t of Labor, Bureau of Labor Statistics, May 2019 <https://www.bls.gov/lau/rdsnpl6.htm#data> (last accessed July 14, 2019) with “Labor Force Statistics for the Current Population,” U.S. Dep’t of Labor, Bureau of Labor Statistics, May 2019, <https://data.bls.gov/timeseries/LNS11300000> (last accessed July 14, 2019).

<sup>52</sup> Priya Baskaran, Associate Professor, West Virginia University College of Law, *Charleston Briefing Transcript*, p. 191 [hereinafter cited as Baskaran Testimony]; *see also* Baskaran, Written Statement for the West Virginia State Advisory Committee to the United States Commission on Civil Rights, July 19, 2018.

<sup>53</sup> Carpenter, at 23.

highest unemployment rates in the country, 5.4 percent.<sup>54</sup> Barriers to occupational-licensing for this population contributes to the overall employment rate and limits these individuals from starting their own business, thereby stifling an already depressed economy.<sup>55</sup>

With not enough regulatory guidance, broad statutory language enables a blanket denial for occupational licenses based on a felony conviction.<sup>56</sup> The lack of coordination between the various licensing boards creates a barrier for these individuals seeking occupational licenses.<sup>57</sup>

## **1. West Virginia Association of Licensing Boards**

The West Virginia Association of Licensing Boards (Association) is a nongovernmental entity created in 1981.<sup>58</sup> The Association's responsibility is to protect the health and safety of the public, as well as ensure the applicant has met all the educational and testing requirements.<sup>59</sup>

There are 33 professional licensing boards and members discuss issues with legislation, as well as general issues.<sup>60</sup> The issues discussed include:

- Legislative changes,
- Updates in required mandatory training,
- Rules relating to finance purchasing or Chapter 30, article 1 modifications and revisions, and
- Ways the boards may become more cost effective and efficient.<sup>61</sup>

## **2. Application Process**

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<sup>54</sup> As of May 2019, West Virginia's unemployment rate is 4.8 percent, thus having the sixth highest unemployment rate in the United States. Only Alaska, Washington, DC, New Mexico, Mississippi, and Arizona have higher rates. See "Local Area Unemployment Statistics, Unemployment Rates for States, Seasonally Adjusted," U.S. Dep't of Labor, Bureau of Labor Statistics, <https://www.bls.gov/web/laus/laumstrk.htm> (last accessed July 14, 2019).

<sup>55</sup> Carpenter, at 40.

<sup>56</sup> Baskaran Testimony, *Charleston Briefing Transcript*, p. 162.

<sup>57</sup> Ibid.

<sup>58</sup> Linda Lyter, President, WV Association of Licensing Boards; Executive Director, WV Massage Therapy Licensure Board, Testimony, *Charleston Briefing Transcript*, p. 172 [hereinafter cited as Lyter Testimony].

<sup>59</sup> Ibid., 176-77.

<sup>60</sup> Ibid., 172.

<sup>61</sup> Ibid.

Currently, the Association requires applications for occupational-licensing from persons with a criminal record. Often, a background check prior to admission into a program is conducted. Processing applications in a timely manner is an issue. Also, licensing boards will take applications on a case-by-case basis.<sup>62</sup>

Students do not receive information about whether a license will be hindered or denied, only if the application is submitted and reviewed. Students with criminal records must produce all arresting documents and sentencing records and may have a face-to-face interview.<sup>63</sup> Any person who has relevant information regarding the applicant may be contacted. This includes, parole officer, family pastor/minister, current or potential employer, school program instructors.<sup>64</sup>

### **3. Liability Insurance – A Challenge for Employers 9/11: Ivy flipped the language.**

Liability insurance is available for employers who will hire ex-felons; however, they face two challenges or barriers other than cost:

- Making employers aware of the insurance programs available and convincing them to take advantage of the, and
- that the process has not changed much because there is less competition among insurance programs.<sup>65</sup>

#### ***Narrative of a Returning Citizen – Obtaining an Occupational License***

One individual with a criminal record shared the challenges she faced, because of her record, in seeking a massage therapist license. She served three years for a non-violent, non-sexual, non-drug related crime due to her association with others.<sup>66</sup> After release from prison, she spent three months in a halfway house—with no counseling, mentoring, or guidance.<sup>67</sup> Because of her mother's chronic pain and after conducting her own research and reviewing testimonies from other chronic pain sufferers about the relief provided from massage, she decided to pursue massage therapy.<sup>68</sup> Her record presented roadblocks to entering school and obtaining financial aid, and, after successfully completing school and passing the board exam, she learned that her record could

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<sup>62</sup> Ibid., 175.

<sup>63</sup> Lyter Testimony, *Charleston Briefing Transcript*, p. 174.

<sup>64</sup> Lyter Testimony, *Charleston Briefing Transcript*, pp. 174–75.

<sup>65</sup> Baskaran Testimony, *Charleston Briefing Transcript*, p. 211; Lyter Testimony, *Charleston Briefing Transcript*, p. 185.

<sup>66</sup> Returning Citizen Testimony, *Charleston Briefing Transcript*, p. 178.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid., 178–79.



prevent her from obtaining her massage therapy license.<sup>69</sup> She contacted the WV Massage Therapy Licensure Board (Board) where the executive director was eager to help resolve the issue.<sup>70</sup> She was interviewed several times; her employer, pastor, and mentors at the Kanawha Institute for Social Research and Action were also interviewed.<sup>71</sup> The Board's executive director also allowed Returning Citizen to demonstrate her skills.<sup>72</sup> After weeks of examination, the Board granted her license. At the time of her presentation, the Returning Citizen had been licensed for ten years—operating her own business for almost seven years—and was licensed in Ohio.<sup>73</sup> She stressed her gratitude for the help she received, her faith in Christ and her strong work ethic in overcoming life's obstacles.<sup>74</sup>

### C. Housing

The U.S. Department of Housing and Urban Development (HUD) administers federal housing benefits via government subsidized residences (housing project apartments) and vouchers to provide assistance in securing private housing.<sup>75</sup> These benefits, which are administered by local public housing authorities (PHAs) with discretion to construct policies related to criminal records and access to housing assistance, has resulted in discriminatory practices. There are only two mandatory restrictions related to federal housing and criminal records required of public housing authorities by HUD guidelines.<sup>76</sup> First, federally subsidized housing providers cannot admit anyone who has been convicted of manufacturing methamphetamine in federally assisted housing.<sup>77</sup> Second, these providers cannot admit an applicant who is subject to a lifetime requirement to register as a sex offender.<sup>78</sup>

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<sup>69</sup> Ibid., 179.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid., 180.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Lyter Testimony, *Charleston Briefing Transcript*, p. 172; Returning Citizen Testimony, *Charleston Briefing Transcript*, pp. 178–80.

<sup>75</sup> Margaret Love, Jenny Roberts, and Wayne Logan, *Collateral Consequences of Criminal Conviction, Law Policy and Practice*, (Thompson Reuters 3d ed. 2018), ch 2, § 2:17.

<sup>76</sup> Marie Claire Tran-Leung, Staff Attorney, Sargent Shriver National Center on Poverty Law, Chicago, Ill, Testimony, *Conference Call Briefing Transcript*, p. 7 [hereinafter Tran-Leung Testimony].

<sup>77</sup> “HUD Mainstream Program, Frequently Asked Questions,” § 3.4, p. 5, U.S. Dep’t of Hous. and Urban Dev’t, [https://www.hud.gov/sites/dfiles/PIH/documents/Mainstream\\_Program\\_Implementation\\_FAQs.pdf](https://www.hud.gov/sites/dfiles/PIH/documents/Mainstream_Program_Implementation_FAQs.pdf) (last accessed July 14, 2019).

<sup>78</sup> “State Registered Lifetime Sex Offenders in Federally Assisted Housing, Notice H 2012-11, Notice PIH 2012-28.” Dep’t of Hous. and Urban Dev’t, Office of Hous., Office of Public and Indian Hous., June 11, 2012, <https://www.hud.gov/sites/documents/12-28PIHN12-11HSGN.PDF> (last accessed July 14, 2019).

However, as HUD allows for discretion for local public housing authorities to create policy, discrimination in housing benefits occurs for several reasons that can include the following:

- Public housing authorities refuse applicants if they were arrested, regardless of conviction,<sup>79</sup>
- Local public housing authority policies fail to place reasonable time limits on housing restrictions.<sup>80</sup> For example, some public housing authorities explicitly wrote policies that allowed for housing applications to be denied for criminal activity that occurred within the past 99 or 200 years,<sup>81</sup>
- The policies utilize overly broad categories of criminal activity resulting in rejection of applicants for any criminal activity regardless of severity of offense or its relation to housing.<sup>82</sup> For example, the housing authority in Galveston, TX allowed for applicants with charges of civil disobedience to be denied, despite the fact that there is no civil disobedience crime in Texas,<sup>83</sup> and
- Public housing authorities under use mitigating evidence such as efforts for rehabilitation.<sup>84</sup>

One member of the Charleston-Kanawha Housing Authority Board explained “there are (recognized) injustices in our system of criminal justice that require each of us to redouble our efforts to reintegrate into society those people who have felony convictions.” On the other hand, public housing residents “have a right to live in a safe and issue-free environment.”<sup>85</sup> Public housing authorities have struggled with the difficulty in maintaining a balance of second chances for formally incarcerated individuals, fair housing practices, and public safety.

In private rental markets, similar restrictive practices were found and in these markets, there would be no recourse for appeal of rejections.<sup>86</sup> Additionally, municipalities have begun to adopt “crime free rental ordinances” that require property owners to conduct criminal background

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<sup>79</sup> Tran-Leung Testimony, *Conference Call Briefing Transcript*, pp. 7–8.

<sup>80</sup> *Ibid.*, 8–9.

<sup>81</sup> *Ibid.*, 8.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> Kitty Dooley, Esq., Member Board of Commissioners, Charleston-Kanawha Housing Authority, Testimony, *Charleston Briefing Transcript*, p. 22 [hereinafter cited as Dooley Testimony].

<sup>86</sup> Tran-Leung Testimony, *DC Briefing Transcript*, p. 8.



checks, but do not provide appropriate screening criteria for property owners to follow.<sup>87</sup> This has resulted in overly punitive/restrictive policies for private property owners that further restrict access to housing.

In 2015 and 2016, Fair housing guidance was issued to assist the public housing authorities in developing policies that would create more opportunity for people with criminal records.<sup>88</sup> The 2015 guidelines made clear that an arrest record with no subsequent conviction was not a permissible basis for denying access. Further HUD clarified that providers did not need to adopt a “one-strike” policy, in which one felony offense would result in automatic denial of access. HUD offered best practices in fair policies the public housing authorities could adopt and in July 2016, HUD released a toolkit for public housing authorities that included a list of public housing authorities with forward-thinking reentry programs and policies. In coordination with the U.S. Department of Justice (USDOJ), HUD implemented the Juvenile Reentry Assistant Program that provided grants and legal aid to help youth expunge their records and assistance in addressing collateral consequences.<sup>89</sup> It is on the local public housing authorities to adopt these best practices to eliminate policies that prevent individuals with criminal justice involvement from being denied a second chance.

Inability to challenge these policies, through due process, blocks the individual from challenging the housing decisions leading to continued disenfranchisement from society.<sup>90</sup> In response to the inability to challenge potentially discriminatory policies, the 2015 and 2016 Fair Housing guidelines recommended the adoption of housing decision review processes.<sup>91</sup> Many states adopted policies that put in place due process procedures so applicants could challenge denials.

In New York, procedural protections like hearing notices, pre-decision opportunity to review information, and post-denial opportunity to respond to the housing provider’s decision have set up opportunities for the individual to challenge barriers to housing benefits.<sup>92</sup> The housing authority of New Orleans established a three-person panel to review mitigating evidence related to criminal records. Additionally, applicants with criminal records are tracked to “further review” instead of an outright denial.<sup>93</sup> The Charleston-Kanawha County Housing Authority allows a fair hearing for

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<sup>87</sup> Marie Claire Tran-Leung, Staff Attorney, Sargent Shriver National Center on Poverty Law, Written Statement for the West Virginia State Advisory Committee to the United States Commission on Civil Rights, May 4, 2018, at 8 [hereinafter cited as Tran-Leung Statement].

<sup>88</sup> Tran-Leung Testimony, *Conference Call Briefing Transcript*, pp. 8–9.

<sup>89</sup> Ibid.

<sup>90</sup> Beverly Sharp, Program Coordinator, Criminal Justice Department, Ashland Community & Technical College, Ashland, Kentucky; Re-Entry Initiatives Coordinator, West Virginia Council of Churches Testimony, *Charleston Briefing Transcript*, pp. 14–15 [hereinafter cited as Sharp Testimony].

<sup>91</sup> Tran-Leung Testimony, *Conference Call Briefing Transcript*, pp. 8–9.

<sup>92</sup> Tran-Leung Statement, at 13.

<sup>93</sup> Ibid., 16.

disputes of criminal records and whether a conviction is correct. After a five year prohibition, after the date of the release for individuals with criminal records, a case-by-case review is conducted to determine whether they have been responsible, maintained employments, and refrained from further criminal activity in order to grant those who meet that criteria access to public housing.<sup>94</sup> Despite requirements to provide notice as to why an individual is denied access, the ability for the individual to present evidence is “a relatively informal process” that can be difficult to navigate without assistance from a knowledgeable person.<sup>95</sup>

Presenter Matt Boggs, described the experience of individuals with substance use disorders and criminal justice involvement. He reported some local housing authorities have been open to allowing individuals with felony offenses to gain access, but the due process of appealing a rejection is a more mixed experience.<sup>96</sup> In particular for some individuals who are denied housing benefits, there was limited transparency on the reasons for denial and the opportunities for appeal.<sup>97</sup> Boggs told the story of an individual who was paroled to Charleston Work Release. Upon completing the program, the individual decided to stay in Charleston with his family since he had gainful employment and was working on his Bachelor’s Degree. However, he was not eligible for public assisted housing. The individual went on to say, “Thank goodness for the caseworker at the Work Release Center that personally intervened for me, and my oldest brother who was fortunate enough to be able to co-sign for me. Had I not been able to do that, two Master’s degrees later, that would have been devastating to me.”<sup>98</sup> Without assistance from a case worker and supportive family member, this individual may not have gotten the chance to successfully reenter society and earn two Master’s degrees.

Barriers to housing have created a system of increased homelessness for individuals and families. In addition, racial and socioeconomic discrimination and recidivism rates adversely impact an individual’s ability to engage in recovery. A 2015 study by the Ella Baker Center on Human Rights detailed significant barriers for formerly incarcerated individuals, in particular men who were previously incarcerated. Specifically, 77 percent of those surveyed reported they were ineligible for housing or were denied housing due to their felony conviction or the felony conviction of a family member.<sup>99</sup> This survey found a cyclical effect in that incarceration was related to

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<sup>94</sup> Dooley Testimony, *Charleston Briefing Transcript*, pp. 220–21.

<sup>95</sup> *Ibid.*, 41

<sup>96</sup> Matt Boggs, Executive Director of Recovery Point, Charleston, WV, Testimony, *Charleston Briefing Transcript*, p. 25 [hereinafter cited as Boggs Testimony].

<sup>97</sup> *Ibid.*

<sup>98</sup> Sharp Testimony, *Charleston Briefing Transcript*, p. 17.

<sup>99</sup> “Who Pays? The True Cost of Incarceration on Families: a national community-driven report led by the Ella Baker Center for Human Rights, Forward Together, and Research Action Design,” p. 26, *Ella Baker Center*, September 2015, <https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf> (referenced in Tran-Leung Testimony, *DC Briefing Transcript*, pp. 8–9) [hereinafter cited as Baker Study].

homelessness and homelessness was related to incarceration.<sup>100</sup> Rates of homelessness were four times higher in men who had been incarcerated compared to men who had incarceration history.

Individuals who are incarcerated have rates of homelessness significantly higher than the individuals with no history of incarceration, anywhere from seven to eleven times higher.<sup>101</sup>

In addition to increasing the risk of homelessness in the formerly incarcerated individual, the individual's inability to find stable housing can create a risk that the entire household will become homeless. Upon release to the community, 58 percent of surveyed formerly incarcerated individuals lived with family members.<sup>102</sup> Although not required by HUD, many public housing authorities have adopted policies that dictate that, if one member of a household is found to violate the criminal record policies, all individuals in the residence can be removed.<sup>103</sup> In the Ella Baker Center Study, approximately 18 percent of families reported being evicted or being denied housing when the former incarcerated family member was released.<sup>104</sup> Many formerly incarcerated individuals report "living in the shadows" within public housing.<sup>105</sup> The individual may "sneak in and out" of the housing resulting in an increased risk for violation of conditions of parole and risking potential re-incarceration, as well as risking the family's stable housing.<sup>106</sup>

Lack of access to housing benefits have systematically resulted in racial discrimination. In audits in Washington DC and New Orleans, African American testers were treated less favorably and given less opportunity to explain their criminal record compared to Caucasian testers with the same criminal histories and explanations for their histories.<sup>107</sup> Within the Charleston-Kanawha, approximately 28 to 30 percent of individuals who receive public housing are minorities.<sup>108</sup>

As public housing is intended to serve individuals from lower socioeconomic status, it is primarily the formerly incarcerated individuals with limited to no resources who are disproportionately impacted by these barriers.<sup>109</sup> Individuals who require public housing, but are unable to obtain it due to felony convictions, also face barriers to employment, subsequently increasing their need for

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<sup>100</sup> Baker Study, pp. 26–27.

<sup>101</sup> Tran-Leung Testimony, *Conference Call Briefing Transcript*, pp. 6–7.

<sup>102</sup> Baker Study, pp. 26–27.

<sup>103</sup> Love, Roberts, and Logan, *Collateral Consequences of Criminal Conviction, Law Policy and Practice*, ch. 2 § 2:17.

<sup>104</sup> Baker Study, p. 27.

<sup>105</sup> Tran-Leung Testimony, *Conference Call Briefing Transcript*, p. 7.

<sup>106</sup> Sharp Testimony, *Charleston Briefing Transcript*, p. 15.

<sup>107</sup> Tran-Leung Testimony, *Conference Call Briefing Transcript*, p. 8.

<sup>108</sup> Dooley Testimony, *Charleston Briefing Transcript*, p. 21.

<sup>109</sup> *Ibid.*, 35.

public assistance in housing. Participation in the private market is often cost prohibitive and presents additional housing barriers.<sup>110</sup> In the Ella Baker Center Study, 72 percent of surveyed individuals, who were formerly incarcerated, identified unavailability of affordable housing as one of the most important barriers to stable housing.<sup>111</sup> Lack of access to the private rental market, creates perverse incentives to maintain low income if public housing has been secured. Income qualification of public housing can create barriers to increasing income and socio-economic status, which would be required to enter into non-public subsidized housing.<sup>112</sup>

A study done in Georgia, found a person on parole had a 25 percent increased risk of arrest each time he changed his arrest, while stable housing was related to a reduction in risk of recidivism.<sup>113</sup> Washington and Pennsylvania demonstrated the connection between insecure housing and recidivism in pilot programs for individuals with high risk/high need with limited housing options were provided housing and supportive services resulting in decreased recidivism.<sup>114</sup> In West Virginia, substance use disorders are indirectly and directly related to 80 percent of crimes committed.<sup>115</sup> Without access to stable housing, individuals with substance use disorders will struggle to engage in the recovery process and will subsequently have higher risks for reoffending.

Boggs recounted the story of a patient who had a history of substance use disorder and a 2002 Grand Larceny arrest. She was able to receive Section 8 Housing where she eventually left on good terms and remained in recovery for a period of time.<sup>116</sup> As happens with substance use, this patient relapsed and was rearrested for shoplifting in a different county than the one where she had successfully received housing benefits.<sup>117</sup> In this new county, she applied for housing and was denied due to having a felony (the Grand Larceny charge). Her mother attempted to offer her housing, but was denied by the public housing authorities. Despite successfully completing her probation, this patient remained homeless and would occasionally sleep on her mother's couch despite the risks. She was rearrested multiple times and was in and out of the criminal justice system.<sup>118</sup> When this patient was offered the opportunity to enter into treatment that included housing opportunities, she was able to progress in her long-term recovery, maintain stable

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<sup>110</sup> Sharp Testimony, *Charleston Briefing Transcript*, pp. 15–16.

<sup>111</sup> Baker Study, p. 27.

<sup>112</sup> Boggs Testimony, *Charleston Briefing Transcript*, p. 50.

<sup>113</sup> Tran-Leung Statement, at 3.

<sup>114</sup> *Ibid.*, 3, 6.

<sup>115</sup> Boggs Testimony, *Charleston Briefing Transcript*, p. 24.

<sup>116</sup> *Ibid.*, 27–28.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

employment, and find and maintain housing without public assistance.<sup>119</sup> Lack of stable housing can prevent someone from entering into or maintaining recovery and subsequently increase their risk for recidivism.

### *Narrative of Returning Citizen – Obtaining Housing*

Ms. Hampton, an outreach worker for Oxford House, a recovery home network in West Virginia, shared her story of barriers to housing. Hampton is nine and half years in recovery and has a felony record for Simple Possession.<sup>120</sup> She lived in Oxford House for nine years and tried to apply for apartments several times, all resulting in a denial due to the felony conviction.<sup>121</sup> These denials occurred despite being employed and maintaining recovery. In the end, she was unable to rent an apartment, but was able to eventually buy her own home.<sup>122</sup> The stability of the Oxford House allowed her to financially be able to join the non-public assisted housing market, but it required a substantial period of time and she was not able to enter the rental market prior to jumping to homeownership.<sup>123</sup>

### **D. Public Benefits**

Individuals with criminal convictions are routinely denied a wide range of state and federal public benefits. The decision concerning who should be denied what benefits varies from state to state and is based on several factors including whether the crime that is the subject of the conviction is (1) classified as a felony or a misdemeanor, (2) labeled as violent, or (3) related to a crime involving drugs. The most common benefit programs that have been denied to various classes of individuals with convictions in West Virginia include the Supplemental Nutrition Assistance Program (SNAP), which is commonly referred to as “food stamps,” and Temporary Aid to Needy Families (TANF), which provides basic cash assistance to pregnant women and caregivers for minor children.

With the passage of welfare reform in 1996, The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, commonly called “welfare reform,” federal law provides that, unless a state passes affirmative legislation to opt out of the federal standards, individuals with felony drug convictions for possession, use, or distribution of drugs are subject to lifetime bans on TANF and SNAP.<sup>124</sup> Twenty-eight (28) states quickly opted out.<sup>125</sup> Others have taken steps to opt out, or

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<sup>119</sup> Ibid.

<sup>120</sup> Marie Rose Hampton, Outreach Worker, Oxford House, *Charleston Briefing Transcript*, p. 30 [hereinafter cited as Hampton Testimony].

<sup>121</sup> Ibid., 31.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid., 32.

<sup>124</sup> 21 U.S.C. § 862a.

<sup>125</sup> Amy E. Hirsch, Managing Attorney for Public Benefits, Community Legal Services, Written Statement for the West Virginia State Advisory Committee to the United States Commission on Civil Rights, May 4, 2018, at 4

partially opt out, over the years.<sup>126</sup> These state laws in themselves vary widely. Some have eliminated the ban on one type of assistance but not another,<sup>127</sup> some keep the ban in place for a number of years,<sup>128</sup> or while the person is on probation/parole, but not for the person's "lifetime."<sup>129</sup> Often, individuals still do not have access to benefits when they are most needed, i.e., immediately following release from incarceration.<sup>130</sup>

Another class of federal public benefits, Social Security Income (SSI)<sup>131</sup> and Social Security Disability Income (SSDI),<sup>132</sup> are treated differently from one another with regard to individuals leaving prison.<sup>133</sup> While both programs offer cash benefits to disabled individuals, Social Security Income is provided to low-income individuals with disabilities who have never worked or worked very little, while Social Security Disability Income is provided to individuals with disabilities who become disabled after working for a substantial period of time.<sup>134</sup> An individual who leaves prison and is eligible for Social Security Disability Income is able to immediately return to receiving benefits, while an individual who leaves prison having previously received Social Security Income, must go through a new application and enrollment process, which can take substantial time.<sup>135</sup>

The denial of public benefits compounds the other obstacles frequently faced by those with criminal records. For example, denying SNAP benefits on the basis of disability requires a low-wage individual to choose between purchasing food and paying utilities or the cost of transportation. The denial of benefits also creates significant challenges for recently released parents to reunite with, and care for, their children. The latter challenge has disproportionate effects on women with criminal convictions.

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[hereinafter cited as Hirsch Statement]. For a helpful summary of these benefits on a state-by-state basis see Darrel Thompson, "No More Double Punishments Lifting the Ban on SNAP and TANF for People with Prior Felony Drug Convictions," CLASP.org (updated Mar. 2019), <https://www.clasp.org/sites/default/files/publications/2019/04/2019.03.15%20No%20More%20Double%20Punishments.pdf> (last accessed July 14, 2019) [hereinafter cited as Thompson].

<sup>126</sup> Hirsch Statement, at 4; *see also* Thompson, at 6–7.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> 42 U.S.C. § 1381a, *et seq.*

<sup>132</sup> 42 U.S.C. § 423, *et seq.*

<sup>133</sup> Hirsch Testimony, *Conference Call Briefing Transcript*, pp. 17–18.

<sup>134</sup> 42 U.S.C. § 1381a, *et seq.*; 42 U.S.C. § 423, *et seq.*

<sup>135</sup> Hirsch Testimony, *Conference Call Briefing Transcript*, p. 19.



## 1. Generally

### a. Losing Benefits Impairs Access to Employment, Housing and Increases Odds of Living in Poverty.

When inmates are released from prison, they are often denied benefits, unable to obtain a job, and thus, struggle to provide for their families. They are often denied and faced with the Hobson's choice of failing to provide for themselves and their family or committing crimes to make ends meet.<sup>136</sup>

At the time of the Committee's Briefing, West Virginia was one of only six U.S. states to deny SNAP benefits to drug felons.<sup>137</sup> Because people with felony records have a difficult time obtaining employment, this practice means that these individuals are unable to provide food for themselves or their families.<sup>138</sup>

While the benefits individuals receive from TANF and food stamps are very small, for example, the average food stamp allotment nationally is about \$1.40 per meal and the individual has to have very little or no income to be eligible to receive food stamps at all, receiving that support can mean the difference between a mother's and her children's survival, or having to return to hazardous activities, such as trading sex for drugs.<sup>139</sup> Children suffer the worst consequences when parents are denied such benefits, including, at times, removal from the home and placement into foster care.<sup>140</sup>

At the time of the Committee's Briefing, West Virginia did not allow individuals with felony convictions to obtain SNAP or TANF benefits.<sup>141</sup> States that allow individuals with criminal records to access public benefits see about a 10 percent reduction in recidivism in the first year.<sup>142</sup> Access to those benefits assists individuals in rebuilding their lives and reunifying families. Moreover, while there is a stigma associated with receiving welfare, being "banned for life" from

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<sup>136</sup> Jeremiah Underhill, Legal Director, Disability Rights of WV, Charleston, WV, Testimony, *Charleston Briefing Transcript*, p. 210 [hereinafter cited as Underhill Testimony].

<sup>137</sup> Lida Shepherd, American Friends Committee, Charleston, WV, Testimony, *Charleston Briefing Transcript*, p. 203; *see also* Thompson, at 6–7 [hereinafter cited as Shepherd Testimony].

<sup>138</sup> Shepherd Testimony, *Charleston Briefing Transcript*, pp. 201–02.

<sup>139</sup> Hirsch Statement, at 1.

<sup>140</sup> *Ibid.*, 3.

<sup>141</sup> Recent legislation now allows individuals with felony drug convictions to obtain SNAP benefits in West Virginia. W. Va. Code § 9-2-3a (May 21, 2019), codifying H.B. 2459, 84th Leg., 1st Reg. Sess., (W. Va. 2019). Individuals with felony convictions that include the misuse of the SNAP program, loss of life, or the causing of physical injury are still barred from obtaining SNAP.

<sup>142</sup> Hirsch Testimony, *Conference Call Briefing Transcript*, p. 11.



receiving welfare benefits is worse; it is a “tremendously powerful stigmatizing message that really conveys a sense of hopelessness.”<sup>143</sup>

As one individual with a criminal record explained, many incarcerated individuals come from poverty, and thus have little to no resources upon release.<sup>144</sup> By denying them access to public benefits such as subsidized housing that could provide a fresh start, these individuals are often forced to return to the same homes and situations that led them to commit the crime in the first place.<sup>145</sup>

**b. Denying Benefits When the Crime Caused Physical Injury and/or Loss of Life Can Promote Recidivism.**

Some benefits, including SNAP, are denied on the basis of an individual having been convicted of a crime that has as an element of the crime the “causing of a physical injury” and/or the “loss of life.”<sup>146</sup>

Dr. Kirby noted that being labeled a “violent offender” can be arbitrary. Some people are labeled “violent” based on mere affiliation to a gang or to a crime which involved violence, even if they themselves did not act violently.<sup>147</sup> For example, an individual who is born to a gang, will be seen by law enforcement as maintaining that affiliation and will automatically be assigned a higher threat classification and be labeled a violent offender, even if they are not a violent individual.<sup>148</sup>

As one individual with a criminal record explained, even most individuals with violent crimes are eventually going to get out of prison and return to their communities.<sup>149</sup> As with other former felons, they need access to the same resources to survive. Denying those benefits will increase the likelihood that they return to criminal activity. Moreover, for many individuals with violent felonies on their records, the crime for which they served time occurred long ago, and they have served substantial time as punishment.<sup>150</sup>

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<sup>143</sup> Ibid.

<sup>144</sup> Returning Citizen Testimony, *Charleston Briefing Transcript*, p. 245.

<sup>145</sup> Ibid.

<sup>146</sup> W. Va. Code § 9-2-3a (2019).

<sup>147</sup> Jeri Kirby, Assistant Professor, Fairmont State University, Fairmont, WV, Testimony, *Charleston Briefing Transcript*, p. 267 [hereinafter cited as Kirby Testimony]; Shepherd Testimony, *Charleston Briefing Transcript*, p. 203.

<sup>148</sup> Kirby Testimony, *Charleston Briefing Transcript*, pp. 267–68.

<sup>149</sup> Returning Citizen Testimony, *Charleston Briefing Transcript*, p. 270.

<sup>150</sup> Ibid., 269.

## ***2. Denying Benefits Disproportionately Impacts Particular Populations***

### **a. Disabilities**

West Virginia has the highest disability rate, as well as the highest rate of severely disabled individuals in the United States.<sup>151</sup> Indeed, 32 percent of all working-age West Virginians qualify as disabled.<sup>152</sup> The types of jobs available in the state, such as jobs in coal mines, the logging industry, and chemical plants, lead to a higher rate of injuries from which people cannot recover.<sup>153</sup>

Further, the poverty rate for individuals with disabilities is much higher than the rest of the population. The unemployment rate for individuals with disabilities is at 75 percent and increases when the individual has both a disability and felony conviction.<sup>154</sup> As a result, individuals with both criminal records and disabilities are disproportionately affected by the loss of benefits.<sup>155</sup>

Public benefits designed to provide basic cash assistance to individuals with disabilities include Social Security Income (SSI) and Social Security Disability Income (SSDI). Social Security Disability Income benefits are paid to an individual who has previously worked and paid into the Social Security system, but who then becomes disabled and unable to work. Social Security Income benefits, by contrast, provide monthly cash benefits for persons with disabilities who have never worked, or worked only minimally, and have very limited means to support themselves. Social Security Income is a federal, means-tested program, designed to ensure that the poorest, disabled individuals have their most basic housing and food needs met.

Current federal law differentiates between these two types of benefits when it comes to reinstating benefits when an individual leaves jail or prison.<sup>156</sup> While incarcerated, benefits under both Social Security Income and Social Security Disability Income are suspended and/or discontinued. However, when persons eligible to receive Social Security Disability Income are released, their benefits are immediately reinstated. Individuals who have previously received Social Security Income, however, must re-apply and have eligibility re-determined, a process that can take several years.<sup>157</sup> Because eligibility for Social Security Income is based on having a qualifying disability and being very low income, these individuals necessarily have little to no ability to earn income, and little to no resources to rely upon while going through the Social Security Income eligibility process.

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<sup>151</sup> Underhill Testimony, *Charleston Briefing Transcript*, p. 208.

<sup>152</sup> *Ibid.*, 209.

<sup>153</sup> *Ibid.*, 208.

<sup>154</sup> *Ibid.*, 209.

<sup>155</sup> *Ibid.*, 210.

<sup>156</sup> Hirsch Testimony, *Conference Call Briefing Transcript*, p. 19.

<sup>157</sup> *Ibid.*

A less common, but still severe denial of benefits occurs when an individual becomes disabled in the course of committing a felony. Typically, if a person with a disability qualifies for Social Security Income, he or she can re-apply for those benefits despite the felony conviction, although, as noted above, that process may take substantial time. If, however, an individual becomes disabled during the commission of a felony, that individual is ineligible for Social Security Income benefits.<sup>158</sup> As a result, although those individuals may be completely disabled and unable to engage in any type of employment, they are denied the most basic safety-net that is available to others with the same disabilities.

## **b. Gender**

While many public benefits do not single out one gender or another, the laws often disproportionately affect women, because many benefit programs are designed in a way that also disproportionately support women.<sup>159</sup> The TANF program benefits pregnant women and caregivers for minor children, who tend to be women. Accordingly, approximately 90 percent of adults who receive TANF are women.<sup>160</sup> Likewise, while the food stamp program is more gender neutral, it also requires recipients to be pregnant, disabled, working 20 hours a week or living with and caring for minor children. Approximately 62 percent of non-elderly and 63 percent of elderly SNAP recipients are women; thus, the overwhelming majority of food stamp recipients are also women.<sup>161</sup>

If a mother has a felony drug conviction and is subject to the lifetime ban on TANF, her children may still be eligible for benefits, but the total amount coming into the household is substantially less, despite the number of people being the same.<sup>162</sup> As a result of insufficient assistance, families are broken up, homelessness increases, children placed in foster care, and the likelihood of relapse into addiction and return to incarceration also increase.<sup>163</sup>

The financial impact on the state is significant: “the costs of foster care (approximately \$630/month per child) and of incarceration (over \$3,000/month per person in the Philadelphia jails) far exceed the cost of granting (public) benefits.<sup>164</sup> In fact, it costs over five times as much to maintain one child in foster care and a mother in jail then to provide them with TANF and Food Stamps.”<sup>165</sup>

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<sup>158</sup> Underhill Testimony, *Charleston Briefing Transcript*, p. 212,

<sup>159</sup> Hirsch Testimony, *Conference Call Briefing Transcript*, p. 1.

<sup>160</sup> Hirsch Statement, at 5.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*, 6.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

A Yale University study found that 38 percent of recently released mothers and 25 percent of their children go at least one day a month without eating.<sup>166</sup> This is a vulnerable population that depends on basic assistance to avoid relapsing into dangerous and illegal behaviors.<sup>167</sup> As one mother stated: “We still need welfare until we are strong enough to get on our feet. Trying to stay clean, trying to be responsible parents and take care of our families . . . trying to change our lives. Trying to stop doing wrong things. Some of us need help. Welfare helps us stay in touch with society.”<sup>168</sup>

From 1980 to 2014, the incarceration rate of women increased 700 percent – the highest growing incarceration rate in the United States.<sup>169</sup> There is “tremendous” overlay between women having experienced physical and sexual abuse, often as children, and later ending up with felony drug convictions.<sup>170</sup> Individuals involved in the criminal justice system, whether as prosecutors, correctional officers, public health officials, or others agree that most women end up with felony drug convictions as a result of sexual abuse, domestic violence, and other physical abuse.<sup>171</sup> These same stakeholders all agreed that banning benefits is counterproductive and does not deter drug use or crime, but does make it much harder for women to stay clean and sober.<sup>172</sup>

### c. Children

When parents are impacted by felony convictions and the loss of benefits, it necessarily impacts children as well. Incarceration of parents often leads to children being placed out of the home, doing poorly in school, and entering the juvenile justice system.<sup>173</sup> A child’s placement in a juvenile correctional facility increases their likelihood of being incarcerated as an adult by 50 percent.<sup>174</sup>

Loss of benefits to parents with criminal convictions directly impact their children as well. A Yale University study found that 38 percent of recently released mothers go at least one day a month

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<sup>166</sup> Helen Dodson, *Ban on food stamps leads to hunger, HIV risk among former drug felons*, YaleNews, Mar. 25, 2013 (quoting Dr. Emily Wang, Yale School of Medicine), <http://news.yale.edu/2013/03/25/ban-food-stamps-leads-hunger-hiv-risk-among-former-drug-felons> (last accessed July 14, 2019) [hereinafter cited as Dodson].

<sup>167</sup> Dodson; Hirsch Statement, at 7.

<sup>168</sup> Hirsch Statement, at 7.

<sup>169</sup> Kirby Testimony, *Charleston Briefing Transcript*, p. 216.

<sup>170</sup> Hirsch Testimony, *Conference Call Briefing Transcript*, p. 10.

<sup>171</sup> Ibid.

<sup>172</sup> Hirsch Statement, at 1.

<sup>173</sup> Matthew Watts, President & CEO, Hope Community Development Corporation, Charleston, WV, Testimony before the West Virginia State Advisory Committee to the U.S. Commission on Civil Rights, *Charleston Briefing Transcript*, p. 92; Kirby Testimony, *Charleston Briefing Transcript*, p. 246.

<sup>174</sup> Kirby Testimony, *Charleston Briefing Transcript*, p. 246.

without eating, as do 25 percent of their children.<sup>175</sup> Denial of SNAP benefits to a parent with a felony drug conviction means that, even if their children are still eligible, there is less food to go around.<sup>176</sup>

Moreover, when an individual with children is incarcerated and their children receive public benefits, such as TANF or SNAP, during the period of incarceration, the individual is expected to repay the State in the form of “child support.”<sup>177</sup> When an individual owes large sums to the state for child support arrearage relating to their child’s receipt of benefits during their incarceration, the burden inhibits the returning citizen from being able to get back on his or her feet.<sup>178</sup> This is particularly harmful to children when the parent reunites with the children after incarceration, but is having their paycheck garnished to pay the state back child support, and thus less able to provide for the family.<sup>179</sup>

Individuals with a criminal record further explained the impact of felony convictions on their ability to parent their children. Dr. Kirby, herself a returning citizen, noted that she is not allowed to go to the zoo with her daughter’s Girl Scout Troop as a result of her 24 year-old felony conviction.<sup>180</sup> Prof. Kirby explained that another individual with a criminal record is forced to work multiple jobs, receives insufficient food stamps to feed her children and herself and has to pay unsubsidized rent because she has been denied HUD housing.<sup>181</sup> Her daughter’s grade school class is going on a field trip soon, but because of her felon status, she is unable to chaperone.<sup>182</sup> Likewise, she is unable to volunteer at her children’s schools, as they have a policy against allowing convicted felons to volunteer. A Returning Citizen who made a presentation before the Committee, said that he would like to volunteer to coach his grandchildren’s sports teams but would not be permitted because of his felony conviction.<sup>183</sup> These policies impair parents’ ability to bond with their children and be involved in their children’s education.

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<sup>175</sup> Hirsch Statement, at 7.

<sup>176</sup> Ibid.

<sup>177</sup> Hirsch Testimony, *Conference Call Briefing Transcript*, p. 18.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> Kirby Testimony, *Charleston Briefing Transcript*, p. 250.

<sup>181</sup> Ibid., 229.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid., 251.

*Narrative of Returning Citizen—As Reported by Prof. Kirby*

The returning citizen was arrested for a federal drug charge and served two years in prison.<sup>184</sup> She has three children, and while she was incarcerated, the children were separated.<sup>185</sup> She ultimately had to go to court to get her daughter back after her release.<sup>186</sup> At the same time, she was struggling to find housing and a means to support her family, because she did not qualify for HUD or other public benefits.<sup>187</sup> Because she had children, she was able to get \$375 a month in food stamps to feed them, but it was barely enough; however, she is grateful for being able to receive it.<sup>188</sup>

She made applications for dental school but was denied because of her conviction.<sup>189</sup> She wanted to start nursing classes at the community college but was informed during the application process that they would not be able to place her in a job because of her status.<sup>190</sup> Further, she has a beauty license but cannot get hired in that industry either.<sup>191</sup>

Her rent is \$950 a month, and she works multiple jobs to support her children.<sup>192</sup> She reports that volunteer applications have a box to check if you have been convicted of a felony, which prevents her from volunteering with her children's schools.<sup>193</sup>

She would like another chance. She wants to be more involved in her children's lives, to be able to pursue higher education, and to not feel like this conviction that she served time for will prevent her from ever moving forward in life.<sup>194</sup>

Dr. Kirby talked about the toll of intergenerational poverty, cycles of incarceration, and how that cycle is made substantially harder to break when an individual with a criminal record is unable to access benefits, jobs, and housing. "I married my wife who had three daughters and I had three

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<sup>184</sup> Kirby Testimony, *Charleston Briefing Transcript*, p. 226.

<sup>185</sup> *Ibid.*, 227.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*, 227–28.

<sup>191</sup> *Ibid.*, 228.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

<sup>194</sup> Kirby Testimony, *Charleston Briefing Transcript*, p. 229.



daughters and I wanted to break the generational cycle of incarceration. I committed my crime and I am guilty, but I have served my time.”<sup>195</sup>

#### **IV. Other Collateral Consequences Issues Examined by the Advisory Committee**

##### **A. Pre-Conviction Notice of Collateral Consequences**

*Constitutional concerns with not informing the accused of potential long-term collateral consequences before they accept plea agreements.*

Individuals charged with crimes are rarely informed of the potential long-term consequences of having a criminal conviction prior to accepting a plea agreement. As a result, individuals cannot make fully informed decisions about the impact of pleading guilty, i.e., agreeing to have a criminal record. Moreover, when individuals are not made aware of the collateral consequences of their criminal activity and convictions, the loss of benefits cannot serve as a deterrent to the crime.<sup>196</sup>

The Sixth Amendment to the United States Constitution provides that individuals charged with crimes are entitled to representation by an attorney in the criminal prosecutions.<sup>197</sup> Under the Fifth Amendment, the accused has a due process right to be informed of the charges and the consequences of being found guilty of those charges.<sup>198</sup> This should include an explanation of both the direct and indirect consequences of both the trial process and the consequences of accepting a guilty plea.<sup>199</sup>

Attorney and former judge, James Robert Leslie, found that, in his experience, defense attorneys are not able to adequately represent their clients because they cannot fully inform their clients of all the negative, long-term consequences of accepting a criminal conviction.<sup>200</sup> Because there is no standardized list of what all the collateral consequences are, it is nearly impossible to fully inform an accused of what s/he might lose in the way of benefits, access to employment, and other consequences.<sup>201</sup> In one particularly harsh example, a defendant pled guilty to drug-related

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<sup>195</sup> Returning Citizen Testimony, *Charleston Briefing Transcript*, p. 250.

<sup>196</sup> Underhill Testimony, *Charleston Briefing Transcript*, pp. 206–07.

<sup>197</sup> U.S. Const. amend. VI.

<sup>198</sup> U.S. Const. amend. V.

<sup>199</sup> J. Robert Leslie, Senior Deputy Attorney General, WV Office of the Attorney General, Charleston, WV, Testimony, *Charleston Briefing Transcript*, pp. 195–96 [hereinafter Leslie Testimony]. For example, defense attorneys should explain to their clients that a guilty plea may result in lost public benefits. *See also* Thompson, at 6–7.

<sup>200</sup> Leslie Testimony, *Charleston Briefing Transcript*, p. 196.

<sup>201</sup> *Ibid.*, 195–96.

charges, but his criminal defense attorney failed to inform him that one post-conviction consequence of his guilty plea would be that he would be deported.<sup>202</sup> The United States Supreme Court agreed that this constituted ineffective assistance of counsel.<sup>203</sup>

Leslie further found that judges likewise fail to inform defendants of the long-term collateral consequences of their criminal convictions.<sup>204</sup> He believes that judges, as guardians of the Constitution, should be reviewing these consequences with the accused before accepting a guilty plea, and by not doing so, they are neglecting their duties.<sup>205</sup>

## **B. Current Legislative Efforts Toward Reform in West Virginia**

In each of the four barriers to re-entry into society, recommendations to the WV State Legislature have been ongoing. The United States has 4 percent of the world population and 25 percent of incarcerated people and of the population incarcerated, 95 percent return to their communities.<sup>206</sup> However, the recidivism rate is very high and this is mostly due to the population being unprepared to reenter into society.

### **1. Second Chance for Employment Act**

The Second Chance for Employment Act<sup>207</sup> has been presented to the WV State Legislature for several years and a version of the bill was passed in 2017.<sup>208</sup> For an individual with certain nonviolent drug related felony convictions, after a period of ten years – if specific conditions were met<sup>209</sup> – the 2017 law will reduce the felony to a misdemeanor. Senator Pushkin, a primary advocate for this legislation, would like to see the nonviolent drug-related felonies expunged from records. With a high percentage of individuals with felony convictions, the lowest workforce population in the country, and a poverty rate of 17.9 percent, West Virginia would benefit from decreasing barriers to employment<sup>210</sup>

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<sup>202</sup> *Padilla v. Kentucky*, 559 U.S. 356, 359 (2010).

<sup>203</sup> *Id.* at 374.

<sup>204</sup> Leslie Testimony, *Charleston Briefing Transcript*, p. 196.

<sup>205</sup> *Ibid.*

<sup>206</sup> Brooke Rollins, Office of American Innovation, WMAL Interview, podcast, 4/1/19, 10:10am [hereinafter cited as Rollins Podcast].

<sup>207</sup> S.B. 76, 83rd Leg., 1st Reg. Sess. (W. Va. 2017).

<sup>208</sup> Hon. M. Pushkin, WV House of Delegates (D-37), Testimony, *Charleston Briefing Transcript*, p. 135 [hereinafter Pushkin Testimony].

<sup>209</sup> Jividen Testimony, *Charleston Briefing Transcript*, p. 102.

<sup>210</sup> Pushkin Testimony, *Charleston Briefing Transcript*, p. 141.

To assist with increasing access to employment opportunities, Ban the Box legislation has been proposed.<sup>211</sup> This legislation would allow potential employees to be reviewed initially by their credentials and work experience prior to disclosing felony convictions.<sup>212</sup> At the time of the Advisory Committee's Briefing, the current proposed Ban the Box legislation only addressed public sector employment, but could be expanded eventually to include the private sector, as Ban the Box legislation becomes more publically acceptable.<sup>213</sup> Employer acceptance of Ban the Box legislation may be improved as they learn that this legislation does not prevent background checks, rather it allows formerly incarcerated individuals to present their qualifications without their felony conviction being front and center.<sup>214</sup> The WV State Legislature could increase private sector incentivization to hire individuals with felony convictions by creating an insurance system as done on a federal level, to reduce potential liability of hiring someone with a felony conviction.<sup>215</sup> Offering tax incentives may also prompt employers to hire individuals with felony convictions.<sup>216</sup>

Licensing procedures by occupational boards should look at people on a more individual basis.<sup>217</sup> Proposed House Bill 4461 would prevent WV state licensing boards from denying occupational licenses to those with prior convictions unrelated to the responsibilities of that occupation.<sup>218</sup> Additional recommendations for legislative changes to occupational boards included removing vague language regarding what convictions can be considered<sup>219</sup> and placing time limits on how far back convictions are considered.<sup>220</sup>

Increasing access to healthcare and behavioral healthcare fields in the areas of substance use recovery may also be a significant public benefit.<sup>221</sup> Many individuals with felony drug convictions

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<sup>211</sup> H.B. 4567, 83rd Leg., 2d Reg. Sess. (W. Va. 2018).

<sup>212</sup> *Ibid.*, 142.

<sup>213</sup> *Ibid.*, 143.

<sup>214</sup> Hon. Jill Upson, WV House of Delegates (R-65), Testimony, *Charleston Briefing Transcript*, p. 153–54 [hereinafter Upson Testimony].

<sup>215</sup> Pushkin Testimony, *Charleston Briefing Transcript*, pp. 156–57.

<sup>216</sup> Thompson Testimony, *Charleston Briefing Transcript*, p. 157.

<sup>217</sup> Pushkin Testimony, *Charleston Briefing Transcript*, p. 139–40.

<sup>218</sup> Upson Testimony, *Charleston Briefing Transcript*, p. 144.

<sup>219</sup> *Ibid.*, 150.

<sup>220</sup> *Ibid.*

<sup>221</sup> Pushkin Testimony, *Charleston Briefing Transcript*, p. 152.

who have undergone treatment and recovery can serve as peer supports and work with others who also experienced addiction.<sup>222</sup>

It was recommended that WV remove the lifetime ban of SNAP benefits to individuals with drug felonies.<sup>223</sup> This denial of benefits is not a requirement for continued state SNAP funding and most states have removed this ban.<sup>224</sup>

Since the WV State Advisory Committee's Briefing in May 2018, the United States Congress enacted ground-breaking legislation with the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act (FIRST Step Act).<sup>225</sup> The Act will expand vocational training and educational opportunities in the correctional setting so the development of transitional skills will start prior to leaving the prison system, which will help reduce the risk that persons will recidivate upon release from prison.<sup>226</sup> The legislation also targets sentencing reform, an increase in earned time off a sentence for participating in rehabilitative programs, increasing public safety, and decreasing crime rates.<sup>227</sup>

## 2. Other West Virginia Laws

During the 2019 WV State Legislative Session, with bipartisan effort, laws were enacted to ameliorate some of the collateral consequences of felony convictions. The enacted Laws are:

- **WV Senate Bill 152** is related to criminal offense expungement. This bill will allow people with a nonviolent felony and misdemeanor convictions to petition to clear their criminal record.<sup>228</sup> It will eliminate continued punishment for crimes for which the individual has already served their time. A petition for expungement may be filed one year after conviction, completion of any sentence of incarceration or completion of any period of supervision, whichever is later in time for a misdemeanor and five years after conviction, completion of any sentence of incarceration or completion of any period of supervision, whichever is later in time for a non-violent felony. The granting of an Order of Expungement is discretionary by the Circuit Court.<sup>229</sup>

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<sup>222</sup> Ibid.

<sup>223</sup> Shepherd Testimony, *Charleston Briefing Transcript*, p. 201.

<sup>224</sup> Ibid., 203.

<sup>225</sup> H.R. 5682, 115th Cong. (as passed House May 22, 2018).

<sup>226</sup> *Id.*

<sup>227</sup> Rollins Podcast.

<sup>228</sup> S.B. 152, 84th Leg., 1st Reg. Sess. (W. Va. 2019) (effective June 7, 2019).

<sup>229</sup> *Id.*

- **WV House Bill 2083** provides a temporary identification card by the Division of Corrections and Rehabilitation to an inmate prior to release from custody.<sup>230</sup> This will ease the transition back into the community as the lack of identification was found to be a “major barrier to successful community reintegration.
- **House Bill 118** (1st Extraordinary Session) eases restrictions on many professional licenses for people with a criminal conviction and eliminates moral turpitude as a disqualifying standard in the licensing process.<sup>231</sup> The use of criminal convictions to disqualify a person from obtaining a professional license will need to “bear a rational nexus to duties and responsibilities to the profession or occupation.”<sup>232</sup>
- **House Bill 2459** no longer denies Supplemental Nutrition Assistance Program (SNAP) benefits to people with drug felony convictions.<sup>233</sup> Prior to this legislation passing, WV was one of three states that continued to ban access to food snaps for felony drug convictions.

## V. Committee Recommendations

Among their duties, advisory committees to the Commission are authorized to: (1) advise the Commission concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the federal government with respect to equal protection of the laws, and (2) initiate and forward advice and recommendations to the Commission upon matters that the Advisory Committee has examined.<sup>234</sup> The Committee received numerous recommendations from the presenters at the two scheduled Briefings. While not every recommendation fell within the scope of the Committee’s review, the Committee has agreed on a number of recommendations designed to promote better policies and practices in West Virginia that will allow individuals with a criminal record to reintegrate into their communities and reduce the likelihood of recidivism.

Furthermore, the Committee recognizes that there is significant work to be done on issues related to, but beyond the scope of the Committee’s civil rights project. For example, some of the expert presenters suggested further investigation and research into changing criminal sentencing laws to determine the effectiveness of long sentences, and how particular convictions are classified as violent, and whether such classifications are accurate reflections of the crimes that are committed. Similarly, there were recommendations to make bail reforms and to encourage judges to grant pretrial release.

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<sup>230</sup> H.B. 2083, 84th Leg., 1st Reg. Sess. (W. Va. 2019) (effective June 7, 2019).

<sup>231</sup> H.B. 118, 84th 1st Ex. Sess. (W. Va. 2019) (effective June 17, 2019).

<sup>232</sup> *Id.*

<sup>233</sup> H.B. 2459, 84th 1st Reg. Sess. (W. Va. 2019) (effective May 21, 2019).

<sup>234</sup> 45 C.F.R. § 703.2

The Committee notes the importance of addressing the stigma that attaches to persons with a criminal record. The Committee encourages all stakeholders, including the state and local governing bodies, private businesses, chambers of commerce, landlords, churches, community centers, schools, news media, and others to consciously work to combat the stigma associated with having a criminal record, to ensure their successful reentry as fully productive citizens.

Based upon the research and the testimony it received, the West Virginia State Advisory Committee submits the following recommendations for the Commission's consideration.

#### **A. General**

1. The Committee recommends the West Virginia Legislature conduct further research into a variety of areas that greatly impact the success of individuals with criminal records to reintegrate and become productive members of their communities. Specific areas deserving of additional exploration include family reunification, drug addiction and treatment, and the provision of mental health services to individuals recently released from custody. The Committee suggests such a study could be delegated to the West Virginia Law Institute, or other appropriate research body.
2. The Committee recommends that the West Virginia Legislature conduct a study into the particular needs of and challenges for individuals with violent and/or sex offenses seeking reentry into their West Virginia communities. The Committee suggests that the study could be delegated to an appropriate research body.
3. The Committee recommends that the West Virginia Legislature remove accrued child support arrearage owed to the State by individuals with criminal records at the time of release from custody.
4. The Committee recommends that the West Virginia Department of Military Affairs and Public Safety explore the possibility of creating programs to assist inmates with reentry, whether that be through increased social services provided at halfway houses and/or recovery residences, or through other programs that focus on reuniting families and reducing recidivism.<sup>235</sup>
5. The Committee recommends that the state and local human rights commissions engage in public outreach campaigns to educate individuals with criminal records, employers, housing providers, licensing boards, and other stakeholders about the benefits of employing and housing such persons, as well as the appropriate use of criminal records and best practices in this area.

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<sup>235</sup> Several programs in other states could serve as models by which West Virginia could create a pilot program: *The Neighborhood*, a program in Kentucky that creates a "one-stop shop" for individuals as they leave prison and need assistance with social services, benefits, housing, clothing, and other needs, Sharp Testimony, *Briefing Testimony*, pp. 57–59, The Legal Action Center in New York, Kirby Testimony, *Charleston Briefing Transcript*, p. 260, and the Union County Housing Authority in rural Pennsylvania, which has seen a 30 percent reduction in recidivism for those who participate in its housing and support services program, Tran-Leung Statement, at 16.



6. The Committee recommends that the West Virginia State Bar Association consider creating a *pro bono* legal representation program to assist individuals with criminal records in addressing the legal barriers to reentry, including those who are wrongfully denied housing, licenses, and employment, or need assistance obtaining public benefits or identification documents.

## **B. Housing**

1. The Committee recommends that the West Virginia Legislature conduct a study to provide targeted funding to encourage both public housing authorities and private property owners to offer housing to individuals with criminal records.
2. The Committee suggests that such study could be delegated to the West Virginia Law Institute, or other appropriate research body.

## **C. Employment**

1. The Committee recommends that the West Virginia Governor designate the appropriate body governing post-secondary education to engage in a study to review the barriers that currently exist for those with criminal records who seek to enroll in and finance career-based training and apprenticeship programs at institutions within the State, as well as the need for new or additional programs to provide job training to those with criminal records, including access to financial aid.
2. The Committee recommends that the West Virginia Legislature reduce the length of time that must pass after the date of a person's last conviction before they may petition to have their felony conviction modified to a "reduced misdemeanor" pursuant to the recently enacted Second Chance for Employment Act<sup>236</sup> from ten (10) years to five (5) years. This would bring the law in line with the recently enacted expungement period.
3. The Committee recommends that the West Virginia Governor direct the Department of Military Affairs and Public Safety to develop work release centers that will help individuals with criminal records transition back to the community in a slow and supported manner. Funding to implement such a program could be sought through the federal Second Chance Act of 2007.<sup>237</sup>

## **D. Benefits**

1. The Committee recommends that the West Virginia Legislature discontinue and/or refuse to condition eligibility for public benefits on payment of costs and fines associated with the criminal conviction and judicial process.

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<sup>236</sup> S.B. 76, 83rd Leg., 1st Reg. Sess. (W. Va. 2017).

<sup>237</sup> The Second Chance Act of 2007, 18 U.S.C. § 3624.

2. The Committee recommends that the West Virginia Legislature remove any restrictions related to the severity or nature of the crime from eligibility for public assistance benefits, including denying benefits based on offenses that are violent, sexual, or drug related.

#### **E. Licensing**

1. In light of the recently passed HB 118,<sup>238</sup> enacting West Virginia Code § 30-1-24, which addresses many of the concerns raised to this Committee with regard to professional licensing, the Committee commends its passage and recommends that the West Virginia Legislature undertake a comprehensive review two years from enactment of HB 118,<sup>239</sup> to determine if criminal records are continuing to pose significant barriers to licensing in the state. Such review should include all licensing boards in the State, with the purpose of identifying and documenting disqualifying convictions for each type of licensing requirement. The Committee suggests that the study could be delegated to the West Virginia Law Institute, or other appropriate research body.
2. The Committee recommends that the West Virginia Legislature require licensing boards be diligent in collecting information related to a licensing applicant and in reviewing the application. If an application is denied because of an individual's criminal history, licensing boards should be required to issue clear, written findings informing the individual about the basis for the denial, and allow the individual to seek reconsideration of the denial, if the individual believes the information relied upon is inaccurate or incomplete.

#### **F. Pre-Conviction Notice of Collateral Consequences**

1. The Committee recommends the creation of a standardized model of communication between defense attorneys and criminal defendants with regard to the collateral consequences of criminal convictions, including misdemeanor convictions, which is required to be presented before a defendant accepts a plea bargain, so that the defendant understands the full implication of the conviction. Courts should verify that an attorney explained these potential consequences to the defendant prior to accepting the plea agreement.
2. The Committee recommends that the West Virginia Department of Military Affairs and Public Safety establish an entity within that Department charged with collecting data from every stage of the criminal justice process, from arrest through re-entry. In the interests of transparency, such data should be stored electronically and made available online to the general public, provided, however, that any individually identifying information should be redacted after release from incarceration.

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<sup>238</sup> H.B. 118, 84th 1st Ex. Sess. (W. Va. 2019) (effective June 17, 2019).

<sup>239</sup> *Id.*

### **G. Federal Level Recommendations from the Two Briefings**

The Committee brings to the Commission's attention recommendations made by experts for suggested legislative changes at the national level.

1. Federal repeal of lifetime bans on TANF and SNAP benefits for individuals with felony drug convictions.
2. Federal amendment to the Social Security Act to treat SSI the same way that SSDI and retirement benefits are treated in this context. The rationale is that SSI applies to low-income individuals over 65, who meet the disability tests for SSDI; however, those with SSDI or retirement benefits don't have to re-apply for benefits after incarceration. Those with SSI do have to reapply, and the process can take several years.

## **APPENDICES**

**Testimony of Priya Baskaran**  
**West Virginia University College of Law**

**Before the**  
**West Virginia Advisory Committee of the U.S. Commission on Civil Rights**

**Felony Record's Impact on Access to Occupational Licenses**  
**July 19, 2018**

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My name is Priya Baskaran. I am an Associate Professor of Law at the West Virginia University College of Law, where I direct the Entrepreneurship & Innovation Law Clinic (EILC). The EILC provides free transactional legal assistance to West Virginia based non-profits, small businesses, individual entrepreneurs, and community organizations. In the past, I have taught in similar Clinics at the University of Michigan Law School and Georgetown University Law Center, where I represented a number of returning citizens pursuing self-employment and entrepreneurship as a supplemental or primary means of economic participation post-incarceration. My forthcoming Article in the Maryland Law Review examines the employment barriers created by the complex web of post-conviction civil penalties, commonly referred to as collateral consequences, and why the existing nonprofit based system fails to effectuate the economic enfranchisement of returning citizens.<sup>1</sup>

I very much appreciate the opportunity to testify on the impact of occupational licensing barriers in West Virginia for returning citizens. I believe the existing barriers and statutory scheme is harmful for both individual returning citizens as well as the larger state economy. First, the current, outdated statutory scheme makes it very difficult for returning citizens to participate in the local economy, increasing their individual risk of recidivism. The data has consistently shown that returning citizens throughout the United States often prioritize securing employment and that securing employment contributes to reducing recidivism.<sup>2</sup> Second, West Virginia is facing a larger economic crisis, including very low workforce participation. The current occupational licensing scheme reduces viable employment and self-employment options for returning citizens, thus contributing to overall low workforce participation in the state. Reducing or removing these barriers would have a positive outcome for the state.

## **I. Complexity of Licensing Regimes in West Virginia**

In West Virginia, there is no overarching body that controls or regulates all the employment or occupation related licensing. West Virginia currently has thirty-three (33) occupational licensing boards.<sup>3</sup> These are bodies created by state statute that set licensing standards and regulate a variety of professions including accountants<sup>4</sup>, barbers<sup>5</sup>, nurses<sup>6</sup>, and real estate appraisers.<sup>7</sup> The members of these boards are generally appointed by the Governor, with Senate approval.<sup>8</sup>

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<sup>1</sup> Baskaran, Priya, *Respect the Hustle: Necessity Entrepreneurship, Returning Citizens, and Social Enterprise Strategies* (March 20, 2018). 78 Md. L. Rev. (2019 Forthcoming). Available at SSRN: <https://ssrn.com/abstract=3144791>

<sup>2</sup> Stephen Tripodi Et. Al., *Is Employment Associated with Reduced Recidivism?: The Complex Relationship between Employment and Crime* (Florida State University Libraries, Faculty Publications, 2010) at page 2, available here: <http://diginole.lib.fsu.edu/islandora/object/fsu:253662/datastream/>

<sup>3</sup> For a list of current occupational licensing boards, see the West Virginia Secretary of State website here: <https://sos.wv.gov/public-services/execrecords/appointments/Pages/LicensingBoardsList.aspx> (last visited 8/19/2018).

<sup>4</sup> W. Va. Code Ann. §30-9

<sup>5</sup> W. Va. Code Ann. §30-27

<sup>6</sup> W. Va. Code Ann. §30-7

<sup>7</sup> W. Va. Code Ann. §30-38

<sup>8</sup> As one such example, see the Board of Barbers and Cosmetologists. W. Va. Code Ann. §30-27-4



In addition to the above occupational licensing boards, certain licenses fall under the purview of the West Virginia Department of Labor, including plumbers<sup>9</sup> and general contractors.<sup>10</sup> Electricians are separately regulated by the West Virginia Fire Marshall, including temporary licensure and journeymen licensing.<sup>11</sup> Finally, county governments and municipal governments regulate “Handy-man licenses.”<sup>12</sup> These latter licenses are for smaller scale, unskilled, manual labor projects. Examples of handyman projects include painting, lawn care services, and roof repair. The total payment received for the service must be less than \$2500.00.<sup>13</sup>

The number of licensing bodies and a lack of one uniform location or procedure by which one can learn of the various licensing requirements can prove challenging. In order to apply for a license, an applicant must first identify the correct licensing body and then navigate the various rules and regulations propagated by each body.

Additionally, it is very difficult to determine whether a criminal history will prohibit licensure. This means many returning citizens may bear the significant financial burdens of enrolling in the requisite training programs, completing licensing exams, and submitting expensive licensing applications to the Department of Labor or relevant licensing boards only to then learn that they are ineligible due to their criminal history.

It is important that these various licensing divisions act in concert, ensuring consistency, clarity, and equity. Such coordination requires clear language and direction from the state statutes and regulations – emphasizing that the prior criminal history of an applicant is only relevant if there is a direct relationship between the prior offense and the licensure sought.

## **II. Broad standard in existing Statutory Schemes**

Current statutes are overly broad, granting discretion to licensing agencies but providing little guidance on utilizing that discretion. Thus, the existing statutory language governing licensing boards enables blanket denials based on felony convictions rather than encouraging the use of discretion to grant licenses. This is particularly problematic for low-income residents as West Virginia currently licenses 70 of the 102 lower-income occupations (as identified by a seminal study from the Institute for Justice). Such professions include cosmetologists, shampooers, barbers, manicurists, and handymen.

Examination of the existing language easily demonstrates how these blanket bans operate. For example, the statute governing the board of barbers and cosmetologists says<sup>14</sup>:

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<sup>9</sup> W. Va. Code Ann. §21-14-2

<sup>10</sup> W. Va. Code Ann. §21-11

<sup>11</sup> W. Va. Code Ann. §29-3B-4

<sup>12</sup> These “handy-man licenses” are issues locally for manual laborers for projects costing less than \$2,500.00. For examples of such local licensing, see the City of Huntington Handyman FAQ and Application available here: <http://www.cityofhuntington.com/business/building-permit/handyman-requirements> (last visited 8/19/2018).

<sup>13</sup> W. Va. Code Ann. §21-11

<sup>14</sup> W. Va. Code Ann. §30-27-20(g)

(g) The [licensing] board may, after notice and opportunity for hearing, ***deny or refuse to renew, suspend or revoke the license***, permit, registration or certification of, impose probationary conditions upon or take disciplinary action against, any licensee, permittee, registrant or certificate holder for any of the following reasons once a violation has been proven by a preponderance of the evidence:

(1) Obtaining a license, permit, registration or certification by fraud, misrepresentation or concealment of material facts;

(2) ***Being convicted of a felony or other crime involving moral turpitude;***

Such statutory language clearly gives licensing boards the discretion to deny a license based on a felony conviction, creating an operative blanket ban. There is no language in the statute requiring boards to consider a direct connection between the criminal conviction and the underlying profession. For example, it would be understandable if a fraud conviction would prevent an individual from receiving an accounting or law license. There is also no language mandating the consideration of mitigating factors, like the passage of time. Thus, the current language allows for a life-time ban. A criminal conviction from twenty-five years in the past can stymie the present-day economic opportunities for a returning citizen. There is also no language addressing wrongful convictions. This means an improperly imprisoned individual may be denied an occupational license, even though they were later exonerated. In addition to a lack of statutory language that requires consideration of any mitigating factors, there are also no regulations providing such guidance to the relevant licensing authorities.

It is important to reiterate that the primary issue is not the licensing boards, but the underlying legal framework. The licensing boards simply apply the existing statutory scheme. There is evidence of licensing boards in West Virginia who take extra efforts and engage in great due diligence before denying licensure, but there are also many examples of boards who apply a more cautious interpretation of the statute, simply denying licensure based on felony convictions. These boards are reluctant to use their discretion as they are not legal experts, and therefore default to the most conservative approach.

The Veterans Advocacy Legal Clinic (VALC) at WVU College of Law recently encountered this very issue during the 2017-2018 academic year. A client of VALC was denied reinstatement of a cosmetology license based on a felony conviction. Despite the tireless advocacy of Faculty and students in the Clinic, the licensing board ruled against using its discretion to grant licensure. It did not matter that client was a veteran who had previously served our country and obtained an honorable discharge. It did not matter that her conviction was for a non-violent drug offense that carried a mandatory minimum sentence. It did not matter that she was a model prisoner and maintained sobriety during incarceration and post-release. It did not matter that she was committed to rebuilding her life including finding gainful employment. It did not matter that she had previously run a successful small business using her cosmetology license and was eager to return to her earlier career as a hairdresser. It did not matter that she was

unsure of how else she would be able to support herself without the career she had trained so hard-for.

The story of this returning citizen reinforces the negative consequences of the existing broad, discretionary language. Currently, there is no obligation for the board to truly examine whether there is a connection between the profession and the criminal history that would warrant denial. A nonviolent drug-offense has little connection with pursuing a career in cosmetology, a license that already requires 1800 hours of training and \$134 licensing fee.

Additionally, this story highlights the necessity of regulatory changes to improve access to information concerning the licensing process and potential for denial. This particular returning citizen was better resourced than many as she had access to free legal services through the clinic. A returning citizen attempting to navigate this process without access to legal advice would be at an even greater disadvantage.

The solution is a statutory and regulatory system that provides greater guidance to licensing boards, preventing the broad denial of licensure based solely on felony convictions. We also need opportunities for greater process protections, ensuring that returning citizens can determine whether they are eligible for licensing or understand the hearing or appeals process prior to investing time and money into pursuing a license.

### **III. Reforming the existing statutory scheme in West Virginia**

West Virginia needs a statutory scheme that promotes greater workforce participation. According to the Bureau of Labor Statistics, the 2017 workforce participation for West Virginia was 53.1%.<sup>15</sup> This was the lowest workforce participation rate in the nation and nearly ten percent lower than the national average.<sup>16</sup> The workforce participation rate calculated by the U.S. Bureau of Labor statistics and reflects both individuals who are employed and actively seeking employment.<sup>17</sup> A lower workforce participation rate translates to lower GDP and lower tax revenues as fewer individuals are actively contributing to the economy through paid labor. The Congressional Budget Office has also noted that low rates of workforce participation are “associated with larger federal outlays, because people who are not in the labor force are more likely to enroll in certain federal benefit programs.”<sup>18</sup> Enabling returning citizens to rejoin the workforce in West Virginia will positively impact the economic health of the state as well as reduce recidivism rates.

This is an opportune time for state governments to address reentry and proactively engage in local measures to improve the lives of returning citizens. The current United States Department of Justice has made a number of notable changes that impact returning citizens and their communities, making it even more necessary for state and local governments to bridge the gap. First, current Federal initiatives curtail funding for existing reentry services and

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<sup>15</sup> <https://www.bls.gov/web/laus/ststdsadata.txt> (last visited 8/19/2018).

<sup>16</sup> The national average in 2017 was 62.9%. <https://www.bls.gov/web/laus/ststdsadata.txt> (last visited 8/19/2018).

<sup>17</sup> <https://www.bls.gov/opub/mlr/2016/article/labor-force-participation-what-has-happened-since-the-peak.htm> (last visited 8/19/2018).

<sup>18</sup> <https://www.cbo.gov/publication/53452> (last visited 8/19/2018).

programming, shifting the burden onto state governments and communities to absorb and provide for returning citizens who need to navigate life post-incarceration. Included in this list is a reduction of funding for Halfway Houses, which serve as a means for shortening sentences and reintegrating returning citizens into communities by giving them opportunities to work and receive training outside prison.<sup>19</sup> Now local governments, families, and communities must provide additional support and services to provide housing and employment opportunities.<sup>20</sup>

Second, there will be greater numbers of returning citizens in the near future returning to under resourced communities. Attorney General Jeff Sessions announced increased funding for additional prosecutors to pursue opioid related crimes.<sup>21</sup> The increase in prosecutions and the decrease in prosecutorial discretion surrounding mandatory minimums will lead to an increase in the incarceration rate and the length of time served, as well as to the loss of economic potential.<sup>22</sup> With fewer Federal dollars reserved for reentry programs that serve returning citizens, the burden shifts to state and local governments to provide services for individuals returning home. We should seize this as an important opportunity to create a licensing scheme that allows returning citizens to participate in the economy.

#### **IV. Lessons from other Rural Jurisdictions**

Numerous jurisdictions with significant rural populations have enacted comprehensive licensing reform to improve workforce participation and reduce the unnecessary disenfranchisement of returning citizens. Other Appalachian states like Tennessee require licensing boards to demonstrate that an applicant's conviction is "directly related" to the licensed occupation. Additionally, Tennessee licensing boards must also consider mitigating factors, including the age and nature of the offense and evidence of rehabilitation, before denying licensure. Similar language requiring a direct connection between licensing and conviction is common in a number of state statutory regimes including South Carolina, Louisiana, and Florida.

Indiana, another state with a sizeable rural population, recently adopted the most comprehensive licensing reform (HB 1245).<sup>23</sup> West Virginia can and should learn from this comprehensive law, which reduces barriers to occupational licensing for returning citizens and provides greater guidance to licensing boards. Effective July 2018, Indiana State licensing boards and commissions are required to take the following affirmative measures to reduce barriers to licensure based on criminal history.<sup>24</sup>

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<sup>19</sup> See generally <https://www.reuters.com/article/us-usa-justice-prisons-exclusive/exclusive-trump-administration-reduces-support-for-prisoner-halfway-houses-idUSKBN1CI2ZA>; <https://www.motherjones.com/crime-justice/2017/12/team-trump-is-slashing-programs-that-help-prisoners-adapt-to-life-on-the-outside/> (last visited 8/19/2018).

<sup>20</sup> Cite my Article

<sup>21</sup> <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-formation-operation-synthetic-opioid-surge-sos> (last visited 8/19/2018).

<sup>22</sup> <https://www.nytimes.com/2017/05/12/us/politics/attorney-general-jeff-sessions-drug-offenses-penalties.html> (last visited 8/19/2018).

<sup>23</sup> Full text of HB1245 and session information is available here: <https://iga.in.gov/legislative/2018/bills/house/1245> (last visited 8/19/2018).

<sup>24</sup> *Id.*

### **A. Eliminating Overly Broad Language**

Licensing boards must “explicitly list” all disqualifying convictions in their licensing requirements. Furthermore, each disqualifying conviction must “specifically and directly” relate to the duties and responsibilities of the occupation or profession.<sup>25</sup> Additionally, the Indiana law prohibits the use of “nonspecific terms, such as moral turpitude or good character, as a licensing or certification requirement.”<sup>26</sup>

### **B. Reasonable time-limits on past-convictions**

The disqualification period for convictions listed by the agency is generally limited to five years.<sup>27</sup> This means a disqualifying conviction need not serve as a lifetime ban on licensure as long as the applicant has kept a clean record during the disqualification period.

### **C. Consideration of mitigating facts and circumstances**

Even if an applicant has a disqualifying criminal history, the board, commission, or committee is required by statute<sup>28</sup> to consider a number of factors before denying a license to the applicant, including:

- (1) The nature and seriousness of the crime for which the individual was convicted.
- (2) The passage of time since the commission of the crime.
- (3) The relationship of the crime to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the occupation.
- (4) Evidence of rehabilitation or treatment undertaken by the individual

In addition to requiring licensing entities to take these listed affirmative steps, the Indiana law improves access to information about the licensing process. Under the new law, persons with a criminal history (felony or misdemeanor) may request an advisory opinion from the licensing agency as to whether their criminal history would be disqualifying. This enables returning citizens to understand their options prior to pursuing expensive training and licensing.<sup>29</sup>

Furthermore, the Indiana law promotes consistency across licensing entities. The new law applies not only to state licensing agencies, but also to units of county and municipal government that issue licenses, and requires that state agencies work with them to eliminate redundant and overlapping rules, but also ensure all licensing units can work in concert in applying fair standards.<sup>30</sup>

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<sup>25</sup> Ind. Code § 25-1-1.1-6(e)

<sup>26</sup> Ind. Code § 25-1-1.1-6(d)

<sup>27</sup> Ind. Code § 25-1-1.1-6(g). There are a few exceptions that allow for the consideration of an older criminal history by the licensing board, but these are limited by statute to violent crimes, criminal sexual acts, and repeat or second offenses during the “disqualification period.”

<sup>28</sup> Ind. Code § 25-1-1.1-6(f)(1)-(4)

<sup>29</sup> Ind. Code § 25-1-1.1-6(h)

<sup>30</sup> Ind. Code § 36-1-26

## **V. Conclusion**

Ultimately, West Virginia would greatly benefit from a clear and comprehensive statutory and regulatory regime. From an economic health perspective, efforts to reduce barriers and incorporate returning citizens into the workforce would certainly benefit West Virginia as a whole. Additionally, employment plays an important role in reducing recidivism. Moreover, many states have proven that comprehensive reform is possible regardless of population density or political proclivities. This is truly an issue that draws support from all political parties and all geographic regions.



Testimony of Amy E. Hirsch  
Before the West Virginia Advisory Committee to the  
U.S. Commission on Civil Rights  
May 4, 2018

Thank you, Chairperson Martinez, and members of the West Virginia Advisory Committee, for allowing me to testify today concerning collateral consequences of criminal records as they affect public assistance, most particularly the impact of the lifetime ban on TANF benefits and SNAP/Food Stamps for women with felony drug convictions.

My name is Amy E. Hirsch. I am the Managing Attorney for public benefits issues at Community Legal Services, in Philadelphia. In the past, I have taught welfare law at the University of Pennsylvania Law School, and at the Bryn Mawr College Graduate School of Social Work and Social Research. I have written a number of articles about the impact on low-income women and families of welfare policies, domestic violence and sexual abuse, and criminal justice and addictions policies. During 1997-1998, I had a leave of absence from Community Legal Services, and funding from the Center on Crime, Communities and Culture, to do research on the interaction of welfare reform and criminal justice issues.

I looked at the impact of the lifetime ban on TANF benefits and Food Stamps for women with felony drug convictions. I conducted extensive interviews of over 30 criminal justice and public health professionals, and of 26 women with drug convictions, in four counties in Pennsylvania, while the ban was in effect in Pennsylvania. I also analyzed data from the criminal court system in Philadelphia and from a residential drug & alcohol treatment program for women. Much to my surprise, the picture I got from these very different sources was very consistent. Everyone interviewed—prosecutors, police officers, corrections officials, probation officers, defense attorneys, public health professionals, drug & alcohol treatment staff, experts on domestic violence and sexual assault, and the women themselves—spoke from different perspectives, but reached the same conclusion: the ban on benefits is counter-productive. **It does not deter drug usage or crimes, but instead makes it much harder for women to stay clean and sober.**

I wrote a comprehensive report on the research results, Some Days Are Harder Than Hard': Welfare Reform and Women With Drug Convictions in Pennsylvania, and edited a report called Every Door Closed: Barriers Facing Parents With Criminal Records (copies are being provided to the Commission).

My research results have also been published in several journals, including Women, Girls and Criminal Justice, Violence Against Women, Clearinghouse Review, Journal of Poverty Law and Policy, and the Temple Civil and Political Rights Law Review.

Although my research was a small, qualitative study, it began an important national conversation about the counter-productive nature of the federal lifetime ban, which continues today. I want to tell you a little bit about the research results, and their policy implications.

### **The Women**

The women I interviewed began their drug usage as children, or as young teens, in direct response to being sexually and/or physically abused. In the absence of other resources, they self-medicated the pain of abuse with drug usage. Here are a couple of typical quotes from the women I interviewed:

**Lynette:** My stepfather was drunk a lot, my mom left us alone with him. I was sexually molested by my stepfather. I was hurt because I told my mom and she said maybe I led him on—I was very young. They took me away when I was thirteen and it was before then. It went on for a year or two and my mother said it was my fault. The drugs I used when things really hurt me, so I wouldn't feel the hurt.

**Tanya:** When I was a child, my father used to rape me. It started when I was nine. ...After I ran away, I wanted somebody to want me. I ran into this guy, he was older, and I wanted him to want me. He gave me cocaine. I was thirteen.

**Wendy:** I was afraid to go to sleep at home, because my mom's boyfriend came in and messed with me. I thought if I could just go to sleep—I only felt safe sleeping at school. So I went to sleep at school every day, and they yelled at me.

They left school at an early age, often when they ran away to escape the abuse. They have limited literacy, limited job skills, and multiple physical and mental health problems. They have histories of homelessness and prostitution. Their crimes were committed while they were in active addiction, to get drugs or money for drugs.

The criminal justice system was the first place anyone offered them drug treatment or help dealing with the abuse they had experienced.

**Maria:** I was in the city jail), in the OPTIONS program, for drugs and alcohol. They had all different kind of classes-about being raped in the street, about being raped in your family. I needed both those classes.

The convictions which disqualified them from receiving benefits were generally for very small amounts of drugs, (\$5 or \$10 worth) and were often their first convictions.<sup>1</sup>

Their drug usage and crimes were inextricably intertwined with ongoing domestic violence and sexual assault. A staff member working with incarcerated women in a semi-rural area talked about one of the women she was worried about:

She has two children at home who really need her. Her husband was terribly violent to her. She was in a battered women's shelter, and she applied for benefits-one of the shelter workers went with her to the welfare office. The welfare department turned her down. The caseworker said she wasn't eligible because she had been convicted of a felony, writing prescriptions for painkillers for herself. After she was turned down for benefits her husband violated the protection from abuse order, and she had to leave the shelter. Then she violated her parole, and now she's back in jail.

Her parents, who are taking care of her children, are really angry at her. They don't understand how she could have used drugs; they don't understand how much physical and emotional pain she was in—she had broken ribs, broken arms. The abuse this woman endured from her husband, I would have written prescriptions for myself too—she was in such pain. She's going to be released soon, and her children need her, and she needs benefits—isn't there some way to get cash assistance for her? It can't be right.

The women I interviewed have terrible feelings of guilt and shame because of their drug usage, because of the abuse they have experienced, and because of the ways they have failed their children in the past. They love their children very

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<sup>1</sup> Each state has its own laws which define which offenses are felonies, and which drug crimes are misdemeanors or felonies. In Pennsylvania, whether a drug crime is a misdemeanor or a felony is not dependent on the quantity of drugs. The quantity is relevant to sentencing, but not to the classification of the offense. Possession with intent to deliver is a felony regardless of the amount of drugs involved. See § 13(a)(30) of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. § 780-101 et seq.

much, and they are trying to reunify and rebuild their families and move forward with their lives.

Although welfare receipt carries tremendous stigma, being banned from getting benefits is even more shameful. For women who have been living on the streets, getting welfare is a step up in the world, a connection to civil society. For women who have been financially dependent on an abusive boyfriend or husband, welfare is essential to escaping abuse. Until a woman is able to work, getting welfare is often the only legal way she can have money of her own, and be independent. Telling these women that they can never get assistance, no matter what they do, or how hard they try, simply pushes them back into abusive relationships and active addiction.

### **The Lifetime Ban on Benefits**

The ban on benefits is contained in a little-known provision of the federal welfare reform law from 1996. It provides that unless a state affirmatively passes legislation to opt out of the federal ban, any individual with a felony drug conviction for conduct after August 22, 1996 is banned for **life** from receiving TANF benefits or Food Stamps (now called SNAP).<sup>2</sup> The state legislation opting out of the ban must be passed after August 22, 1996, and must specifically reference the federal statute. Twenty-eight states moved quickly and passed legislation to opt-out, and eliminated or modified the ban. Other states have taken action in smaller numbers over the years, so that there is now a patchwork of state provisions that vary widely. Pennsylvania lifted the ban in 2004.

Some states have eliminated the ban only for one type of benefits (either TANF or SNAP, but not both). Others have lifted the ban only for individuals who have completed drug treatment, or have completed probation or parole, or whose convictions were a certain number of years ago, or who have met other requirements. Many of those modifications mean that benefits are not available to individuals when they most need them—right after release from incarceration. While there are at least four states that have lifted or modified the ban since 2015, there are also still 6 states that have not modified the ban at all, and still have a

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<sup>2</sup> The ban is codified at 21 U.S.C.S862a.

lifetime ban on both TANF and SNAP, and most states still impose at least a partial ban.<sup>3</sup>

It is difficult to know just how many low-income individuals are banned from benefits. Because the ban is lifetime, the cumulative numbers continue to rise as additional individuals become banned, and shift as states modify or lift the ban. The Sentencing Project estimated that approximately 180,000 women were affected by the TANF ban between 1996 and 2011, not counting those in states that had partially lifted the ban on TANF, and not counting women in states banned only from SNAP.<sup>4</sup>

I have focused on the impact on women, and on their children, because the recipients of TANF and SNAP are overwhelmingly women and children. TANF requires that you either be pregnant, or the custodial parent or relative caregiver of a minor child, and approximately 90% of the adults who receive TANF are women. Federal SNAP law provides for a limit of 3 months out of 36, for any individual who is not pregnant, disabled, employed at least 20 hours per week, or living with minor children. As a result, 62 % of non-elderly adult SNAP participants and 63 % of elderly adult SNAP participants are female, and almost half of SNAP households include children.<sup>5</sup> In addition, the increase in rates of incarceration for women has been very closely linked to drug offenses, more so than for men.<sup>6</sup> Because of the structure of the benefit programs involved, and the impact of drug offenses, the ban disproportionately affects women.

### **The Benefits At Issue**

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<sup>3</sup> See Center for Law and Social Policy, “No More Double Punishments” (updated March 2017), <http://www.clasp.org/resources-and-publications/publication-1/Safety-Net-Felony-Ban-FINAL.pdf>.

<sup>4</sup> The Sentencing Project, “A Lifetime of Punishment,” (updated September 2015), <http://sentencingproject.org/wp-content/uploads/2015/12/A-Lifetime-of-Punishment.pdf>.

<sup>5</sup> USDA Food and Nutrition Service, “Characteristics of Supplemental Nutrition Assistance Program Households: Fiscal Year 2014 (December 2015), <https://fns-prod.azureedge.net/sites/default/files/ops/Characteristics2014.pdf>.

<sup>6</sup> Center for American Progress, “Removing Barriers to Opportunity for Parents With Criminal Records and Their Children at p. 5 (Dec. 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/12/09060720/CriminalRecords-report2.pdf>.



The federal ban prohibits any individual with a felony drug conviction from receiving TANF or SNAP. SNAP benefits, more commonly called Food Stamps, are completely federally funded, and provide an average of \$1.40 cents per person per meal. Currently, the maximum Food Stamp allotment for a mother and two children is \$511/month nationally; however the average monthly SNAP benefit nationally for a family of three is only \$379/month.

TANF benefits, which are funded by a federal block grant, and vary by state, are a maximum of \$316/month for a mother and child, or \$403/month for a mother and two children, in most counties in Pennsylvania. The grant levels for TANF have not been raised in Pennsylvania since January 1, 1990. In Pennsylvania, the maximum TANF grant and Food Stamp benefits combined are only 54% of the federal poverty line for a family of three. Yet Pennsylvania's TANF grant levels are higher than those of 21 other states.<sup>7</sup>

If, as a result of the ban, a mother with one child is only able to get benefits for the child and not for herself, the family is reduced to 39% of the federal poverty line. Because it is impossible to find safe housing, and buy food, clothing and other necessities at that level of income, the ban inevitably results in families becoming homeless, and children entering or staying longer than necessary in foster care. The strain of severe poverty increases the likelihood of relapse into addiction and a return to jail.

The costs of foster care (approximately \$630/month per child) and of incarceration (over \$3,000/month per person in the Philadelphia jails)<sup>8</sup> far exceed the cost of granting benefits. In fact, it costs over five times as much to maintain one child in foster care and a mother in jail than to provide them with TANF and Food Stamps.

Although the benefits at issue are small, they make an incredible difference to the women involved. Here are some typical quotes from women I interviewed;

**Linda:** If I could get welfare it would make a lot of difference to me. I wouldn't have to ask nobody for anything. I'd have something of my own.

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<sup>7</sup> Center on Budget and Policy Priorities, "TANF Cash Benefits Have Fallen by More Than 20% in Most States and Continue to Erode" (updated Oct. 17, 2016), <http://www.cbpp.org/research/family-income-support/tanf-cash-benefits-have-fallen-by-more-than-20-percent-in-most-states>.

<sup>8</sup> [https://static.prisonpolicy.org/scans/Philadelphias\\_Crowded\\_Costly\\_Jails\\_rev.pdf](https://static.prisonpolicy.org/scans/Philadelphias_Crowded_Costly_Jails_rev.pdf) (estimate of \$95/day in 2009).



**Tanya:** We still need welfare until we are strong enough to get on our feet. Trying to stay clean, trying to be responsible parents and take care of our families... We trying to change our lives. Trying to stop doing wrong things. Some of us need help. Welfare helps us stay in touch with society.

The impact of the ban has also been described in a study done by Yale University researchers who interviewed 110 affected individuals recently released from prisons in states with bans in effect. They found that 38% of the women they interviewed who were living with children had not eaten for an entire day in the past month, and 25% of the women living with children reported that their children had not eaten for a day in the past month. "These individuals are incredibly vulnerable when they are released from a prison. If they cannot get government food assistance, they are much more likely to be hungry and thus engage in dangerous sexual behavior in exchange for money or food for themselves or their children."<sup>9</sup>

As one of the women I interviewed said; "Now it matters because I'm trying to do the right thing."

Thank you.

Respectfully submitted,

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<sup>9</sup> Helen Dodson, "Ban on food stamps leads to hunger, HIV risk among former drug felons" quoting Dr. Emily Wang, Yale School of Medicine, Yale News, March 25, 2013, <http://news.yale.edu/2013/03/25/ban-food-stamps-leads-hunger-hiv-risk-among-former-drug-felons>.

**Testimony of Margaret Colgate Love  
Collateral Consequences Resource Center**

**Before the  
West Virginia Advisory Committee of the U.S. Commission on Civil Rights**

**Collateral Consequences: The Crossroads of Punishment, Redemption  
and the Effects on Communities**

**May 4, 2018**

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My name is Margaret Love. I am a lawyer in private practice in Washington, D.C., specializing in executive clemency and restoration of rights. I very much appreciate the opportunity to testify at this important hearing. My interest in the subject of this hearing dates from my service as U.S. Pardon Attorney in the 1990s. Since leaving government almost 20 years ago I have represented dozens of individuals seeking to avoid or mitigate the collateral legal consequences and stigma of a criminal conviction. I have also written extensively about criminal records issues, including co-authoring the only comprehensive treatise on collateral consequences, and I have been involved in related law reform efforts at the national and state level. Four years ago, I helped establish the Collateral Consequences Resource Center, which provides news and commentary about relevant developments in law and policy, as well as practice and advocacy resources. Among the resources available on the CCRC website is a 50-state database of mechanisms for restoration of rights,<sup>1</sup> and several reports on recently enacted legislation that provide a window into what is fast becoming one of the Nation's most important emerging areas of public policy.<sup>2</sup> I welcome the Commission's interest in collateral consequences, which I believe present one of the key civil rights issues of our time, and a critical test of the American justice system's commitment to fundamental fairness.

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## Overview

Persons convicted of crime are subject to a wide variety of legal and regulatory sanctions and restrictions in addition to the sentence imposed by the court. These so-called "collateral consequences" have been promulgated with little coordination in disparate sections of state and federal codes, making it difficult for anyone to identify all the penalties and disabilities that are

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<sup>1</sup> See Restoration of Rights Project, <http://ccresourcecenter.org/resources-2/restoration-of-rights/>.

<sup>2</sup> See *Second Chance Reforms in 2017: Roundup of new expungement and restoration Laws* (Dec. 2017), <http://ccresourcecenter.org/wp-content/uploads/2017/12/Second-Chance-Reforms-in-2017-CCRC-Dec-2017.pdf>; *Four Years of Second Chance Reforms, 2013 – 2016: Restoration of Rights & Relief from Collateral Consequences* (Feb. 2017), <http://ccresourcecenter.org/wp-content/uploads/2017/02/4-YEARS-OF-SECOND-CHANCE-REFORMS-CCRC.pdf>. See generally Margaret Love, Joshua Gaines & Jenny Osborne, Collateral Consequences Resource Center, *Forgiving and Forgetting in American Justice: A 50-State Guide to Expungement* (April 2018, revised ed.), available at <http://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-CCRC-Apr-2018.pdf>,



triggered by conviction of a specific offense. While collateral consequences have been a familiar feature of the American justice system since colonial times, they have become more important and more problematic in the past 20 years for three reasons: they are more numerous and more severe, they affect more people, and they are harder to avoid or mitigate.<sup>3</sup>

Of increasing importance, largely because of the widespread availability of criminal records from background screeners and through the internet, people with a criminal record are exposed to less formal discrimination that is frequently hard to establish and correspondingly hard to combat.<sup>4</sup> These informal collateral consequences adversely affect the opportunities of people with any sort of criminal record, even unresolved arrests. I discuss both types of consequences in the pages that follow, the law and policy issues raised by them, and what states and the federal government are doing to ameliorate their effect. I close with some recommendations about further steps the federal government might take to make it possible for people to overcome a past record and regain first-class legal and social status.

### **1. Laws and regulations imposing collateral penalties**

An inventory maintained by the Council of State Government identifies literally thousands of laws and regulations across the country that impose some type of disqualification or limitation based on a person's past conviction of a crime.<sup>5</sup> Many of these restrictions are categorical and permanent, with no evident way to avoid or mitigate them. Some serve an important and

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<sup>3</sup> See Margaret Colgate Love, Jenny Roberts, and Cecelia Klingele, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE* at 1-35 (West/NACDL, 2d ed. 2016). See also Gabriel "Jack" Chin, *Collateral Consequences of Criminal Conviction* in *ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM* (Erik Luna ed., forthcoming 2017). A full bibliography of scholarly writings and practice materials relating to collateral consequences is available at the website of the Collateral Consequences Resource Center, [www.cccresourcecenter.org](http://www.cccresourcecenter.org).

<sup>4</sup> See Wayne Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013).

<sup>5</sup> See National Inventory of the Collateral Consequences of Conviction (NICCC), <https://niccc.csgjusticecenter.org/>. The NICCC is a searchable online database originally developed by the American Bar Association under a grant from the U.S. Department of Justice. While the NICCC is frequently cited for identifying 47,000 collateral consequences, that number is inflated by about 25% because of the coding methodology used in constructing the NICCC database. While the publicly available data is now several years out of date, the CSG plans to restructure and update the NICCC over the next 12 months.

legitimate public safety or regulatory function, such as keeping firearms out of the hands of violent offenders, protecting children or the elderly from persons with a history of abuse, or barring people convicted of fraud from positions of public trust. Others are directly related to a specific type of crime, such as registration requirements for sex offenders, driver's license restrictions for those convicted of serious traffic offenses, or debarment of those convicted of procurement fraud. But many others apply across the board, without regard to any relationship between crime and consequence, and frequently without consideration of how long ago the crime occurred or what affected individuals have managed to accomplish since. Many consist of nothing more than a direction to an official decision-maker to conduct a criminal background check, frequently understood as an unspoken warning that it is safest to reject anyone with a criminal record. Others are implied by a requirement that eligibility for a benefit or opportunity depends upon a person having "good moral character," a status considered unattainable after criminal conviction.

The laws and policies that are most problematic from a public safety perspective are the ones restricting eligibility for employment and licensure, and within these categories the most troublesome are the laws and policies affecting the health, education, and care-giving professions – all very much in demand. Restrictions imposed by subsidized or public housing providers are troublesome impediments to successful reentry, though these are rarely mandated by law and could easily be ended by firm federal enforcement policies.<sup>6</sup> Laws disenfranchising people with a conviction are permanent in only a handful of states,<sup>7</sup> and in twenty states disenfranchisement applies only when a person is actually incarcerated. But in my experience many people believe conviction deprives them of the rights of citizenship even if it doesn't, and this erroneous belief creates a sense of alienation that discourages full reintegration.

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<sup>6</sup> The only federally-mandated restrictions based on past convictions are those that apply to PHA residents convicted of an offense requiring lifetime sex offender registration or of producing meth on public housing grounds), *see* 42 USC § 13663 (sex offenders); 42 USC § 1437n(f) (meth).

<sup>7</sup> *See 50-State Comparison: Loss and Restoration of Civil Rights and Firearms Privileges*, Restoration of Rights Project, *supra* note 1, <http://ccresourcecenter.org/resources-2/restoration-of-rights/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/>.

## **2. Informal collateral consequences – Background checking**

But perhaps the most disturbing development in the last decade has taken place outside the formal legal system. Quite apart from the thousands of laws and rules restricting the opportunities of those with a criminal record, there are a host of informal exclusions and restrictions imposed by private and public individuals and entities through the ubiquitous practice of criminal background checking.<sup>8</sup> Twenty years ago, background checks were rare, even for employment. Nowadays, they control access to almost every area of endeavor, from obtaining a home improvement loan to volunteering to coach your own child's sports team. These informal collateral consequences are reinforced by fears of civil liability that are largely illusory as a practical matter but are supported by insurer threats to withdraw coverage if employers hire convicted individuals. Technological advances have made it possible to discover whether a person has a criminal record with a few keystrokes, and a post-9/11 aversion to risk has encouraged more and more people to avail themselves of this opportunity. An entire industry of professional background screeners has sprung up in the past 15 years to accommodate and encourage the public's apparently insatiable appetite for information about their neighbors and co-workers. Unlike Europe, America has no "right to be forgotten."<sup>9</sup>

Any involvement with the criminal justice system—even a dated arrest record — may become a job obstacle for the 75 million Americans who have a criminal record of some sort. The thousands of private background check companies have varying levels of competence, and inaccuracies in their reports are all too common. Even people who have avoided adverse encounters with the law may find themselves being unfairly screened from jobs or other

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<sup>8</sup> See Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 *How. L.J.* 1, 3-4, 15-17 (2016). More than 70% of employers now perform some form of background check. See *SHRM Survey Findings: Background Checking — The Use of Criminal Background Checks in Hiring Decisions*, Society for Human Resource Management (Jul. 19, 2012), available at <http://www.shrm.org/research/surveyfindings/articles/pages/creditbackgroundchecks.aspx>. For a review of the new landscape of background checking, see James B. Jacobs, *THE ETERNAL CRIMINAL RECORD* (Harvard U. Press 2015).

<sup>9</sup> Marc Rotenberg & David Jacobs, *Updating the Law of Information Privacy: The New Framework of the European Union*, 36 *HARV. J.L. & PUB. POL'Y*, 605 (2013).



opportunities because of an erroneous background check report. In theory, the federal Fair Credit Reporting Act regulates background screening companies, but in practice enforcement is lax to nonexistent. Similarly, Title VII of the federal Civil Rights Act has been extended to limit employment discrimination based on arrest or conviction, but here too enforcement actions by the Equal Employment Opportunity Commission have been few. Several states bar record-based discrimination under their fair employment practices laws, but lawsuits are not a very efficient way to secure rights to individuals faced with barriers every day.

### 3. Legal and policy implications

When persons with a record are limited in their ability to support themselves and to participate in the political process, this has both economic and public safety implications. Study after study has shown that housing and employment are the most important determinants of successful reentry and rehabilitation.<sup>10</sup> That is, when people returning to the community from prison can find a decent place to live and a stable job, they are far less likely to reoffend. But public housing authorities and other subsidized housing providers frequently impose restrictions on who may live in subsidized housing that are well beyond those required by law. And, many fields that currently offer the best employment opportunities – notably health and other care providers – are precisely those most likely to be off-limits to people with a record.<sup>11</sup> The difficulties experienced by a home health aide in finding and keeping employment were described in detail by a federal judge in support of his decision to expunge her record. Noting her conviction’s “dramatic adverse impact on her ability to work,” Judge John Gleeson commented that “there is something random and senseless about the suggestion that Doe’s ancient and minor offense should disqualify her from work as a home health aide.”<sup>12</sup> He also noted that “[t]he growing

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<sup>10</sup> See Mike Vuolo, Sarah Lageson, and Christopher Uggan, *Criminal Record Questions in the Era of “Ban-the Box,”* 16 CRIMINOLOGY & PUB. POL’Y 139 (2017) (collecting research).

<sup>11</sup> See Love *et al.*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 3, § 2:10; Madeline Neighly, *et al.*, Nat’l Emp’t Law Project, *A Healthy Balance: Expanding Health Care Job Opportunities for Californians with a Criminal Record While Ensuring Patient Safety and Security* (May 2014).

<sup>12</sup> See *Doe v. United States*, 110 F. Supp. 3d 448, 455, 457 (E.D. N.Y. 2015), vacated, 2016 U.S. App. Lexis 14764 (2d Cir. 2016).

concern in recent years about the collateral consequences of criminal records has prompted various efforts to address how the criminal justice system can better balance its law enforcement goals with society's interest in the successful rehabilitation and reentry of individuals with criminal convictions.”<sup>13</sup>

#### 4. Limits imposed by the courts

As a general matter, collateral consequences have been resistant to constitutional attack.<sup>14</sup> In recent years, as collateral consequences have become more punitive and less closely related to public safety, the courts have begun to limit their application through constitutional principles. Sex offender registration and residency restrictions have been subject to due process and ex post facto limitations in state courts,<sup>15</sup> and several federal courts have recognized Second Amendment limits to firearms dispossession laws.<sup>16</sup> The Supreme Court has recognized that when a person considering a guilty plea is unaware of severe consequences that will inexorably follow, this may implicate the Sixth Amendment right to effective assistance of counsel.<sup>17</sup> In the next few weeks the Court will decide whether a North Carolina law limiting internet access to a convicted sex

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<sup>13</sup> *Id.* at 452-53. For a discuss of this and other recent federal court decisions addressing collateral consequences, see Nora V. Demleitner, *Judicial Challenges to the Collateral Impact of Criminal Convictions: Is True Change in the Offing?*, 91 N.Y.U. L. REV. ONLINE 150 (2016).

<sup>14</sup> Gabriel “Jack” Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012). See generally Love et al., *supra* note 3, §§ 3:1 through 3-24.

<sup>15</sup> See, e.g., Maurice Chammah, *Making the Case Against Banishing Sex Offenders*, The Marshall Project, October 5, 2016, <https://www.themarshallproject.org/2016/10/05/making-the-case-against-banishing-sex-offenders#.gb7K62Ad4>; Collateral Consequences Resource Center, *State courts question mandatory lifetime sex offender registration*, Jan. 4, 2015, <http://ccresourcecenter.org/2015/01/04/state-courts-question-mandatory-lifetime-sex-offender-registration/>.

<sup>16</sup> See Margaret Love, *When does the Second Amendment protect a convicted person’s right to bear arms?* Collateral Consequences Resource Center, September 20, 2016, <http://ccresourcecenter.org/2016/09/20/a-closer-look-at-the-third-circuits-recent-second-amendment-decision/>

<sup>17</sup> See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

offender violates the First Amendment.<sup>18</sup> Courts have also begun to enforce state and federal laws barring employment and housing discrimination against people with a criminal record, and limiting the activities of professional background screeners.<sup>19</sup> During the Obama Administration, federal laws barring discrimination in employment and housing were extended to the unfair treatment of people with a criminal record, and a few lawsuits were filed.<sup>20</sup>

But a strategy based on lawsuits is unlikely to yield broad and lasting results. The more productive strategy is to persuade legislatures to limit the effect of their own laws, to regulate the way executive agencies enforce them, and to provide relief mechanisms to avoid and mitigate legal restrictions. During the Obama Administration, the Attorney General developed strategies to give people returning home from prison the tools they need to live law-abiding lives,<sup>21</sup> and the President took steps to end discrimination in federal hiring and to encourage fair chance policies

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<sup>18</sup> See Adam Liptak, *A Constitutional Right to Facebook and Twitter? Supreme Court Weighs In*, New York Times, Feb. 27, 2017, <https://www.nytimes.com/2017/02/27/us/politics/supreme-court-north-carolina-sex-offenders-social-media.html> (describing oral argument in *Packingham v. North Carolina*).

<sup>19</sup> See Love *et al.*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 3, §§ 5:14 through 5:31.

<sup>20</sup> Equal Employment Opportunity Commission, 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.A. §§2000e et seq. No. 915.002 (April 25, 2012), [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf); U.S. Department of Housing and Urban Development, Office of General Counsel, Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transaction (2016), [https://portal.hud.gov/hudportal/documents/huddoc?id=hud\\_ogcguidappfhastander.pdf](https://portal.hud.gov/hudportal/documents/huddoc?id=hud_ogcguidappfhastander.pdf). See Love *et al.*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 3 at §§ 6:9 through 6:13 for a review of legal challenges to employment discrimination based on criminal record; Collateral Consequences Resource Center, *Justice Department will enforce limits on landlord background checks*, (Oct. 22, 2016), <http://ccresourcecenter.org/2016/10/22/justice-department-will-enforce-limits-on-landlord-background-checks/> (describing U.S. Justice Department's Statement of Interest in *Fortune Society v. Sandcastle Towers Housing Development*, a federal civil rights suit brought against a Brooklyn provider of low-income housing, claiming that it has a blanket policy of refusing to rent to individuals convicted of any non-traffic crime).

<sup>21</sup> See Federal Interagency Reentry Council, A Record of Progress and a Roadmap for the Future (2016), <https://csgjusticecenter.org/wp-content/uploads/2016/08/FIRC-Reentry-Report.pdf>.



in the private sector.<sup>22</sup> Hopefully these initiatives and others like them will continue in the Trump Administration, and this hearing is a good start.

## 5. State Reform Trends

State legislatures have been particularly active in the past few years in developing mechanisms by which individuals may avoid or mitigate collateral consequences. Since 2013, almost every state has enacted or expanded some type of statutory relief from collateral consequences,<sup>23</sup> on the theory that public safety and economic efficiency are not enhanced when so many potentially productive citizens are relegated to the margins of society. Mainstream law reform organizations have developed schemes that involve the courts in relieving specific sanctions and certifying rehabilitation. The American Law Institute,<sup>24</sup> American Bar Association,<sup>25</sup> and Uniform Law Commission<sup>26</sup> all have proposed broad reform schemes involving a number of common features: Collateral consequences should be: (1) Identified and collected so that defendants, lawyers, judges and policymakers can know what they are; (2) Incorporated into counseling, plea bargaining, sentencing and other aspects of the criminal process; (3) Subject to relief so that individuals can pursue law-abiding lives, and regain a respectable status in the community; and (4) Limited to those that evidence shows reasonably promote public safety. Some states have enacted elements of these reforms, which rely upon additional transparency and reasonableness

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<sup>22</sup> See generally Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 834-835 (2017) (discussing his Administration's efforts to improve reentry and encourage fair chance hiring).

<sup>23</sup> See reports cited in note 2, *supra*, documenting laws affecting opportunities of people with a criminal record passed since 2013. State relief mechanisms are described and analyzed in a series of state "profiles" and 50-state comparison charts in the CCRC's Restoration of Rights Project, <http://ccresourcecenter.org/resources-2/restoration-of-rights/>. .

<sup>24</sup> See MODEL PENAL CODE: SENTENCING, Proposed Final Draft, April 2017, [https://www.ali.org/media/filer\\_public/11/75/11753a46-bb87-4421-9c0b-89e0d59f0f3d/sentencing-proposed-final-toc.pdf](https://www.ali.org/media/filer_public/11/75/11753a46-bb87-4421-9c0b-89e0d59f0f3d/sentencing-proposed-final-toc.pdf).

<sup>25</sup> See ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standards 19-2.1 and 19-3.1 (3d ed. 2003).

<sup>26</sup> See UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT § 4 (2010), available at [http://www.law.upenn.edu/bll/archives/ulc/ucsada/2010\\_final\\_amends.pdf#search=%22uniform%22](http://www.law.upenn.edu/bll/archives/ulc/ucsada/2010_final_amends.pdf#search=%22uniform%22).

standards, but Vermont is the only one to have enacted all of them.<sup>27</sup> The approach adopted by Vermont, which is embodied in the model laws of the American Law Institute and the Uniform Law Commission, embraces a “forgiving” approach to mitigating collateral consequences, though this could easily be combined with a “forgetting” approach that includes a component limiting public access to the record.<sup>28</sup>

Notwithstanding the preference of mainstream law reform organizations for “forgiving” through a form of judicial pardon, the most popular reforms chosen by legislatures in the past decade are record-sealing laws and so-called “ban-the-box” statutes and policies. More than 30 states have recently adopted or expanded expungement and sealing laws, involving the courts in relieving collateral consequences through removing legal barriers or limiting public access to the record.<sup>29</sup> Many if not most of the new record-closing laws have been enacted by states typically considered conservative, including Missouri, Louisiana, Indiana, Kentucky, and Tennessee. Many limit sealing to less serious crimes and contain exceptions for certain types of employment or licensing, and most involving lengthy waiting periods.

In addition, 30 states and more than 150 cities and counties from every region of the country have removed questions about criminal record from employment application forms, postponing

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<sup>27</sup> See Vermont Uniform Collateral Consequences of Conviction Act, 13 V.S.A. § 8001 et seq., <http://legislature.vermont.gov/statutes/fullchapter/13/231>.

<sup>28</sup> See Alessandro Corda, *Beyond Totem and Taboo: Towards a Narrowing of American Criminal Records Exceptionalism*, \_\_ FED. SENT’G REPT. \_\_ (2018) (forthcoming); see also Love, et al., *Forgiving and Forgetting in American Justice*, supra note 2 at 6-15, 27-71 (rev. April, 2018), <http://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-CCRC-Apr-2018.pdf>; Eli Hager, *Forgiving v. forgetting: A new redemption tool*, The Marshall Project, Mar. 19, 2015, <http://ccresourcecenter.org/2015/03/19/forgiving-v-forgetting-a-new-redemption-tool/>. The debate over the merits of forgiving v. forgetting has been going in this country since the 1960s. See Margaret Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L. J. 1705, 1708-1713 (2003).

<sup>29</sup> See Love, et al., *Forgiving and Forgetting in American Justice*, supra note 2 at 6-15, 27-71 (rev. April, 2018), <http://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-CCRC-Apr-2018.pdf>.

inquiries about criminal records until late in the hiring process.<sup>30</sup> In some cases these ban-the-box laws apply to private as well as public employment, and some are accompanied by substantive limits on when a criminal record can be disqualifying – but the jury seems to be out on whether these laws actually increase hiring of people with a record.<sup>31</sup>

Another important recent trend in state legislation has been the passage of laws regulating consideration of conviction in employment and occupational licensing. In 2017, California and Nevada, Arizona and Illinois passed general laws affecting employment or licensing or both, and most recently in March 2018 Indiana enacted one of the most progressive licensing schemes in the country.<sup>32</sup> It now appears that this may represent a trend, as seven additional states have either recently enacted or at the time of this writing were poised to enact similarly progressive occupational licensing schemes.<sup>33</sup> A model licensing law developed by the Institute of Justice appears to have influenced several of these new laws, offering procedural innovations (such as preliminary assessments of eligibility), establishing substantive standards for licensure, and requiring periodic reporting by licensing agencies.<sup>34</sup> Occupational licensing reform has in

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<sup>30</sup> See Beth Avery and Phil Hernandez, National Employment Law Project, *Ban the Box: U.S. Cities, Counties and States Adopt Fair Hiring Policies* (April 2017), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

<sup>31</sup> See Vuolo *et al.*, *supra* note 8, collecting research.

<sup>32</sup> See *Indiana enacts progressive new licensing reform*, Collateral Consequences Resource Center, April 3, 2018, <http://ccresourcecenter.org/2018/04/03/indiana-enacts-progressive-new-licensing-law/>.

<sup>33</sup> In addition to Indiana, in the first four months of 2018 three other states enacted new general laws regulating occupational and professional licensure (Arizona, Louisiana, and Massachusetts) and similar bills were on the governor's desk for signature in four others (Kansas, Maryland, Nebraska, and Tennessee). Arizona's new 2018 licensing law follows on another law passed in that state in 2017 that authorized provisional licenses for individuals with a criminal record. Massachusetts' new licensing law is part of a more general criminal justice reform bill. Delaware and Connecticut also recently loosened restrictions on licensing for cosmetology and related professions. See *More states facilitating licensing for people with a criminal record*, Collateral Consequences Resource Center, April 18, 2018, <http://ccresourcecenter.org/2018/04/18/more-states-facilitating-licensing-for-people-with-a-criminal-record/>; Rebecca Pirijs, *States Making It Easier for Ex-Offenders to Get Licenses*, NCSL Blog, March 29, 2018, <http://www.ncsl.org/blog/2018/03/29/states-making-it-easier-for-ex-offenders-to-get-occupational-licenses.aspx>; Love *et al.*, *Forgiving and Forgetting*, *supra* note 2 at 18-22.

<sup>34</sup> See Model Occupational Licensing Review Law, <http://ij.org/activism/legislation/model-legislation/model-economic-liberty-law-1/>. This law followed the Institute's comprehensive study of



essence become a bipartisan, national effort, with even the federal government joining the effort.<sup>35</sup>

I believe these state-level extensions of relief represent perhaps most encouraging and impressive commitment to improving the opportunities available to people with a criminal record. While most record-closing laws apply only to minor convictions or non-conviction records, more transparent forms of relief are becoming attractive as well.<sup>36</sup> For example, the West Virginia legislature recently chose to deal with the collateral consequences of minor felonies by authorizing courts to reduce them to misdemeanors, rejecting the competing bill that would have sealed them.<sup>37</sup> Research testing the effectiveness of more transparent forms of judicial relief shows impressive gains for those who have in effect had a court certify their rehabilitation.<sup>38</sup>

## 6. Directions for Federal Reform

This hearing is an encouraging sign of continued federal government interest in the important problem of record-based discrimination, which consigns a large and potentially productive group of people to the fringes of society. I believe the two most important area of federal reform are 1) enactment of statutory mechanisms for relief from collateral consequences imposed by federal

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licensing barriers. See Dick M. Carpenter, II, et al., *License to Work: A National Study of Burdens from Occupational Licensing*, <http://ij.org/report/license-work-2/>.

<sup>35</sup> Pirius, *supra* note 33: “Under a U.S. Department of Labor grant, a three-year project will assist states improve their understanding of policies and best practices related to occupational licensing. Between 2017 and 2019, the project brings together 11 states to participate in the Occupational Licensing Learning Consortium. The 11 states are Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Kentucky, Maryland, Nevada, Utah and Wisconsin.”

<sup>36</sup> See Hager, *supra* note 28; see also Love, et al, *Forgiving and Forgetting*, *supra* note 2 at 15-18.

<sup>37</sup> See Collateral Consequences Resource Center, *Second chance employment bill approved in West Virginia*, April 10, 2017, <http://ccresourcecenter.org/2017/04/10/second-chance-employment-bill-approved-in-west-virginia/>.

<sup>38</sup> See Collateral Consequences Resource Center, *California set-aside enhances employment prospects*, April 3, 2017, <http://ccresourcecenter.org/2017/04/03/california-set-aside-enhances-employment-prospects/>; *Id.*, *How effective are judicial certificates in relieving collateral consequences?*, Mar. 14, 2017, <http://ccresourcecenter.org/2017/03/14/how-effective-are-judicial-certificates-in-relieving-collateral-consequences/>.

law, whether mandatory or discretionary; and 2) enactment of a statutory mechanism for relief from collateral consequences for individuals with a federal conviction. Congress has not legislated in this area since the 1980's, and then it was only to repeal then-existing relief statutes that applied to individuals with federal convictions.<sup>39</sup> The President has not used his constitutional pardon power in a regular manner for decades.<sup>40</sup> Federal statutes and regulatory schemes may or may not give effect to state restoration measures.<sup>41</sup> When a government provides no way of recognizing and rewarding genuine rehabilitation, this has moral and social implications as well as economic ones. If specific legal restrictions can neither be justified or avoided, it invites disrespect for the law and unfair decision-making. While I appreciate the efforts of EEOC and HUD to extend the fair employment and housing laws, it seems to me a bit of a cop-out to address record-based discrimination only through laws intended to address racial discrimination. It is true that collateral consequences have had a particularly profound effect on communities of color, but the standards that apply to record-based discrimination are necessarily different from those that apply to racial and ethnic discrimination.

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<sup>39</sup> See Love, *supra* note 28, 30 FORDHAM URB. L. J. at 1715-16 (describing the 1984 repeal of the Federal Youth Corrections Act).

<sup>40</sup> See, e.g., Margaret Colgate Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOL. L. REV. 89 (2016). See also Philip Rucker *et al*, *Trump grants pardon to former Bush official; some say he is using the law as a political tool*, Wash. Post, April 13, 2018 ("Trump has shown little interest in the ordinary pardon caseload that is prepared at the Justice Department, instead gravitating toward cases of personal political interest.")

<sup>41</sup> A few federal statutes specifically incorporate a waiver provision based on state provisions for pardon or restoration of rights. For example, under the Firearms Owners Protection Act of 1986, state convictions that have been expunged, set aside, or pardoned, or for which a person has had civil rights restored, do not constitute "convictions" for purposes of prosecution as a felon in possession. 18 U.S.C. § 921(a)(20). In certain cases, an alien may avoid deportation based on conviction if he has been pardoned. See Jason A. Cade, *Deporting the Pardoned*, 46 U.C. Davis. L. Rev. 335 (2012). Under HUD regulations, federal restrictions on licensure as a mortgage originator for persons convicted of a felony may be waived by a pardon. See 24 C.F.R. § 3400.105(b)(2), 76 Fed. Reg. 38464 (June 30, 2011). Employment restrictions in the transportation sector may be waived by TSA if a conviction has been pardoned or expunged. For the effect of convictions that have been expunged, pardoned, or set aside; or for offenses that did not result in a conviction, see the Transportation Security Administration's definition of "convicted" in 49 C.F.R. § 1570.3.



Congress could usefully study the extent to which federal laws and rules impose categorical restrictions based on criminal record that have no apparent regulatory or public safety rationale, and with no means of mitigation or avoidance. For example, people with a criminal record are barred by federal law from obtaining small business loans,<sup>42</sup> from child care licensure,<sup>43</sup> and from many federally regulated areas of employment.<sup>44</sup> While federal agencies were encouraged in the last Administration to review their rules and policies excluding people with a record, it is not clear how much progress was made.<sup>45</sup> Another important area of reform is enforcement of fair hiring policies within federal agencies and among federal contractors. There is no evidence that Congress has done much to follow up the first steps taken in the Obama Administration to enforce fair hiring principles in federal employment and contracting, and it could profitably take a lesson from the progress shown by the states in these areas. It could also look at enforcement of federal laws and policies that could improve opportunities for people with criminal records, like the Fair Credit Reporting Act's regulation of background screeners.

There is a great deal that the federal government can do to claim a leadership role in addressing collateral consequences. That said, for now the main action is in the states, which have made

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<sup>42</sup> See Joshua Gaines, *SBA to relax some rules on loans to people with a record, but most left in place*, Collateral Consequences Resource Center (Jan. 23, 2015), <http://ccresourcecenter.org/2015/01/23/sba-rules-loans-people-record-restrictive/>.

<sup>43</sup> See, e.g., Collateral Consequences Resource Center, *HHS finalizes rules on child care worker screening*, (Sept. 28, 2016), <http://ccresourcecenter.org/2016/09/28/hhs-finalizes-rules-on-child-care-worker-screening/>.

<sup>44</sup> See Love *et al.*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION *supra* note 3, §§ 2:10, 2:11. The full range of federal collateral consequences can be viewed in the National Inventory of the Collateral Consequences of Conviction, <https://niccc.csgjusticecenter.org/>.

<sup>45</sup> See, e.g., Collateral Consequences Resource Center, *SBA relaxes rule against business loans to probationers, while other federal agencies keep collateral consequences unchanged* (June 30, 2015), <http://ccresourcecenter.org/2015/06/30/sba-relaxes-rule-against-business-loans-to-probationers/>.

commendable progress in recent years in addressing the issues raised by this increasingly important area of public policy.

I am very pleased that the West Virginia Advisory Committee to the USCCR has taken up this important subject, and I would be happy to respond to any questions you may have.

**Collateral Consequences: Protecting Public Safety or  
Encouraging Recidivism**

**Testimony before the West Virginia Advisory Committee to  
the U.S. Commission on Civil Rights**

**May 4, 2018**

**John G. Malcolm**

**Vice President, Institute for Constitutional Government  
Director & Ed Gilbertson and Sherry Lindberg Gilbertson  
Senior Legal Fellow, Edwin Meese III Center for Legal and  
Judicial Studies**

**The Heritage Foundation**

Thank you for inviting me to speak to you today about collateral consequences and its effect on those with a criminal record. My name is John Malcolm. I am the Vice President of the Institute for Constitutional Government and also the Director of the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation, although the views I express today are my own.<sup>1</sup>

### **Collateral Consequences Today**

When most people think about the consequences of a criminal conviction, they imagine a court-ordered prison sentence or probation, which normally has a definite beginning and an end, and possibly a fine and restitution order. Many probably think that when “prison bars and chains are removed,” the offender’s punishment is over and he or she can begin the process of reintegrating into society and becoming a law-abiding citizen.<sup>2</sup> In 1910 in *Weems v. United States*, Supreme Court Justice Joseph McKenna described what actually awaits a criminal convict at the end of his sentence. He stated: “His prison bars and chains are removed, it is true ...” but “he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty.”<sup>3</sup> He was right.

In fact, there are more than 48,000 federal and state civil laws and regulations—known as “collateral consequences” (as opposed to the “direct consequences” of conviction)—that restrict the activities of ex-offenders<sup>4</sup> and curtail their liberties after they are released from confinement or their period of probation ends.<sup>5</sup> Experts estimate that there are thousands of similar restrictions in local ordinances.<sup>6</sup> And the federal, state, and local governments are free to pile on “at any time” whatever “additional restrictions and limitations they deem warranted.”<sup>7</sup>

Many people convicted of crimes are never sent to prison, and of those who are, more than 95 percent—millions of people<sup>8</sup>—will eventually be released and will return to our communities.<sup>9</sup> They face long odds when it comes to trying to put their past behind them. In addition to having to endure the stigma associated with being a convicted criminal, many ex-offenders have substance abuse issues, a limited education, and even more limited job skills and experience. Opportunities for ex-offenders to get their rights restored are limited.<sup>10</sup> Regrettably, many of these ex-offenders will end up committing additional offenses after their release, thereby posing a continuing threat to public safety.<sup>11</sup> Although many of these individuals



undoubtedly would have committed additional crimes regardless of any collateral consequences imposed upon them, a significant minority (if not a majority) would like to turn over a new leaf and become productive, self-reliant, law-abiding members of society, capable of supporting themselves and their families.

As the American Bar Association has pointed out, “[i]f promulgated and administered indiscriminately, a regime of collateral consequences may frustrate the chance of successful re-entry into the community, and thereby encourage recidivism.”<sup>12</sup> It is not in anyone’s best interests to consign ex-offenders to a permanent second-class status. Doing so will only lead to wasted lives, ruined families, and more crime.

Like the criminal conviction itself, civil sanctions carry real consequences that can be as injurious as they are “demoralizing.”<sup>13</sup> It is, therefore, time to rethink the collateral consequences that we impose on people with a criminal record when those consequences increase the likelihood that ex-offenders will fail in their efforts to reform and to provide for their families.

Legislators have broad discretion when it comes to enacting laws creating collateral consequences. Usually imposed under the guise of protecting public safety, these laws are considered remedial and not punitive. They can affect, among other things, an ex-offender’s ability to get a job or a professional license; to get a driver’s license;<sup>14</sup> to obtain housing,<sup>15</sup> student aid,<sup>16</sup> or other public benefits;<sup>17</sup> to vote, hold public office or serve on a jury;<sup>18</sup> to do volunteer work;<sup>19</sup> and to possess a firearm.

Clearly there will be times when public safety benefits will significantly outweigh any burden that a particular collateral consequence placed on an ex-offender. For example, it is perfectly reasonable to prohibit convicted sex offenders from running a day care center or residing or loitering near elementary schools; such a prohibition is a prudent way to protect children.<sup>20</sup> Prohibiting violent felons from purchasing or possessing firearms is another example.<sup>21</sup> Similarly, forcing a public official who has been convicted of bribery or public corruption to resign from office<sup>22</sup> or prohibiting someone convicted of defrauding a federal program from participating in a related industry for a period of time imposes collateral consequences that are sensible and that are directly related to the substance of the offense that

was committed.<sup>23</sup> Others, such as restrictions on voting, may make sense for some period of time but perhaps not indefinitely.<sup>24</sup>

Other collateral consequences, though, have a tenuous connection to public safety and appear to be more punitive in nature, and they certainly make it more difficult for an ex-offender to reintegrate into society.<sup>25</sup> State and federal legislators should periodically review existing collateral consequences to ensure that they are truly necessary to protect public safety, and are reasonably related to the offense that was committed. Collateral consequences that do not fit these parameters should be amended or repealed<sup>26</sup> so that ex-offenders who are earnestly working to lead lawful, prosperous lives and to provide for their families are not needlessly thrown off-course.

Collateral consequences are considered to be civil in nature and thus distinct from criminal laws and penalties, so courts, prosecutors, and defense attorneys have generally treated them as falling outside the scope of their control and immediate concern.<sup>27</sup> Few are aware of the full scope of these “post-sentence civil penalties, disqualifications, or disabilities” that follow a conviction,<sup>28</sup> including criminal defendants and defense counsel.<sup>29</sup> They should be.

As I previously stated, researchers for the Justice Center at the Council of State Governments have identified over 48,000 collateral consequences scattered throughout state and federal codes, with thousands more at the local level. Texas, for example, has over 200 collateral consequences in 22 different sections of the state code.<sup>30</sup> Many other states, including West Virginia, have also enacted unknown numbers of collateral consequences that are “scattered—one might say hidden—throughout their codes and regulations.”<sup>31</sup> And, of course, the number of people convicted of a crime has risen dramatically since the 1970s and, with that, the number of people living with the collateral consequences of their crimes.

Moreover, not all collateral consequences appear to be reasonably related to the offense(s) committed. For example, Ohio law provides for the suspension or revocation of an offender’s driver’s license upon conviction of some crimes that are entirely unrelated to driving.<sup>32</sup> Why restrict an ex-offender’s ability to get or drive to a job or to pick up his or her children from school if that individual poses no greater risk to people on the road than any other driver?

Similar problems can arise with respect to another category of collateral consequences: those that revoke receipt of or eligibility for certain government benefits. For example,

- A criminal conviction may cost a military veteran his or her pension, insurance, and right to medical treatment,<sup>33</sup> which is particularly troubling because studies indicate that veterans who are suffering from post-traumatic stress disorder and therefore in serious need of medical treatment may be more likely to commit crimes.<sup>34</sup>
- In the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Congress barred individuals convicted of state or federal drug offenses from receiving, in addition to student aid, federal cash assistance under the Temporary Assistance for Needy Families (TANF) program and food stamps under the Supplemental Nutrition Assistance Program (SNAP).<sup>35</sup>
- States may also categorically bar certain types of offenders, such as all drug<sup>36</sup> and sex offenders,<sup>37</sup> from government housing for any period of time and can suspend or revoke a driver's license on the basis of a conviction, to name only a few such restrictions.<sup>38</sup>

While these restrictions may make sense for some limited class of ex-offenders whose convictions are related to those programs, depriving broad swathes of ex-offenders of the ability to get assistance for themselves and their families, to live in affordable housing in a stable environment, or to obtain educational assistance to enhance their skills is hardly conducive to helping them become productive citizens.

Perhaps the most ubiquitous and pernicious collateral consequences imposed on ex-offenders are restrictions on their ability to earn a livelihood.<sup>39</sup> Again, for some limited class of offenders, these restrictions may make sense. For example, federal law bars individuals with a prior criminal conviction from holding elected office and, depending on the nature of the conviction, from working for the military<sup>40</sup> or in law enforcement,<sup>41</sup> private security,<sup>42</sup> and jobs that require a security clearance.<sup>43</sup> It is less clear whether the same ban should apply to other professions that require a federal license, such as grain inspectors, locomotive engineers, and merchant mariners.<sup>44</sup>

State laws restricting employment opportunities for ex-offenders can be even more severe. For example:

- Virginia has enacted over 140 mandatory collateral consequences that affect employment, from disqualification to hold any state “office of honor, profit, or trust” to ineligibility to hold a commission as a notary public.<sup>45</sup>
- Ohio imposes more than 500 mandatory collateral consequences that restrict employment opportunities including employment as a contractor or truck driver.<sup>46</sup>

Of the more than 48,000 collateral consequences identified by the Council of State Governments, 60 percent to 70 percent are employment-related.<sup>47</sup> Experts estimate that there are thousands of similar restrictions in local ordinances.<sup>48</sup> These can bar ex-offenders from pursuing various occupations such as street peddling, cab driving, and construction.<sup>49</sup> A multitude of other occupational licensing laws compounds the effect of collateral consequences insofar as they “may either explicitly exclude individuals convicted of certain criminal convictions or implicitly exclude them through a requirement that applicants be of ‘good moral character.’”<sup>50</sup> These include operating a dance hall, bar, pool hall, bowling alley, or movie theater<sup>51</sup> and working as a midwife, an interior designer, landscape architect,<sup>52</sup> hearing aid dealer,<sup>53</sup> acupuncturist,<sup>54</sup> or a barber.

The list goes on and on,<sup>55</sup> each law magnifying the effect of the one before it.<sup>56</sup> Even creative politicians would be hard-pressed to come up with a legitimate public safety rationale for prohibiting an ex-offender from serving as a midwife, an interior designer, or a barber. This is particularly absurd when one considers that many ex-offenders receive training to become barbers while incarcerated,<sup>57</sup> only to discover that they cannot get a license to practice in the one field in which they now have a marketable skill.<sup>58</sup>

Let’s face it, ex-offenders have a hard enough time finding employment as it is. They have a criminal record and gaps in their resume. Employers are often reluctant to give ex-offenders a job out of fear that they may engage in wrongdoing during their employment, subjecting that employer to potential loss, legal liability, or reputational harm. Some insurers

deny coverage to companies that hire ex-offenders.<sup>59</sup> Occupational licensing restrictions only increase the uphill battle that ex-offenders already face.

Research shows that states with heavy occupational licensing burdens and restrictions for ex-offenders have seen higher average levels of recidivism for new criminal offenses than have states with fewer occupational licensing burdens and restrictions.<sup>60</sup> Studies have also shown a positive correlation between collateral consequences and lower employment rates as well as higher recidivism rates.<sup>61</sup> Although more research is needed, existing research strongly suggests that imposing irrational restrictions on economic opportunities for ex-offenders undermines efforts to promote public safety and a cost-effective criminal justice system.<sup>62</sup>

### **What Should Be Done**

Under certain circumstances, presidents and governors can issue pardons and restore an individual's civil rights, and courts can expunge criminal records or issue certificates of rehabilitation,<sup>63</sup> thereby providing some deserving ex-offenders with some relief from the burdens otherwise imposed by collateral consequences. Employers may also help to improve ex-offenders' employment prospects by voluntarily delaying their inquiry into a job applicant's prior criminal record until later in the hiring process—a practice commonly referred to as a “ban the box” policy.<sup>64</sup>

There are also things that state and federal legislators can do to address unduly onerous collateral consequences. Legislators should review and consolidate all existing collateral consequences in a single location in order to make them more accessible so that the public is aware of the full consequences of criminal conviction.<sup>65</sup> Legislators should reassess the collateral consequences enacted within their jurisdictions to ensure that they are necessary to protect the public, reasonably related to the offense committed, and not capable of being enforced indiscriminately or arbitrarily. Any restriction that does not satisfy these parameters should be amended or repealed.<sup>66</sup> Legislators might also consider establishing more robust procedures for ex-offenders to petition for relief or waivers from certain collateral consequences, which could be granted in meritorious cases.

## **Conclusion**

In light of growing evidence that a number of collateral consequences may frustrate reintegration into the community and encourage recidivism, some states have already begun to reassess what collateral consequences should attach to which convictions, as well as why and for how long.<sup>67</sup> While some collateral consequences are justifiable as a way to protect public safety, many are not. Unjustifiable collateral consequences appear to be punitive in nature, designed to continue punishing ex-offenders once they complete their sentences for the crimes they committed. The public's desire to continue to stigmatize an ex-offender may be understandable, but it comes at a high cost.

Since most ex-offenders—millions of them—at some point will be released from custody and return to our communities, it is important that we do everything we can to encourage them to become productive, law-abiding members of society and that we not put too many impediments, in the form of excessive collateral consequences, in their way that will hinder their efforts. More attention must be paid to this issue to avoid these dangerous and counterproductive results.

In a time of intense polarization, this is one of the few issues people can rally around and find common ground. If people are pushed into the corner and denied opportunities for gainful employment and a stable environment for too long, they will have little choice but to recidivate. It is not in anybody's best interest to relegate the formally incarcerated to a backwater of second-class citizenship status.

Thank you for providing the opportunity to comment on this important issue. I look forward to collaborating with any interested parties on current and future efforts to reform our system of collateral consequences and to promote a better understanding of the issue. I welcome any questions you may have.

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<sup>1</sup> The title and affiliation are for identification purposes. Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees, and do not reflect support or opposition



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<sup>2</sup> *Weems v. United States*, 217 U.S. 349, 366 (1910) (“His prison bars and chains are removed, it is true...but he goes from them to a perpetual limitation of his liberty...subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty.”).

<sup>3</sup> *Id.*, at 366.

<sup>4</sup> The term “ex-offender” as used in this testimony refers to a person with a prior criminal conviction.

<sup>5</sup> See *Weems*, 217 U.S. at 366; Joe Palazzolo, *5 Things to Know About Collateral Consequences*, Wall St. J. (May 17, 2015), <http://blogs.wsj.com/briefly/2015/05/17/5-things-things-to-know-about-collateral-consequences/>; Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, 51 Fed. Probation 52 (1987). The National Inventory of Collateral Consequences of Conviction lists 48,229 entries. Of these, 35,485 entries—roughly 74 percent—relate to employment, occupational or professional licensure, or business licenses. The Justice Center, Council of State Governments, <https://niccc.csgjusticecenter.org/map/> (last accessed April 23, 2018) (hereinafter Inventory). Other estimates place employment-related collateral consequences at between 60 and 70 percent of the total. Joe Palazzolo, *5 Things to Know About Collateral Consequences*, Wall St. J. (May 17, 2015), <http://blogs.wsj.com/briefly/2015/05/17/5-things-things-to-know-about-collateral-consequences/> (last accessed April 23, 2018). According to the National Association of Criminal Defense Attorneys, “[t]here are approximately 48,000 laws and rules in U.S. jurisdictions that restrict opportunities and benefits based on criminal convictions.” Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae, p. 6, *Packingham v. North Carolina*, No. 15-1194, [http://www.scotusblog.com/wp-content/uploads/2016/12/15-1194\\_amicus-petitioner-NACDL.pdf](http://www.scotusblog.com/wp-content/uploads/2016/12/15-1194_amicus-petitioner-NACDL.pdf) (last accessed April 23, 2018).

<sup>6</sup> Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 Ohio St. L.J. 1 (2014); Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 Fed. Probation 11, 14–15 (1996) (“[An] analysis of state legal codes reveals an increase between 1986 and 1996 in the extent to which states restrict the rights of convicted felons.... [T]here was an increase in the number of states restricting six rights; voting, holding office, parenting, divorce, firearm ownership, and criminal registration increased.”); Jeremy Travis, *Invisible Punishment, in The Collateral Consequences of Mass Imprisonment* 18 (Marc Mauer & Meda Chesney-Lind eds., 2002).

<sup>7</sup> See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Penn. L. Rev. 1790-91 (2012).

<sup>8</sup> Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. Rev. 623, 628 (2006) (estimating that roughly 65,000 individuals are released from prison and 9 million individuals are released from local jails each year); Jo Craven McGinty, *How Many Americans Have a Police Record? Probably More Than You Think*, Wall St. J. (Aug. 7, 2015), <http://on.wsj.com/1MSctje>; Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, Prison Pol’y Initiative (Mar. 14, 2016), <http://www.prisonpolicy.org/reports/pie2016.html>.

<sup>9</sup> “At least 95% of all state prisoners will be released from prison at some point; nearly 80% will be released to parole supervision.” Timothy Hughes & Doris James Wilson, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Reentry Trends in the United States*, <https://www.bjs.gov/content/reentry/reentry.cfm> (last visited Dec. 19, 2016). “Virtually all offenders convicted of a federal crime are released from prison eventually and return to society or, in the case of illegal aliens, are deported to their country of origin.” Glenn R. Schmitt & Hyun J. Konfrst, U.S. Sentencing Comm., *Life Sentences in the Federal System* 1 (2015), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226\\_Life\\_Sentences.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf) (noting that in 2013, all offenders who received a life sentence without parole or who effectively received a life sentence due to their age and sentence duration made up only 0.4

percent of all federal criminal sentences); see also Pew Charitable Trusts, *Prison Time Surges for Federal Inmates* (Nov. 18, 2015), [http://www.pewtrusts.org/~media/assets/2015/11/prison\\_time\\_surges\\_for\\_federal\\_inmates.pdf](http://www.pewtrusts.org/~media/assets/2015/11/prison_time_surges_for_federal_inmates.pdf) (“With the exception of the comparatively small number of offenders who are sentenced to death or life behind bars or who die while incarcerated, all inmates in federal prisons will eventually be released.”).

<sup>10</sup> The Collateral Consequences Resource Center maintains a website with a 50-state database of mechanisms for restoration of rights. See Restoration of Rights Project, <http://ccresourcecenter.org/resources-2/restoration-of-rights/>.

<sup>11</sup> Kim Steven Hunt & Robert Dumville, U.S. Sentencing Comm., *Recidivism Among Federal Offenders: A Comprehensive Overview* (Mar. 2016), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism\\_overview.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf) (studying 25,431 federal offenders released from prison or commencing a term of probation in 2005; 49.3 percent were rearrested within eight years for a new crime or for one or more technical violations of the supervised release conditions, the median time to rearrest was 21 months, 31.7 percent were reconvicted, and 24.6 percent were reincarcerated). In 2014, 76.6 percent of offenders released from state prison were rearrested within five years, 55.4 percent were convicted, and 28.2 percent were reincarcerated. Matthew Durose et al., Bureau of Justice Statistics, Dep’t of Justice, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (2014), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>. A comparison of the two studies reveals that a quarter (25.7 percent) of released state inmates had a violent commitment offense compared to only 6.8 percent of inmates released from federal prison. State offenders were more likely to be under 40 years of age (68.5 percent) and male (89.3 percent) than the federal offenders (60.1 percent under age 40 and 85.9 percent male). The BJS study also included non-U.S. citizens, a category of offender excluded from the Sentencing Commission’s study.

<sup>12</sup> See ABA, *Standards for Criminal Justice, Collateral Sanction and Discretionary Disqualifications of Convicted Persons*, 10 (3d ed. 2004) (referencing compilations of various states’ collateral consequences for comparison) (hereinafter ABA Standards).

<sup>13</sup> Kenneth L. Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 6–7 (1998).

<sup>14</sup> 23 U.S.C. § 159 (2000) (revocation or suspension of drivers’ licenses of individuals convicted of drug offenses); see also, e.g., Fla. Stat. § 322.055(2) (same).

<sup>15</sup> Rebecca Beitsch, *States Rethink Restrictions on Food Stamps, Welfare for Drug Felons*, Pew Charitable Trusts (July 30, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/07/30/states-rethink-restrictions-on-food-stamps-welfare-for-drug-felons>.

<sup>16</sup> See, e.g., 20 U.S.C. § 1091(r) (prohibiting students convicted of drug offenses while receiving student aid from receiving such aid for a period of years after conviction).

<sup>17</sup> See, e.g., 13 C.F.R. § 123.101(i) (prohibiting someone who is “presently incarcerated, or on probation or parole following conviction for a serious criminal offense,” from receiving a federal home disaster loan); 13 C.F.R. § 124.108(a)(4)(ii) (prohibiting someone who is “currently incarcerated, or on parole or probation pursuant to a pre-trial diversion or following conviction for a felony or any crime involving business integrity,” from being eligible to participate in the U.S. Small Business Administration’s 8(a) Business Development Program); see also Beitsch, *supra* note 15.

<sup>18</sup> See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 Am. U. L. Rev. 65, 73–74 (2003); see also, e.g., Cal. Civ. Code § 203(a)(5) (prohibiting persons in California “who have been convicted of malfeasance in office or a felony” from serving on a jury unless their rights have been restored).

<sup>19</sup> See, e.g., Am. Bar Assoc. Comm. on Effective Crim. Sanctions & Pub. Def. Serv. D.C., *Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations* 18, 31 (2009), available at <http://bit.ly/2iTXKJ> (noting laws that bar certain offenders from volunteer work that involves the presence of a minor); Kim Ambrose, Wa. Defender Assoc., *Beyond the Conviction*, 12–13 (2013), <http://bit.ly/2iFaANT> (same); James Frank et al., *Collateral Consequences of Criminal Conviction in Ohio* 31 U. Cin. Ctr. Crim. Just. Research, report to the Ohio Office of Criminal Justice Services), available at <http://ocjs.ohio.gov/CollateralConsequences.pdf> (Ohio law provides that “[a]ny person who has been convicted of a disqualifying offense is incompetent to hold a public office, to be publicly employed, or even to be a volunteer in certain public positions, such as volunteer firefighter.”).

<sup>20</sup> See, e.g., Nat'l Conf. of State Legislatures, *Enactments Concerning Sex Offenders Near Schools and Child-Care* (Sept. 19, 2006), available at [http://www.npr.org/programs/morning/features/2006/oct/prop83/ncsl\\_schools.pdf](http://www.npr.org/programs/morning/features/2006/oct/prop83/ncsl_schools.pdf); N.H. Rev. Stat. Ann. § 170-E:29(III) (2013) (restricting activity of those convicted of “a violent or sexually-related crime against a child”); see also Ian Lovett, *Public-Place Laws Tighten Rein on Sex Offenders*, N.Y. Times (May 29, 2012), [http://www.nytimes.com/2012/05/30/us/sex-offenders-face-growing-restrictions-on-public-places.html?\\_r=0](http://www.nytimes.com/2012/05/30/us/sex-offenders-face-growing-restrictions-on-public-places.html?_r=0); Roger Przybylski, Office of Justice Programs, Dep’t of Justice, *Recidivism of Adult Sex Offenders* (July 2015), available at <https://www.smart.gov/pdfs/RecidivismofAdultSexualOffenders.pdf> (discussing high recidivism rates for new sex crimes by adult sex offenders). Some have argued, however, that some restrictions and registration requirements for sex offenders may have gone too far and may end up doing more harm than good. See Jill Levinson & Andrew J. Harris, *SORNA: Good Intentions, Flawed Policy, and Proposed Reforms*, Fed. Soc., Engage, Vol. 13:3 (Oct. 2012), available at <http://www.fed-soc.org/publications/detail/an-exchange-over-the-sex-offender-registration-and-notification-act-sorna>.

<sup>21</sup> See 18 U.S.C. § 922(g)(1); *District of Columbia v. Heller*, 554 U.S. 570, 626–627 (2008) (“Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons....”). But see *U.S. v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011) (“*Heller*’s statement regarding the presumptive validity of felon gun dispossession statutes...does not foreclose” parties with a criminal conviction from bringing an as-applied challenge.); Collateral Consequences Resource Center, *Second Amendment Challenges to Felon-in-possession Laws* (Dec. 13, 2014), <http://ccresourcecenter.org/2014/12/13/second-amendment-challenges-felony-dispossession-laws/>. Some have urged, however, that individuals convicted of nonviolent offenses should be able to petition to have their Second Amendment rights restored. See, e.g., Paul Bedard, *House Votes to Let Nonviolent Ex-felons Restore Gun Rights*, Wash. Examiner (June 5, 2015), <http://www.washingtonexaminer.com/house-votes-to-let-nonviolent-ex-felons-restore-gun-rights/article/2565685>; James King, *This Ex-con is Trying to Get Guns in the Hands of Non-violent Felons*, The Week (Mar. 2016), <http://theweek.com/articles/614883/excon-trying-guns-hands-nonviolent-felons>.

<sup>22</sup> See, e.g., Nat'l Conf. of State Legislatures, *Penalties for Violations of State Ethics and Public Corruption Laws* (Feb. 2, 2015), <http://www.ncsl.org/research/ethics/50-state-chart-criminal-penalties-for-public-corr.aspx>.

<sup>23</sup> See, e.g., 12 U.S.C. § 1829 (2000) (prohibiting persons convicted of crimes of dishonesty or breach of trust from owning, controlling, or otherwise participating in the affairs of a federally insured banking institution, subject to waiver by the FDIC; waiver may not be given for 10 years following conviction in the case of certain offenses involving the banking and financial industry); 10 U.S.C. § 2408 (2000) (persons convicted of fraud or felony arising out of defense contract prohibited from working in any capacity for a defense contractor or subcontractor for a period of at least five years); see also *DiCola v. Food & Drug Admin.*, 77 F.3d 504, 507 (D.C. Cir. 1996) (upholding the Food and Drug Administration’s lifetime ban of a former drug company executive from “providing services in any capacity to the pharmaceutical industry” after conviction of adulterating a drug product and failing to keep adequate records; “The permanence of the debarment can be understood, without reference to punitive intent, as reflecting a congressional judgment that the integrity of the drug industry, and with it public confidence in that industry, will suffer if those who manufacture drugs use the services of someone who has committed a felony subversive of FDA regulation.”).

<sup>24</sup> Some have argued that it is perfectly reasonable to deny the right to vote to convicted felons. See Hans A. von Spakovsky & Roger Clegg, *Felon Voting and Unconstitutional Congressional Overreach*, Heritage Foundation Legal Memorandum No. 145 (Feb. 11, 2015), available at <http://www.heritage.org/research/reports/2015/02/felon-voting-and-unconstitutional-congressional-overreach> (“Those who are not willing to follow the law cannot claim a right to make the law for everyone else. And when an individual votes, he or she is indeed either making the law—either directly in a ballot initiative or referendum or indirectly by choosing lawmakers—or deciding who will enforce the law by choosing local prosecutors, sheriffs, and judges.”). Others, such as the NAACP, have argued that convicted felons should not lose their right to vote. See NAACP, *Felon Disenfranchisement Is About Race*, The Root (Oct. 2, 2012), [http://www.theroot.com/articles/politics/2012/10/felon\\_disenfranchisement\\_naacp\\_launches\\_campaign/](http://www.theroot.com/articles/politics/2012/10/felon_disenfranchisement_naacp_launches_campaign/); see also *Developments in the Law—One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv. L. Rev. 1939 (2002) (criticizing felony disenfranchisement laws). State laws vary considerably on this issue, with 48 states and the District of Columbia imposing at least some restrictions on felon voting. See Nat'l Conf. of State Legislatures, *Felon Voting Rights* (2016), available at <http://www.ncsl.org/research/elections-and-campaigns/felon>.

voting-rights.aspx/. In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court upheld the constitutionality of California's felony disenfranchisement law. The essential issue appears to remain, as Associate Supreme Court Justice Clarence Thomas put it: Is the ex-offender "worthy of participating in civic life"? *Caron v. United States*, 524 U.S. 308, 318 (1998) (Thomas, J., dissenting).

<sup>25</sup> See Tracy Sohoni, *The Effects of Collateral Consequence Laws on State Rates of Returns to Prison* (July 2015) (unpublished PhD dissertation, University of Maryland, on file with NCJRS) (showing correlation between various collateral consequences, employment rates, and recidivism); Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193 (2004) (same); Richard P. Seiter & Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What Is Promising*, 49 Crime and Delinquency 360 (2003) (same).

<sup>26</sup> Some organizations, such as the National Association of Criminal Defense Lawyers, have suggested an even more aggressive approach to addressing the problems created by overweening collateral consequences. See Nat'l Assoc. Crim. Defense Lawyers, *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime* 33 (2014), <http://bit.ly/1pqvFvA> (hereinafter NACDL).

<sup>27</sup> See, e.g., *Hawker*, 170 U.S. at 196–200; *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000) (arguing that a collateral consequence, no matter how severe, is "not the sentence of the court which accept[s] the plea but of another agency over which the trial judge has no control and for which he has no responsibility."), *abrogated by Padilla v. Kentucky*, 559 U.S. 356 (2010); *United States v. George*, 869 F.2d 333, 337 (7th Cir. 1989) (A collateral consequence "may result from a criminal prosecution, but is not a part of or enmeshed in the criminal proceeding.").

<sup>28</sup> See Ram Subramanian et al., *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction*, Vera Inst. (2014), <http://archive.vera.org/sites/default/files/resources/downloads/states-rethink-collateral-consequences-report-v4.pdf> (on state reforms) (hereinafter Vera).

<sup>29</sup> In *Padilla v. Kentucky*, 559 U.S. 356 (2010), a longtime U.S. resident and Vietnam veteran was arrested and pled guilty to transporting marijuana after defense counsel assured him that deportation would not follow a guilty plea. The federal government did institute deportation proceedings. Padilla argued he had inadequate notice of the consequences of his plea. The Supreme Court held that defense counsel must advise noncitizen defendants of potential immigration consequences of a conviction. See Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 How. L.J. 675 (2011); Case Comment, *United States v. Muhammad: Tenth Circuit Holds that Defendant Need Not Be Informed of Collateral Consequences Before Pleading No Contest*, 128 Harv. L. Rev. 1860 (2015) (arguing that "defendants have a constitutional right to knowledge of the direct—but not collateral—consequences of their plea.").

<sup>30</sup> See ABA Standards, *supra* note 12, at 21, 22. While some states apply collateral sanctions only to convictions rendered in that state, others apply sanctions based on convictions rendered in other jurisdictions as well, so ex-offenders must often scour the codes of multiple states if they wish to know the full scope of disabilities that might apply to them.

<sup>31</sup> Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L.J. 753, 784 (2011); see also ABA Standards, *supra* note 12; Oh. Just. & Pol'y Ctr., *Civil Impacts of Criminal Convictions Under Ohio Law*, <http://civiccoho.org/> (state database of collateral consequences, a keyword search of "mandatory" on Dec. 29, 2016, resulted in 596 entries).

<sup>32</sup> NACDL, *supra* note 26, at 33 (statement of Gary Mohr, Director, Ohio Department of Rehabilitation and Correction); see also Frank et al., *supra* note 19, at 4–5. West Virginia appears to have some laws that fit into this category too. For example, anyone who has been convicted of a felony within the previous five years cannot obtain a license certificate to engage in any kind of business involving an automobile or to be a veterinarian. See W.Va. Code § 17A-6B-5; W.Va. Code § 17A-6C-6; W.Va. Code § 17A-6D-8; W.Va. Code § 30-10-8(7). Anyone who fails to pay overdue child support payments can be only receive a restricted driver's license. W.Va. Code § 17B-2-10. An individual cannot get a license to be a physical therapist assistant if he was convicted of any felony during the preceding ten years. W.Va. Code § 30-20-10(7). An individual can be denied a license to serve as a wildlife guide if he has been convicted of any crime including a misdemeanor. W.Va. Code § 20-2-26. And an individual can be denied a license to be a barber or cosmetologist if he has been convicted of any felony or other crime involving moral turpitude. W.Va. Code § 30-27-20(g)(2).



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<sup>33</sup> Dep't of Justice, Federal Statutes Imposing Collateral Consequences Upon Conviction, 3–4 (2000), <http://bit.ly/2eUGdiS> (hereinafter DOJ Report).

<sup>34</sup> See, e.g., Matthew Wolfe, *From PTSD to Prison: Why Veterans Become Criminals*, Daily Beast (July 28, 2013), <http://www.thedailybeast.com/articles/2013/07/28/from-ptsd-to-prison-why-veterans-become-criminals.html>; David Wood, *Combat Veterans with PTSD, Anger Issues More Likely to Commit Crimes: New Report*, World Post (Oct. 10, 2012), [http://www.huffingtonpost.com/2012/10/09/veterans-ptsd-crime-report\\_n\\_1951338.html](http://www.huffingtonpost.com/2012/10/09/veterans-ptsd-crime-report_n_1951338.html).

<sup>35</sup> See Marc Mauer & Virginia McCalmont, *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*, Sentencing Project (Updated Sept. 2015), available at <http://sentencingproject.org/wp-content/uploads/2015/12/A-Lifetime-of-Punishment.pdf>. In 2015, 37 states enforced the TANF ban; 34 states enforced the SNAP ban; 25 states conditioned receipt of welfare on the nature of conviction(s) (e.g., individuals convicted of drug possession but not manufacturing or distribution may receive benefits); some looked to completion of drug treatment programs or a post-conviction waiting period. *Id.* at 2. See also ABA Standards, *supra* note 12, at 39 (arguing that prisoners themselves do not need and should not receive welfare assistance while in prison).

<sup>36</sup> 24 C.F.R. § 966.4.

<sup>37</sup> See NACDL, *supra* note 26, at 33 (providing, e.g., that California bans “every person on the [sex-offender] registry” from public housing, so “those convicted of public urination in California are barred for life from public housing while those convicted of more serious violent offenses are not.”).

<sup>38</sup> See, e.g., Judge Harold Baer, Jr., *Collateral Consequences of Conviction: A Reminder of Some Possible Civil Penalties*, at 8 (2011), available at <http://bit.ly/2jpieN0>; Randy T. Leavitt, *Collateral Consequences of Criminal Convictions 6–7* (2009), available at [http://randyleavitt.com/11\\_Leavitt.pdf](http://randyleavitt.com/11_Leavitt.pdf).

<sup>39</sup> See generally ABA Standards, *supra* note 12; Devah Prager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 960 (2003) (discussing employment barriers based on prior criminal conviction); Joe Palazzolo, *For Americans Who Served Time, Landing a Job Proves Tricky*, Wall St. J. (May 17, 2015), <http://on.wsj.com/1HcwLfY> (same).

<sup>40</sup> DOJ Report, *supra* note 33, at 3; 10 U.S.C. § 504(a) (2006).

<sup>41</sup> See, e.g., *Can a Felon Work for the Government?*, Jobs for Felons Hub (Nov. 11, 2015), <https://www.jobsforfelonshub.com/can-a-felon-work-for-the-government/>; Fla. Stat. § 943.13(4) (2016).

<sup>42</sup> See U.S. Equal Emp't Opportunity Comm'n, *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. (Apr. 25, 2012) (§§ III.A & VI.A), [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm); Chin, *supra* note 7, at 1800; see also Vera, *supra* note 28, at 20 (noting state bill to loosen state restrictions on ex-offenders from private security employment).

<sup>43</sup> See Chin, *supra* note 7, at 1800.

<sup>44</sup> DOJ Report, *supra* note 33, at 4–5.

<sup>45</sup> See Va. Code § 18.2-471; § 47.1-4; Inventory, *supra* note 5 (a search for mandatory employment-related restrictions under Virginia law generated 188 search results as of Jan. 16, 2017).

<sup>46</sup> See Oh. Just. & Pol'y Ctr., *supra* note 31; Inventory, *supra* note 5 (a search for mandatory employment-related restrictions under Ohio law generated 666 search results as of Jan. 16, 2017).

<sup>47</sup> See Palazzolo, *supra* note 5.

<sup>48</sup> See *id.*; Meek, *supra* note 6.

<sup>49</sup> See Meek, *supra* note 6, at 17.

<sup>50</sup> *Id.*, at 15.

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., W.Va. Code § 30-22-10(a)(1).

<sup>53</sup> See, e.g., W.Va. Code § 30-26-5(2).

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<sup>54</sup> See, e.g., W.Va. Code § 30-36-10(a).

<sup>55</sup> This does not even scratch the surface. See Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 38 Harv. J. L. & Pub. Pol'y 209 (2015).

<sup>56</sup> See, e.g., Daniel Walters, *From Prison to Olympia*, Inlander (Jan. 14, 2016), <http://www.inlander.com/spokane/from-prison-to-olympia/Content?oid=2658314> (anecdotes of employment barriers of collateral consequences).

<sup>57</sup> Eugene L. Meyer, *Prisoners Learning Barber Trade in Jail*, Wash. Post (Oct. 3, 2001), available at <http://articles.latimes.com/2001/oct/03/news/cl-52695>; Suzanne Le Mignot, *Barber School Gives Jail Inmates Second Chance*, CBS Chi. (Oct. 5, 2012), available at <http://chicago.cbslocal.com/2012/10/05/barber-school-gives-jail-inmates-second-chance/>; James Miller, *Marion Correctional Institution's Barber Program Gives Inmates Get [sic] a Clean-cut Benefit*, Marion Star (April 29, 2014), <http://www.marionstar.com/story/news/2014/04/29/barber-program-gives-inmates-get-a-clear-cut-benefit/8482799/>; Larry Yellen, *Stateville's First-ever Class of Barbers Graduate*, Fox 32 (Nov. 18, 2015), <http://www.fox32chicago.com/news/local/51335959-story>.

<sup>58</sup> See, e.g., Mike Cronin, *Texas Aids Convicted Felon in Training as Barber but Denies License*, Tex. Watchdog (June 7, 2012), <http://www.texaswatchdog.org/2012/06/texas-aids-convicted-felon-in-training-as-barber-but-denies/1339021201.column>; Michael Schulte, *Felony Conviction, Barrier to Obtaining Professional License*, Ga. Ctr. for Opportunity (Nov. 2014), <http://georgiaopportunity.org/access-professional-licenses-benefit-returning-citizens/> (listing some of the “80 professions that are off-limits to those with a felony conviction, including barber, cosmetologist, electrical contractor, plumber, conditioned air contractor, auctioneer, utility contractor, registered trade sanitarian, and scrap metal processor”); Sondra Wolfer & Helen Peterson, *Ex-Con Barber's Cut Some Slack*, N.Y. Daily News (Feb. 21, 2003), <http://www.nydailynews.com/archives/news/ex-con-barber-cut-slack-article-1.676409>; Bryant Jackson-Green, *How Occupational Licensing Blocks Path to Success for Ex-Offenders*, Ill. Pol'y (Apr. 7, 2015), <https://www.illinoispolicy.org/how-occupational-licensing-blocks-path-to-success-for-ex-offenders/> (listing licenses that can be denied due to a felony record in Illinois, including barber, nail technician, pet shop operator, referee, livestock dealer, and dance hall operator).

<sup>59</sup> Joe Palazzolo, *Criminal Records Haunt Hiring Initiative*, Wall St. J. (July, 2015), <https://www.wsj.com/articles/criminal-records-haunt-hiring-initiative-1436736255?mobile=y>.

<sup>60</sup> Stephen Slivinski, *Turning Shackles into Bootstraps, Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform* (Center for the Study of Economic Liberty at Arizona State University Policy Report No. 2016-01, Nov. 7, 2016) (estimating “that between 1997 and 2007 the states with the heaviest occupational licensing burdens saw an average increase in the three-year, new-crime recidivism rate of over 9%. Conversely, the states that had the lowest burdens and no [‘good-character’] provisions saw an average decline in that recidivism rate of nearly 2.5%.”).

<sup>61</sup> See the works of Sohoni; Uggen & Manza; Seiter & Kadela, *supra* note 25; see also See Mike Vuolo, Sarah Lageson, and Christopher Uggen, *Criminal Record Questions in the Era of “Ban-the Box,”* 16 CRIMINOLOGY & PUB. POL’Y 139 (2017) (collecting research); Tripodi, S. J., Kim, J. S., & Bender, K., *Is Employment Associated With Reduced Recidivism?: The Complex Relationship Between Employment and Crime*, International Journal of Offender Therapy and Comparative Criminology, 54 (5), 706-720 (2010) (individuals that obtained employment when released lowered their recidivism risk by 68.5% and averaged 31.4 months before being re-incarcerated, with a range of 9 to 60 months. Individuals that did not obtain employment averaged 17.3 months before being re-incarcerated with a range of 4 to 47 months, showing that employed ex-prisoners remain crime-free for a longer period of time than those that are unemployed.); Indianapolis-Marion County City-County Council Re-Entry Policy Study Commission Report (July 2013) (“According to research conducted by Dr. John Nally and Dr. Susan Lockwood of the Indiana Department of Correction, employment of ex-offenders is the #1 predictor of recidivism. Unemployed offenders are more than two times likely to recidivate than those who have a job.”), available at

<http://www.indy.gov/eGov/Council/Committees/Documents/RE-ENTRY/Re-entry%20Policy%20Report.pdf>; Nally, J.M., Lockwood, S, Ho, T., Knutson, K., *The Post-Release Employment and Recidivism Among Different Types of Offenders With A Different Level of Education: A 5-Year Follow-Up Study in Indiana*, Justice Policy Journal, Vol. 9, No. 1 (Spring 2012), available at [http://www.cjcj.org/uploads/cjcj/documents/the\\_post-release.pdf](http://www.cjcj.org/uploads/cjcj/documents/the_post-release.pdf); Deschenes, E.P., Owen, B., Crow, J., *Recidivism among Female Prisoners: Secondary Analysis of the 1994 BJS Recidivism Data Set*, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/216950.pdf>; Matheson, F., Doherty, S., Grant, B., *Community-Based Aftercare and Return to Custody in a National Sample of Substance-Abusing Women Offenders*,



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101 American Journal of Public Health 1126-32 (June 2011), available at [https://www.researchgate.net/publication/51052068\\_Community-Based\\_Aftercare\\_and\\_Return\\_to\\_Custody\\_in\\_a\\_National\\_Sample\\_of\\_Substance-Abusing\\_Women\\_Offenders](https://www.researchgate.net/publication/51052068_Community-Based_Aftercare_and_Return_to_Custody_in_a_National_Sample_of_Substance-Abusing_Women_Offenders).

<sup>62</sup> See *id.*; see also Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, 270 Nat'l Inst. Just. J. 42 (2012), available at <http://www.nij.gov/journals/270/pages/criminal-records.aspx> (citing related materials from the Justice Department); Michelle Natividad Rodriguez & Maurice Emsellem, 65 Million "Need Not Apply," Nat'l Employment L. Project 3 n. 6 (2011) (arguing that "the opportunity for stable employment actually lowers crime recidivism rates and thus increases public safety."), available at [http://www.nelp.org/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf). Collateral consequences likely account for significant losses in potential economic growth. At least one study has connected collateral consequences to a 1.5 percent to 1.7 percent reduction in the employment rate for men and estimates that "[i]n GDP terms, these reductions in employment cost the U.S. economy between \$57 [billion] and \$65 billion in lost output" in 2008 alone. John Schmitt & Kris Warner, *Ex-offenders and the Labor Market*, Ctr. for Econ. & Pol'y Res., at 14 (Nov. 2010). "Survey results suggest that between 60 [percent] and 75 percent of ex-offenders are jobless up to a year after release." *Research on Reentry and Employment*, Nat'l Inst. of Just., Dep't of Justice, <http://bit.ly/1h8W6kx> (last visited Jan. 9, 2017).

<sup>63</sup> See *Ex parte Garland*, 71 U.S. 333 (1866) (discussing the consequences of a pardon); NACDL, *supra* note 26, at 20 (discussing expungement); Collateral Consequences Resource Center, *State-Specific Resources*, <http://ccresourcecenter.org/resources-2/state-specific-resources/> (last accessed Oct. 25, 2016) (discussing various state and federal processes for restoration of rights); Joe Palazzolo, *Brooklyn Judge Issues First Federal "Certificate of Rehabilitation"*, Wall St. J. (Mar 8, 2016), <http://blogs.wsj.com/law/2016/03/08/brooklyn-judge-issues-first-federal-certificate-of-rehabilitation/>.

<sup>64</sup> John G. Malcolm & John-Michael Seibler, *Mandatory "Ban the Box" Requirements May Do More Harm Than Good*, Heritage Foundation Legal Memorandum No. 198 (Jan. 30, 2017), available at <http://www.heritage.org/research/reports/2017/02/mandatory-ban-the-box-requirements-may-do-more-harm-than-good>.

<sup>65</sup> See ABA Standards, *supra* note 12, standard 19-2.1; see also Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 St. Louis U. Pub. L. Rev. 87, 118-21 (2012) (arguing that counsel should inform defendants of potential collateral consequences).

<sup>66</sup> See generally ABA Standards, *supra* note 12; see also Dep't of Justice, *Smart on Crime—Reforming the Criminal Justice System for the 21st Century* 5 (Aug. 2013), <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf>.

<sup>67</sup> See Vera, *supra* note 28 (on state reform efforts between 2009-2014).

**Written Statement of the Sargent Shriver National Center on Poverty Law  
Before the West Virginia Advisory Committee  
to the United States Commission on Civil Rights**

*Hearing on  
Felony Records: The Collateral Consequences*

*May 4, 2018*

Submitted by:

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On behalf of the Sargent Shriver National Center on Poverty Law, we would like to thank the West Virginia Advisory Committee to U.S. Commission on Civil Rights for holding this important briefing on the collateral consequences of a felony conviction for residents of West Virginia.

The Sargent Shriver National Center on Poverty Law (Shriver Center) has for the past fifty years provided national leadership in advancing laws and policies that secure justice to improve the lives and opportunities of people living in poverty. We focus on issues that deeply affect their lives and upward mobility, such as housing, employment, education, healthcare and public benefits. We also connect and mobilize networks of lawyers, community organizers, activists, and allies across the country, providing them with resources and training to build their capacity and improve their effectiveness. Finally, we advocate for systemic change that has a broad impact by tracking strategies and tactics that worked in one state and modifying them for the battle in the next.

The Shriver Center has long understood how a person's involvement with the criminal justice system can significantly impact his or her subsequent attempts to access housing, employment, public benefits and other important supports. For this reason, we have been engaged in a number of initiatives to reduce the collateral consequences that come with having a criminal record.

Our longstanding work at the intersection of housing and criminal justice in particular has had wide impact. In 2015, we published a report entitled *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*. In that report, we reviewed the admissions policies of over 300 public housing authorities (PHAs) and other federally subsidized housing providers and identified ways in which those policies hindered the efforts of people with criminal records to access affordable housing. Later that same year, in a notice to PHAs about their obligation to set reasonable criminal records policies under federal law, the U.S. Department of Housing and Urban Development encouraged them to review our report for a better understanding of these issues.

In this testimony, we will start by discussing the critical role that housing plays in helping people re-join their communities after leaving the criminal justice system. We will then describe the barriers that they face in federally subsidized housing and on the private rental market. Next, we will give an overview of governmental efforts at the federal, state, and local level to dismantle those criminal records barriers. Finally, we will end with a brief set of recommendations for the West Virginia Advisory Committee to the U.S. Commission on Civil Rights.

## **I. The Importance of Housing for People with Criminal Records**

Every year, more than 640,000 people – roughly one-third the population of West Virginia – leave state and federal prisons, while local jails process more than 11 million people.<sup>1</sup> For many, a common question emerges on the first night: “Where will I sleep?” But often, securing safe, decent and affordable housing will present a significant challenge for people long after they have left the criminal justice system. In a 2015 survey by the Ella Baker Center on Human Rights, nearly four out of five formerly incarcerated individuals reported that, because of their criminal history, they were denied admission or deemed ineligible for housing.<sup>2</sup> Formerly incarcerated men are twice as likely to

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<sup>1</sup> Press Release, Peter Wagner & Bernadette Dauby, Mass Incarceration: The Whole Pie 2017 (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html>.

<sup>2</sup> SANETA DE VUONO-POWELL ET AL., WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 27 (Sept. 2015), <http://whopaysreport.org/who-pays-full-report/>

experience housing instability short of homelessness (e.g., moving multiple times a year, relying on others for living expenses) than men who had never been incarcerated. Similarly, the risk of homelessness quadruples for men who have been incarcerated.<sup>3</sup> The limited employment prospects for people with criminal records and its impact on a person's ability to afford housing helps to explain these increased odds, but even assuming equal annual earnings, formerly incarcerated men remain more likely to experience housing instability than men who have never been incarcerated.<sup>4</sup>

Just as incarceration is a risk factor for homelessness,<sup>5</sup> a history of homelessness increases the risk of incarceration. Individuals in jails are seven to eleven times more likely to have recently experienced homelessness than the general population.<sup>6</sup> In a study in Georgia, a person on parole increased his chances of arrest by 25% each time he changed his address.<sup>7</sup> By contrast, providing housing to people with criminal records can help to reduce their risk of recidivism. The state of Washington, for example, designed a pilot program for individuals identified as high risk/high need who were being released from prison without a suitable place to live. Through the program, these individuals were provided with housing and supportive services, which ultimately reduced their odds of returning to the criminal justice system.<sup>8</sup>

Housing barriers for justice-involved individuals can also severely restrain their ability to reintegrate back into their communities by exacerbating other collateral consequences. Sustained employment and improved relationships with family, for example, are difficult to achieve in the absence of safe, decent and affordable housing, especially for people who have been formerly incarcerated.<sup>9</sup>

Indeed, living with family is one of the most affordable and stable housing options available to justice-involved individuals.<sup>10</sup> It is also one of the most commonly-used options.<sup>11</sup> In the Ella

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<sup>3</sup> Amanda Geller & Marah A. Curtis, *A Sort of Homecoming: Incarceration and the Housing Security of Urban Men*, 40 SOC. SCI. RES. 1196, 1203 (2011).

<sup>4</sup> *Id.* at 1206.

<sup>5</sup> See generally Stephen Metraux et al., *Incarceration and Homelessness*, 2007 NAT'L SYMP. ON HOMELESSNESS RES. 9-8 to 9-11, <https://www.huduser.gov/publications/pdf/p9.pdf> (2007); see also U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, REDUCING CRIMINAL JUSTICE INVOLVEMENT AMONG PEOPLE EXPERIENCING HOMELESSNESS 1 (August 2016), [https://www.usich.gov/resources/uploads/asset\\_library/Criminal\\_Justice\\_Involvement\\_08\\_2016.pdf](https://www.usich.gov/resources/uploads/asset_library/Criminal_Justice_Involvement_08_2016.pdf).

<sup>6</sup> Greg A. Greenberg & Robert A. Rosenheck, *Jail Incarceration, Homelessness and Mental Health: A National Study*, 59 PSYCHIATRIC SERVS. 170, 175 (2008), <http://ps.psychiatryonline.org/doi/pdf/10.1176/ps.2008.59.2.170>.

<sup>7</sup> Faith E. Lutze et al., *Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State's Reentry Housing Program for High Risk Offenders*, 41 CRIM. JUST. & BEHAV. 471, 474 (2014), <https://wsicj.wsu.edu/wp-content/uploads/sites/436/2014/11/Criminal-Justice-and-Behavior-2014-Lutze-471-91.pdf>.

<sup>8</sup> *Id.* at 483; see also Jocelyn Fontaine, *The Role of Supportive Housing in Successful Reentry Outcomes for Disabled Prisoners*, 15 CITYSCAPE 53 (2013) (discussing the successful efforts to reduce recidivism through a similar program that offered housing and support services in Ohio).

<sup>9</sup> JOCELYN FONTAINE & JENNIFER BIESS, URBAN INST., HOUSING AS A PLATFORM FOR FORMERLY INCARCERATED PERSONS 8 (2012), <http://www.urban.org/sites/default/files/publication/25321/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.PDF>.

<sup>10</sup> CLAIRE HERBERT ET. AL, NAT'L POVERTY CNTR., RESIDENTIAL INSTABILITY AMONG THE FORMERLY INCARCERATED 2-3 (2016), [http://www.npc.umich.edu/publications/policy\\_briefs/brief42/policybrief42.pdf](http://www.npc.umich.edu/publications/policy_briefs/brief42/policybrief42.pdf).

<sup>11</sup> URBAN INST., UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE'S PRISONER REENTRY PORTFOLIO 8 (2006) (showing that the majority of respondents from studies in Illinois, Maryland, Ohio, and Texas reported living with families or intimate partners upon release from the criminal

Baker Center's report, for example, two-thirds of formerly-incarcerated individuals surveyed relied on their families for support or a place to live.<sup>12</sup> Restrictions on where people with criminal records can live, however, mean that many of them are living in the shadows rather than out in the open, especially in federally subsidized housing. These illicit living arrangements pose a threat to the entire family's housing because of the risk of eviction or subsidy termination, straining the family dynamic. A young father described his experience in this way: "I was living like I was on the run. The feeling that if I get caught there, my wife will lose her apartment, that she's taking that risk for me – that weighed so heavy on my heart."<sup>13</sup> Rather than dampen the strong family bonds that can help people leave the criminal justice system for good, it is time for policymakers to find ways to reinforce those bonds by reducing unreasonable criminal records barriers to housing.

## II. The Housing Barriers that People with Criminal Records Face

People with criminal records encounter barriers both in federally subsidized housing and on the private rental market. We will discuss each of these scenarios in turn.

### A. Federally Subsidized Housing

The shortage of affordable housing, especially in cities where many of the formerly incarcerated return to, is a significant barrier for a population whose prior interaction with the criminal justice system often limits their employment prospects.<sup>14</sup> Given this shortage, the need for federally subsidized housing becomes more acute for people with criminal records.

#### 1. Federal Law Governing Criminal Records Screening

The three major HUD-assisted programs are public housing, Housing Choice Voucher, and project-based Section 8. For these programs, federal law imposes only two narrow mandates related to criminal records screening. Public housing authorities and project owner must permanently ban two types of applicants: (1) applicants who have been convicted of manufacturing methamphetamine on federally assisted property,<sup>15</sup> and (2) applicants who are subject to a lifetime registration requirement because of a prior sex offense.<sup>16</sup>

Other than these narrow instances, PHAs and project owners have a certain amount of discretion over their criminal records policies. Federal law allows them to reject persons who have engaged in any of the following activities within a reasonable time before applying:

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justice system), <http://www.urban.org/sites/default/files/publication/42981/411289-Understanding-the-Challenges-of-Prisoner-Reentry.PDF>.

<sup>12</sup> See DEVUONO-POWELL, *supra* note 2.

<sup>13</sup> Casey Tolan, *NYCHA Stops Discriminating Against New Yorkers with Criminal Records*, VILLAGE VOICE (Dec. 13, 2016), <http://www.villagevoice.com/news/nycha-stops-discriminating-against-new-yorkers-with-criminal-records-9453843>.

<sup>14</sup> See FONTAINE & BIESS, *supra* note 9, at 6.

<sup>15</sup> 42 U.S.C. § 1437n(f)(1) (2016). Federal law also requires PHAs and project owners to deny admission if, within the past three years, a person has been evicted from federally assisted housing for drug-related activity unless either (1) that person has successfully completed drug rehabilitation or (2) the circumstances that led to the prior eviction no longer exist (e.g., the death or incarceration of the person who committed the drug-related criminal activity). 42 U.S.C. § 13661(a) (2016). Also prohibited are applicants who currently use illegal drugs or abuse alcohol. *Id.* at § 13661(b)(1).

<sup>16</sup> 42 U.S.C. § 13663(a) (2016).

1. Drug-related criminal activity,<sup>17</sup>
2. Violent criminal activity,<sup>18</sup>
3. Other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing employees.<sup>19</sup>

For the last category, HUD has advised that “there are a wide variety of other crimes that cannot be claimed to adversely affect the health, safety, or welfare of the PHA’s residents;”<sup>20</sup> therefore, it should not be regarded as a catch-all provision.

The discretion that PHAs and project owners is not unfettered. One significant limit is time. According to federal law, criminal activity is relevant only if it occurred within a “reasonable time” before the screening process take place.<sup>21</sup> In addition, a PHA or project owner’s criminal records screening policy must comply with federal civil rights laws, including the Fair Housing Act.

## 2. Barriers to Federally Subsidized Housing

In 2011, then-HUD Secretary Shaun Donovan emphasized the discretion that PHAs and project owners have in crafting their screening policies and encouraged them to use this discretion to give “second chances” to justice-involved individuals and to help them “gain access to one of the most fundamental building blocks of a stable life – a place to live.”<sup>22</sup> Yet, in our 2015 report, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, we found that many PHAs and subsidized housing providers were instead closing the door on applicants with criminal records through one of four practices.

The first practice of concern involved **arrest record screening**. A number of housing providers deny applicants on the basis of prior arrests, even if those arrests never resulted in a conviction. One policy even went to so far as to deny people on the basis of a single arrest within the past seven years.<sup>23</sup> Arrests, however, prove only that a person has been suspected of criminal activity, not that they have actually committed any crime.<sup>24</sup> Exacerbating this problem is the fact that arrest records are notoriously inaccurate and thus often provide an incomplete picture of a person’s

<sup>17</sup> 42 U.S.C. § 13661(c) (2016). “Drug-related criminal activity” is defined as the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute, or use the drug. 24 C.F.R. § 5.100 (2016).

<sup>18</sup> 42 U.S.C. § 13661(c) (2016). “Violent criminal activity” is defined as any criminal activity that has as one of its elements the use, attempted use or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage. 24 C.F.R. § 5.100 (2016).

<sup>19</sup> 42 U.S.C. § 13661(c) (2016).

<sup>20</sup> U.S. DEP’T. OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK 96-97 (2003).

<sup>21</sup> 42 U.S.C. § 13661(c)(2) (2016)

<sup>22</sup> Letter from Shaun Donovan, Secretary, U.S. DEP’T. OF HOUS. & URBAN DEV., to Public Housing Authority Executive Directors (June 17, 2011), <http://nhlp.org/files/Rentry%20letter%20from%20Donovan%20to%20PHAs%206-17-11.pdf>. The next year, Secretary Donovan issued a similar letter to HUD’s multi-family project owners. Letter from Shaun Donovan, Secretary, U.S. DEP’T. OF HOUS. & URBAN DEV., to Owners and Agents (undated), <http://nhlp.org/files/HUD%20Letter%203.14.12.pdf>

<sup>23</sup> MARIE CLAIRE TRAN-LEUNG, WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING 18, tbl. 1 (2015), <http://www.povertylaw.org/files/docs/WDMD-final.pdf>.

<sup>24</sup> *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 241 (1957).



interaction with the criminal justice system.<sup>25</sup> Given the unreliability of these records and the likelihood that a person will be denied housing for something that he or she did not do, arrest records should not play such a decisive role in the screening process.

Also of concern was the **failure to place reasonable time limits** on the use of criminal history despite the federal requirement to do so.<sup>26</sup> In extreme cases, the written policy explicitly denied admission to anyone who had been convicted in the last 99 or 200 years.<sup>27</sup> More commonly, subsidized housing providers did not indicate the point at which a criminal record would be too old to factor into the admissions analysis, thus leaving the impression that criminal history is an insurmountable barrier.

The third major barrier facing people with criminal records is the use of **overbroad categories of criminal activity**. Some housing providers, for example, bar anyone with a past criminal conviction without regard to whether the underlying activity was minor or irrelevant to a person's ability to be a good tenant. Even where a screening policy offers a more limited universe of prohibited criminal activity, the end result can still be too broad. Many housing providers, for example, only limit felony convictions, but given how state legislatures have increasingly been ratcheting up the punishments for crimes, the "felony" label does not necessarily indicate the level of seriousness that would justify denying a person housing. A felony ban would apply to a person in Virginia who once shoplifted a \$200 item as well as a person in Illinois who twice shoplifted household goods at the local drugstore.<sup>28</sup> Additionally, some housing providers use vague categories of criminal activity, such as "civil disobedience" in a state where such a crime does not exist<sup>29</sup> or criminal activity that indicates a person will be a "negative influence on other residents."<sup>30</sup>

The fourth and last practice of concern was the **underuse of mitigating evidence** in the criminal records screening process. In public housing, PHAs must consider the time, nature and extent of the applicant's conduct. In addition, PHAs may consider evidence of rehabilitation, such as substance abuse treatment, education, and employment, in order to mitigate the effects of a criminal record in the admissions process.<sup>31</sup> Instead, some housing providers either neglected to inform applicants of this right or refused to give due consideration to the evidence presented by the applicants, thus depriving the applicant of a meaningful opportunity to show how they were more than the four corners of their criminal background check.<sup>32</sup>

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<sup>25</sup> NAT'L EMP'T LAW PROJECT, FAULTY FBI BACKGROUND CHECKS FOR EMPLOYMENT: CORRECTING FBI RECORDS IS KEY TO CRIMINAL JUSTICE REFORM 1-3 (2015), <http://www.nelp.org/content/uploads/NELP-Policy-Brief-Faulty-FBI-Background-Checks-for-Employment.pdf>.

<sup>26</sup> 42 U.S.C. § 13661(c) (2016).

<sup>27</sup> MARIE CLAIRE TRAN-LEUNG, WHEN DISCRETION MEANS DENIAL: THE USE OF CRIMINAL RECORDS TO DENY LOW-INCOME PEOPLE ACCESS TO FEDERALLY SUBSIDIZED HOUSING IN ILLINOIS 12 (2011), <http://povertylaw.org/files/docs/when-discretion-means-denial.pdf>.

<sup>28</sup> VA. CODE ANN. § 18.2-103 (2016); 720 ILL. COMP. STAT. 5/16-25(f)(1) (2016). In Illinois, a person's second conviction for retail theft of items valued at less than \$300 classifies as a Class 4 felony.

<sup>29</sup> GALVESTON HOUS. AUTH., PUBLIC HOUSING ADMISSIONS AND CONTINUED OCCUPANCY POLICY 116 (2016), <http://www.ghatx.org/documents/PH%20ACOP%20FINAL%20with%20Links%202016%20March%2028.pdf>.

<sup>30</sup> See, e.g., NACOGDOCHES COMMUNITIES LLC, SANDY OAKS & PARKCREST TENANT SELECTION AND OCCUPANCY PLAN 8, <http://www.nacogdoches-ha.org/NACForms/Tenant%20Selection%20Plan.pdf>.

<sup>31</sup> 24 C.F.R. § 960.203(d)(1) (2016).

<sup>32</sup> See TRAN-LEUNG, *supra* note 23, at 29.

## B. The Private Rental Market

While our report focused on federally subsidized housing, we have found that the private rental market is afflicted with similar problems around criminal records screening. Examples abound across the country. Mid-America Apartments, a national housing provider that operates in more than a dozen cities across the country, has been accused of halting the online application process once a person indicates a past felony conviction.<sup>33</sup> In Austin, Texas, a survey of local affordable housing providers found identical issues arising their use of arrests, unreasonable lookback periods, overbroad categories of criminal activity, and negligible opportunities to present evidence of rehabilitation.<sup>34</sup> According to researchers conducting a study in Baltimore, Dallas, and Cleveland, few of the 130 landlords being studied would admit an applicant with a felony record.<sup>35</sup> In New York City, a 900+ unit housing development has a policy of denying housing to anyone who has ever been convicted of a crime, even if the person is likely to be a good tenant.<sup>36</sup> Similarly, the Washington State Attorney General investigated a number of Washington-based multi-family housing providers and identified five that banned anyone with a prior felony conviction. Subsequently, the parties entered into consent decrees that required the housing providers to, among other things, adopt a policy of non-discrimination against people with criminal records and attend relevant fair housing trainings.<sup>37</sup>

Discrimination exists not only in the way admissions policies are written, but also in how they are administered, as demonstrated by fair housing audits in New Orleans, Louisiana, and Washington, D.C. In these audits, African-American and white testers attempted to apply for rental units with identical criminal histories and explanations for those histories. Both audits showed that, more often than not, landlords and property managers treated the white testers more favorably than African-American testers. Some leasing agents portrayed the criminal background check policy as more flexible and forgiving for a white tester while telling the African-American tester that the same criminal record would result in an automatic denial.<sup>38</sup> One agent, for example, told the white tester, “I really don’t think you will have an issue with [your criminal record] because it was so long ago.” The African-American applicant, however, did not receive such reassurances.<sup>39</sup> Leasing agents were also more likely to express sympathy with the white tester than the African-American tester,

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<sup>33</sup> Press Release, Equal Rights Center Files Lawsuit Against National Housing Provider Alleging Illegal Race and National Origin Discrimination (Dec. 12, 2017) <https://equalrightscenter.org/erc-files-lawsuit-national-housing-provider-alleging-illegal-race-national-origin-discrimination/>.

<sup>34</sup> AUSTIN/TRAVIS COUNTY REENTRY ROUNDTABLE, LOCKED OUT: CRIMINAL HISTORY BARRIERS TO AFFORDABLE RENTAL HOUSING IN AUSTIN & TRAVIS COUNTY, TEXAS 4 (2016), [http://www.reentryroundtable.net/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final\\_.pdf](http://www.reentryroundtable.net/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final_.pdf).

<sup>35</sup> Phillip ME Garboden & Eva Rosen, *How Landlords Discriminate*, TALKPOVERTY (May 17, 2016), <https://talkpoverty.org/2016/05/17/when-landlords-discriminate/>.

<sup>36</sup> Amended Complaint at 2, *Fortune Society v. Sandcastle Towers Hou. Dev’t Fund Corp. et al.*, No. 1:14-cv-6410 (E.D.N.Y. May 1, 2015), <http://www.relmanlaw.com/docs/FortuneSocietyAmendedComplaint.pdf>.

<sup>37</sup> Press Release, Wash. State Office of Att’y Gen., AG Takes on Discriminatory Blanket Housing Bans on Renters with Criminal Histories (Jan. 23, 2017) (including links to the individual consent decrees), <http://www.atg.wa.gov/news/news-releases/ag-takes-discriminatory-blanket-housing-bans-renters-criminal-histories>.

<sup>38</sup> EQUAL RIGHTS CENTER, UNLOCKING DISCRIMINATION: A DC AREA TESTING INVESTIGATION ABOUT RACIAL DISCRIMINATION AND CRIMINAL RECORDS SCREENING IN HOUSING 24-26 (2016), <https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf>.

<sup>39</sup> *Id.* at 26.

selectively making comments such as “everyone has a past” and minor drug charges are “not a big deal.”<sup>40</sup> Scenarios like these show how criminal records can often stand in a proxy for race.

Two developments have contributed to the overall increase in criminal records screening on the private rental market. In recent years, the number of tenant screening companies has proliferated, as has the technical ease with which they can provide criminal background checks to housing providers. As a result, landlords are able to access an applicant’s criminal record more quickly and cheaply than ever before. Taking notice, many municipalities are increasingly adopting crime-free rental ordinances, which often require landlords to conduct criminal background checks on prospective and current tenants in a misguided attempt to control crime in their cities. Because these ordinances are usually silent on the type of screening criteria landlords should adopt, however, landlords looking to preserve their ability to do business in a given jurisdiction will often be overly cautious and take an overly broad approach to their screening practices, thus contributing to an increasingly harsh housing environment for people with criminal records.<sup>41</sup>

### **III. Governmental Efforts to Reduce Housing Barriers for People with Criminal Records**

#### ***A. Actions by the U.S. Department of Housing & Urban Development***

To help combat housing barriers for people with criminal records, HUD has taken two important steps: (1) reminding public housing authorities and project owners of their obligations under federal law, and (2) issuing guidance on the fair housing implications of the use of criminal records by federally subsidized housing providers as well as landlords on the private rental market. These developments are encouraging in their capacity to help increase housing opportunities for justice-involved individuals, but more work remains to be done on the federal level.

##### **1. HUD Notice PIH 2015-19/H 2015-10**

In late 2015, HUD issued Notice PIH 2015-19/H 2015-10, which reminded PHAs and project owners of the procedural and substantive protections that federal law gives to applicants and residents with criminal records in the public housing and voucher programs.

Most notably, the Notice clarified that an arrest record was not a permissible basis for denying admission or taking other adverse actions. Noting that one-third of all felony arrests in the 75 largest counties in the country never result in a conviction, the Notice explained that an arrest proved simply that a person had been suspected of committing a crime, not that he had actually committed the crime.<sup>42</sup>

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<sup>40</sup> GREATER NEW ORLEANS FAIR HOUS. ACTION CNTR., LOCKED OUT: CRIMINAL BACKGROUND CHECKS AS A TOOL FOR DISCRIMINATION 26 (2015), [http://www.gnofairhousing.org/wp-content/uploads/2015/09/Criminal\\_Background\\_Audit\\_FINAL.pdf](http://www.gnofairhousing.org/wp-content/uploads/2015/09/Criminal_Background_Audit_FINAL.pdf).

<sup>41</sup> See EMILY WERTH, THE COST OF BEING “CRIME-FREE”: LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 15 (2013), <http://povertylaw.org/files/docs/cost-of-being-crime-free.pdf>; see also Los Angeles Times Editorial Board, *Housing Discrimination Isn’t a Crime-Fighting Tool*, L.A. TIMES (May 16, 2016), <http://www.latimes.com/opinion/editorials/la-ed-0516-hesperia-20160516-story.html>.

<sup>42</sup> OFFICE OF PUBLIC & INDIAN HOUS., U.S. DEP’T. OF HOUS. & URBAN DEV., NOTICE PIH 2015-19, GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 3-4 (2015) [hereinafter HUD NOTICE PIH 2015-19] (citing BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009, at 22 tbl. 21 (2013)), <https://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf>

Moreover, the Notice noted that PHAs and project owners are not required to adopt “one-strike” policies that terminate housing assistance or evict residents who commit criminal activity. Instead, PHAs and project owners should use their discretion to consider all the relevant circumstances, such as the seriousness of the offending action, the effect that eviction of the entire household would have on family members not involved in the criminal activity, and the extent to which the leaseholder has taken all reasonable steps to prevent or mitigate the criminal activity.<sup>43</sup> In addition, the Notice reiterated the procedural protections to which applicants and tenants are entitled, such as notice and an opportunity to dispute the accuracy and relevance of a criminal record before the PHA denies admission or assistance.<sup>44</sup>

The Notice also offered examples of best practices by PHAs to help people with criminal records.<sup>45</sup> Beyond the Notice, HUD’s Office of Public and Indian Housing also made efforts to educate PHAs and encourage them to adopt more reasonable criminal records policies. In July 2016, HUD PIH released a toolkit for PHAs that included a catalog of PHAs with forward-thinking reentry programs and policies.<sup>46</sup> Furthermore, in partnership with the U.S. Department of Justice, HUD implemented the Juvenile Reentry Assistance Program demonstration, which provided grants to PHAs and legal aid providers to help youth expunge their records and assist them in addressing the collateral consequences caused by their criminal records.<sup>47</sup>

One outstanding issue that the Notice failed to address concerns reasonable time limits on the use of criminal records. By federal law, subsidized housing providers may only consider criminal activity that took place within a “reasonable time” before screening. Yet, as our report showed, for a number of housing providers who either impose no time limits or use overly long lookback periods, criminal history factors into the admissions analysis long after outgrowing its relevance. Without further guidance from HUD on this issue, these practices are likely to continue.

While the Notice was a welcome step in improving the housing opportunities for people with criminal records, especially those with arrest records, implementation and enforcement of the Notice has fallen short of expectation. For example, although HUD stated clearly that arrest records are not a proper basis for denying housing, it has muddied the water by subsequently stating that police reports describing the circumstances of the arrest are a suitable alternative.<sup>48</sup> Like arrest records, police reports indicate nothing more than suspicions, and they do not provide reliably probative evidence about whether the person actually committed the crime. Police reports, therefore, suffer the same deficiency as arrest records and should play only a very limited role in the screening process.

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<sup>43</sup> *Id.* at 2-3.

<sup>44</sup> *Id.* at 4-5.

<sup>45</sup> *Id.* at 5-7.

<sup>46</sup> U.S. DEP’T. OF HOUS. & URBAN DEV., IT STARTS WITH HOUSING: PUBLIC HOUSING AGENCIES ARE MAKING SECOND CHANCES REAL (2016) [hereinafter IT STARTS WITH HOUSING], [https://portal.hud.gov/hudportal/documents/huddoc?id=HUD\\_It\\_Starts\\_with\\_Housing.pdf](https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_It_Starts_with_Housing.pdf).

<sup>47</sup> Press Release, U.S. Dep’t. of Hous. & Urban Dev., HUD and Justice Department Award \$1.75 Million to Help Justice-Involved Youth Find Jobs and Housing (Apr. 25, 2016), [https://portal.hud.gov/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2016/HUDNo\\_16-056](https://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2016/HUDNo_16-056)

<sup>48</sup> U.S. DEP’T. OF HOUS. & URBAN DEV., FAQs: EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 2 (2016), <https://portal.hud.gov/hudportal/documents/huddoc?id=faqexcludearrestrec33116.pdf> [hereinafter ARREST RECORDS FAQs].



Also of concern are HUD's efforts to enforce the Notice. Although HUD has "encourage[d] PHAS to revise their [written admissions policies] as they relate to criminal records in order to better facilitate access to HUD-assisted housing for applicants who, despite their criminal history, do not pose a threat to the health or safety of residents or staff," it is unclear whether HUD will take affirmative steps to ensure that these written policies include all the protections laid out in the Notice.<sup>49</sup> If not, then these protections are very unlikely to help all the applicants and residents with criminal records in the HUD-assisted programs.

## 2. Ensuring Fair Housing for People with Criminal Records

The Notice also warned PHAs and project owners that their criminal records policies must comply with civil rights laws, including the federal Fair Housing Act.<sup>50</sup> Five months later, HUD's Office of General Counsel issued important guidance that outlined the fair housing rights of people with criminal records.<sup>51</sup> Unlike the Notice, the guidance applied to both the private rental market as well as federally subsidized housing.

The Fair Housing Act prohibits housing discrimination on the basis of protected classes, such as race, national origin, sex, and familial status.<sup>52</sup> Although criminal records status is not a protected class, the Guidance clarified that a housing provider's criminal records policies may nonetheless give rise to a FHA violation under the theories of discriminatory treatment or disparate impact.

In cases of **discriminatory treatment**, a housing provider uses a person's criminal record intentionally to treat a person differently on the basis of race, national origin, or other protected class.<sup>53</sup> Examples of discriminatory treatment can be found in the audits from New Orleans and Washington, D.C., where leasing agents described more flexible criminal records policies for white testers than for African-American testers.<sup>54</sup> In these relatively straightforward cases, the criminal record serve as a proxy for protected classes.

In cases of **disparate impact**, criminal records policies that are neutral on their face may nonetheless violate the FHA if they have an unjustified, disparate impact on a protected class. In the first part of this three-step analysis, the question is whether the policy has a disparate impact. Here, the Guidance notes that local, state, and national statistics may be sufficient to establish disparate impact and highlights pertinent national statistics. For example, while the number of African Americans in prison in 2014 was triple their share of the general population nationwide, non-white Hispanics, who comprised more than 60% of the general population, accounted for approximately one-third of the prison population in the same time frame.<sup>55</sup> Given that studies have shown racial

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<sup>49</sup> *Id.* at 3.

<sup>50</sup> See HUD NOTICE PIH 2015-19, *supra* note 42, at 5.

<sup>51</sup> U.S. DEP'T. OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2016), [hereinafter HUD FAIR HOUSING GUIDANCE] [https://portal.hud.gov/hudportal/documents/huddoc?id=hud\\_ogcguidappfhastandcr.pdf](https://portal.hud.gov/hudportal/documents/huddoc?id=hud_ogcguidappfhastandcr.pdf).

<sup>52</sup> 42 U.S.C. § 3604(a)-(b) (2016).

<sup>53</sup> See HUD FAIR HOUSING GUIDANCE, *supra* note 51, at 8-10.

<sup>54</sup> See *supra* notes 38-40 and accompanying text.

<sup>55</sup> See HUD FAIR HOUSING GUIDANCE, *supra* note 51, at 3-4.

disparities to mar the criminal justice system from arrest to sentencing,<sup>56</sup> most criminal records policies will be vulnerable under this first prong.

The second question is whether the policy is justified, *i.e.*, whether it is necessary to achieve a substantial, legitimate and nondiscriminatory interest of the housing provider. Recognizing that housing providers have an interest in protecting the safety of their residents and others, the Guidance nevertheless stressed that “bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record are not sufficient” to satisfy this question.<sup>57</sup> In analyzing this second question, the Guidance set forth three broad principles:

1. Policies that deny housing on the basis of **arrests that have not resulted in a conviction** are unlikely to satisfy this prong. Since arrests by themselves are not proof of criminal activity, arrest records screening cannot reliably protect resident safety and/or property.<sup>58</sup>
2. Policies that deny housing on the basis of any conviction – essentially, **blanket bans on convictions** – are also unlikely to satisfy this prong because such policies will capture individuals with old, minor, or irrelevant criminal records whose exclusion will not protect resident safety and/or property.<sup>59</sup>
3. Finally, even if a policy denies housing on the basis of a **more narrowly tailored set of convictions**, housing providers must still show that the policy is necessary to achieve a substantial, legitimate, and non-discriminatory interest. Housing providers that fail to consider the nature, severity, or recency of the underlying criminal conduct are unlikely to satisfy this standard.<sup>60</sup>

The last question in the three-step analysis asks whether a less discriminatory alternative to the criminal records policy in question exists. According to the Guidance, a policy that includes an individualized assessment of a person’s relevant mitigating information was likely to meet this standard. Examples of relevant mitigating information includes the circumstances surrounding the criminal activity, the age at the time of the criminal activity, the person’s tenant history, and any evidence of rehabilitation. The Guidance also advised that a less discriminatory alternative may include a policy that requires the housing provider to determine a person’s qualification before analyzing any criminal history information, which resembles the “ban-the-box” policies more commonly found in the context of employment and criminal records.<sup>61</sup>

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<sup>56</sup> See generally SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2013), <http://www.sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf>.

<sup>57</sup> See HUD FAIR HOUSING GUIDANCE, *supra* note 51, at 5.

<sup>58</sup> *Id.* at 5-6.

<sup>59</sup> *Id.* at 6. A significant exception applies to this principle: these fair housing protections do not extend to convictions for “the illegal manufacture or distribution of a controlled substance as defined under Section 102 of the Controlled Substances Act.” 42 U.S.C. § 3607(b)(4) (2016). Note, however, that this exception only applies to disparate impact claims. A housing provider that intentionally discriminates against persons who have been convicted of manufacturing or distributing drugs on the basis of race, national origin, or other protected class may still found to be in violation of the Fair Housing Act under the theory of discriminatory treatment.

<sup>60</sup> See HUD FAIR HOUSING GUIDANCE, *supra* note 51, at 6-7.

<sup>61</sup> *Id.* at 7.



The U.S. Department of Justice affirmed the legal framework set forth in the Guidance in a Statement of Interest filed last fall in *Fortune Society v. Sandcastle Housing Development Fund Corp. et al.* The plaintiff, the Fortune Society, is a non-profit organization based in New York City that provides services to over 5000 formerly incarcerated individuals every year, 95% of whom are African American or Latino. Helping its clients to find and secure housing, the Fortune Society attempted to place clients at the Sand Castle, a 900-plus-unit property in an affordable part of the city close to public transportation.<sup>62</sup> In one of the first federal cases to challenge a criminal records policy under the disparate impact theory of the FHA, the Fortune Society is challenging the Sand Castle's practice of denying admission to anyone with a prior criminal conviction, regardless of how minor the crime was or how much progress a person has made since leaving the criminal justice system.<sup>63</sup> The case is currently pending in the Eastern District of New York.

Like the Notice and the Guidance, much of HUD's efforts to help people with criminal records took place before the current presidential administration began. We are hoping that HUD will continue its work in this area, but until HUD makes its intentions known around reentry, progress may have to come from state and local governments.

### **B. Legislative Responses from State and Local Governments**

Efforts to increase housing opportunities for people with criminal records have become law in only two states. **Oregon** prohibits landlords from considering arrests that have not resulted in a conviction. As for convictions and pending charges, they may consider the following types of criminal activity: drug-related crimes; person crimes; sex offenses; crimes involving financial fraud (including identity theft and forgery); and other crimes where the underlying conduct "would adversely affect property of the property of the landlord or a tenant or the health, safety, or right to peaceful enjoyment of the premises of residents, the landlord or the landlord's agent."<sup>64</sup> **Texas** took a different tack: instead of creating an additional basis of liability, state law instead limits the liability of landlords who lease to people with criminal records, as long as the underlying criminal activity is not defined as "violent" or "sexually violent" under state law.<sup>65</sup>

A small number of states have instead turned to administrative efforts. In **California**, the Fair Employment and Housing Council has proposed regulations that, if promulgated, would govern the use of criminal history records in both private and publicly subsidized housing.<sup>66</sup> In **North Carolina**, the state's housing finance agency developed a model criminal background check policy that it strongly encouraged landlords in its housing programs to adopt.<sup>67</sup> And last year, **New York State Homes and Community Renewal** issued guidance to certain state-funded housing

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<sup>62</sup> Press Release, Fortune Society, New Lawsuit Challenges Landlord's Ban on Renting to Those with Criminal Records (Oct. 31, 2014), <https://fortunesociety.org/2014/10/31/press-release-new-lawsuit-challenges-landlords-ban-on-renting-to-those-with-criminal-records/>

<sup>63</sup> See Amended Complaint, *supra* note 36.

<sup>64</sup> OR. REV. STAT. § 90.303 (2016).

<sup>65</sup> TEX. PROP. CODE ANN. § 92.025 (2016).

<sup>66</sup> California Fair Employment & Housing Council, Proposed Text of Fair Housing Regulations 35-41 (2018) <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/02/Text-FairHousingReg.pdf>.

<sup>67</sup> Memorandum from Paul Kimball, North Carolina Hous. Fin. Agency to All Owners and Managers of Affordable Rental Housing with an NCFHA Regulatory Agreement (Feb. 8, 2016) (see attachment entitled "Model Policy on Screening Applicants with Criminal Records"), <http://www.fairhousingnc.org/wp-content/uploads/2016/05/NCHFA-Memo2.8.16.pdf>.

providers on their use of criminal records.<sup>68</sup> Similar to HUD's fair housing guidance, the New York guidance prohibits the use of arrests that have not resulted in a conviction, as well as convictions that have been excused by pardon, overturned on appeal, or otherwise vacated. Housing providers may consider convictions or pending arrests only if the underlying offense either (i) "involved physical danger or violence to persons or property" or (ii) "adversely affected the health, safety, or welfare of other people." Even when considering such convictions, a housing provider must conduct an individualized assessment of the applicant, weighing all factors under the totality of the circumstances.<sup>69</sup> Finally, the applicant is entitled to certain procedural protections, such as notice and a pre-decision opportunity to review and explain information the criminal background check, written notice of the housing provider's denial of admission, and a post-denial opportunity to respond to the housing provider's decision.<sup>70</sup> Housing providers are even given a worksheet so that they can document the decision-making process.<sup>71</sup>

At the local level, a handful of municipalities have enacted legislation in recent years to increase access to housing for people with criminal records: Newark, New Jersey (2012);<sup>72</sup> San Francisco, California (2014);<sup>73</sup> Richmond, California (2016);<sup>74</sup> Washington, D.C (2016);<sup>75</sup> and Seattle (2017).<sup>76</sup> The common elements of these ordinances include provisions that:

1. Prohibit certain housing providers from considering certain types of criminal activity, such as arrests that have not lead to convictions, expunged and sealed records, and juvenile records;<sup>77</sup>

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<sup>68</sup> The covered subsidy programs include New York state-funded public housing, Section 8 vouchers administered by New York State Homes and Community Renewal, and housing funded by the New York State Housing Finance Agency. NEW YORK STATE HOMES & COMMUNITY RENEWAL, GUIDE FOR APPLYING NEW YORK STATE'S ANTI-DISCRIMINATION POLICIES WHEN ASSESSING APPLICANTS FOR STATE-FUNDED HOUSING WHO HAVE CRIMINAL CONVICTIONS 1 (2016), [http://www.nyshcr.org/AboutUs/Offices/FairHousing/GPCC\\_Guidance\\_Document.pdf](http://www.nyshcr.org/AboutUs/Offices/FairHousing/GPCC_Guidance_Document.pdf). [hereinafter NEW YORK STATE GUIDE].

<sup>69</sup> *Id.* at 1-2.

<sup>70</sup> *Id.* at 2.

<sup>71</sup> Worksheet for Applying New York State's Anti-Discrimination Policies When Assessing Applicants for State-Funded Housing Who Have Criminal Convictions (2016), [http://www.nyshcr.org/AboutUs/Offices/FairHousing/GPCC\\_Worksheet.pdf](http://www.nyshcr.org/AboutUs/Offices/FairHousing/GPCC_Worksheet.pdf); see also NEW YORK STATE GUIDE, *supra* note 68, at 2-5 (explaining the reasoning behind the worksheet).

<sup>72</sup> NEWARK, N.J. MUNI. CODE, tit. 2, §§ 31-1 to 31-9 (2016).

<sup>73</sup> S.F., CAL., POLICE CODE, art. 49, § 4906 (2016) ("Procedures for Considering Arrests and Convictions and Related Information in Employment and Housing Decisions").

<sup>74</sup> Richmond, Cal., Ordinance 20-16 N.S. (Dec. 20, 2016), <http://www.ci.richmond.ca.us/ArchiveCenter/ViewFile/Item/7690>.

<sup>75</sup> Washington, D.C., Bill 21-706 (Dec. 21, 2016), <http://lims.dccouncil.us/Download/35646/B21-0706-Engrossment.pdf>.

<sup>76</sup> Seattle, WA, Ordinance Chapter 14.09 (2017), <https://www.seattle.gov/civilrights/civil-rights/fair-housing/fair-chance-housing-legislation>. By not imposing a waiting period for people with criminal histories to be free from unfair discrimination, the Seattle ordinance prohibiting landlords from denying most applicants housing based on criminal history features some of the strongest protections in the country.

<sup>77</sup> The San Francisco ordinance applies to city-funding housing providers. S.F., CAL., POLICE CODE, art. 49, § 4903 (definition of "affordable housing"). The Richmond ordinance applies to affordable housing providers. Richmond, Cal., Ordinance 20-16 N.S., § 7.110.040(b). The ordinances in Washington, D.C., and Newark apply to all housing providers.

2. Set limits on how far back housing providers can inquire about a person's criminal history;<sup>78</sup>
3. Require housing providers to conduct individualized assessments of applicants using multiple factors, such as the nature, severity, and recency of the criminal activity;<sup>79</sup>
4. Install procedural safeguards to add transparency to the decision-making process, such as delaying consideration of criminal history information until after the housing makes a conditional offer to the applicant.<sup>80</sup>

In addition, the adjacent Illinois cities of Urbana and Champaign have longstanding ordinances outlawing housing discrimination on the basis of prior arrests and convictions.<sup>81</sup> The Urbana ordinance has no limit on its anti-discrimination provision, but under an exception in Champaign, housing providers may deny housing to individuals who have been convicted of (i) a forcible felony, (ii) a felony drug offense, or (iii) the sale, manufacture, or distribution of illegal drugs. This exception does not apply to anyone who has lived outside of prison for five years without being subsequently convicted for a similar offense.<sup>82</sup>

In Wisconsin, similar housing protections once existed in the cities of Madison and Appleton as well as Dane County.<sup>83</sup> In 2013, however, the Wisconsin legislature passed a law that that stripped these and other localities from offering such ordinances that offered more tenant protections than the minimum provided by the state.<sup>84</sup> Municipalities considering these ordinances, therefore, must be mindful of such possible setbacks.

Finally, similar to state administrative efforts, there have been local efforts to protect the fair housing rights of people with criminal records administratively. The Boston Department of

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<sup>78</sup> Richmond bars the use of convictions that are older than two years. Richmond, Cal., Ordinance 20-16 N.S., § 7.110.050(a)(5). San Francisco and Washington, D.C. bar the use of convictions older than seven years. S.F., CAL., POLICE CODE, art. 49, § 4906(a)(5); Washington, D.C., Bill 21-706 § 3(d). Washington, D.C. also places limits on the universe of convictions and pending arrests that a landlord can consider. Washington, D.C., Bill 21-706 § 3(d). Newark limits the use of convictions for indictable offenses to eight years; it also limits the use of convictions for disorderly persons offenses and municipal ordinances violations for five years. NEWARK, N.J. MUNI. CODE, tit. 2, § 31-3.

<sup>79</sup> NEWARK, N.J. MUNI. CODE, tit. 2, § 31-4 (required considerations); S.F., CAL., POLICE CODE, art. 49, § 4906(f) (individualized assessment required); Richmond, Cal., Ordinance 20-16 N.S., § 7.110.050(e) (individualized assessment required); Washington, D.C., Bill 21-706 § 3(e) (required considerations).

<sup>80</sup> NEWARK, N.J. MUNI. CODE, tit. 2, § 31-2 ("ban-the-box" & notice requirements), § 31-5 (notice requirements); S.F., CAL., POLICE CODE, art. 49, § 4906(b)-(c) ("ban-the-box"), § 4906(d)-(e) & (g)-(i) (notice and hearing requirements); Richmond, Cal., Ordinance 20-16 N.S., § 7.110.050(c) ("ban-the-box"), § 7.110.050(d) (opportunity to provide evidence of rehabilitation or other mitigating evidence), § 7.110.050(f) (additional procedures), § 7.110.080 (recordkeeping requirements).

<sup>81</sup> CHAMPAIGN, ILL. CODE §§ 17-2, 17-3 (2016); URBANA, ILL. CODE §§ 12-39, 12-64 (2016).

<sup>82</sup> CHAMPAIGN, ILL. CODE § 17-4.5 (2016).

<sup>83</sup> FAIR HOUSING COACH, THE DOS & DON'TS OF CONDUCTING CRIMINAL BACKGROUND CHECKS 6 (2012), <http://www.sentencingproject.org/wp-content/uploads/2016/04/Fair-Housing-Coach-Ex-Offender-Issue.pdf>.

<sup>84</sup> WIS. STAT. § 66.104(2)(a) (2016); see also Doug Erickson & Dean Mosiman, *In Raft of State Law Changes, Tenants Lost Ground to Landlords*, WIS. STATE J. (June 8, 2016), [http://host.madison.com/wsj/news/special/homeless/in-raft-of-state-law-changes-tenants-lost-ground-to/article\\_f021f5c3-f081-58e9-909e-6ac7b91f280c.html](http://host.madison.com/wsj/news/special/homeless/in-raft-of-state-law-changes-tenants-lost-ground-to/article_f021f5c3-f081-58e9-909e-6ac7b91f280c.html) (discussing past legislative changes that have curtailed housing protections for people with criminal records).

Neighborhood Development, for instance, recently developed a fair chance tenant selection policy that housing providers must adopt as a condition of receiving funds or land from the department.<sup>85</sup>

In summary, there have been a growing number of efforts, especially by states and municipalities, to take affirmative steps to increase housing opportunities for people with criminal records. Even more jurisdictions are at various stages of considering the types of legislation discussed above. As encouraging as these developments are, however, state and local protections are few. Where local protections do not exist, people with criminal records will have to rely on enforcement of the federal Fair Housing Act to protect their housing rights, and it is unclear at this time whether HUD affirmatively acts in this realm. Many more state and local legislatures and administrative bodies will need to step up, therefore, if we want to help protect the housing rights of the more than 70 million people in the United States living with a criminal record.

### *C. Policy Responses from Public Housing Authorities*

Like states and municipalities, public housing authorities can be important partners in helping ensure that people with criminal records get a fair chance at housing. Heeding the call from HUD to give people this fair chance, a number of PHAs have taken steps to make their housing programs more accessible, offering important models for their peers in both subsidized and private housing. In November 2013, for example, the New York City Housing Authority (NYCHA) started its Family Reentry Pilot Program, whose purpose was to reunite people leaving the criminal justice system with family members living in NYCHA housing. In implementing this program, NYCHA sought to address a problem common in countless PHAs across the country: justice-involved individuals with little to no housing options living in the shadows with family members in federally subsidized housing, thus jeopardizing that housing for the whole family. Through the Family Reentry Pilot Program, the formerly incarcerated individual had access to an array of support services and, upon successful completion of the program, the option of being permanently added to the family member's lease or, alternatively, seeking his or her own NYCHA unit.<sup>86</sup>

The Family Reentry Pilot Program has proven to be so successful that NYCHA is now working on expanding the pilot and making the program permanent.<sup>87</sup> Moreover, the success of the NYCHA program has spurred three other housing authorities in New York (Schenectady Public Housing Authority, Syracuse Housing Authority, and White Plains Housing Authority) to implement their own pilot programs to help justice-involved individuals to reunite with their families in subsidized housing.<sup>88</sup> Pilot programs with a similar goal of family reunification exist at the Chicago Housing Authority and the Housing Authority of the City of Los Angeles.<sup>89</sup>

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<sup>85</sup> BOSTON DEP'T OF NEIGHBORHOOD DEV'T, BOSTON FAIR CHANCE TENANT SELECTION POLICY (2017) (on file with author).

<sup>86</sup> For a in-depth look at NYCHA's pilot program, see JOHN BAE ET AL., VERA INST. OF JUSTICE, COMING HOME: AN EVALUATION OF THE NEW YORK CITY HOUSING AUTHORITY'S FAMILY REENTRY PILOT PROGRAM (2016), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/coming-home-nycha-family-reentry-pilot-program-evaluation/legacy\\_downloads/NYCHA\\_report-032917.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/coming-home-nycha-family-reentry-pilot-program-evaluation/legacy_downloads/NYCHA_report-032917.pdf).

<sup>87</sup> See Tolan, *supra* note 13.

<sup>88</sup> Corp. for Supportive Hous., Increasing Housing Opportunities for Formerly Incarcerated (March 6, 2017), <http://www.csh.org/2017/03/increasing-housing-opportunities-for-formerly-incarcerated>.

<sup>89</sup> See IT STARTS WITH HOUSING, *supra* note 46, at 10-11; CHICAGO HOUS. AUTH., CHICAGO HOUSING AUTHORITY DEMONSTRATION PROGRAM AND SPECIAL INITIATIVES OVERVIEW: REENTRY PILOT (2016), [http://www.thecha.org/assets/1/6/Reentry\\_Pilot\\_Program\\_rev\\_820161.pdf](http://www.thecha.org/assets/1/6/Reentry_Pilot_Program_rev_820161.pdf).



Rather than start with a pilot program, some PHAs have instead opted to change their program policies outright, such as the Housing Authority of New Orleans. After a multi-year campaign by local advocates, HANO reversed its policy of automatically denying people with criminal records and instead adopted a plan that is more narrowly tailored, transparent, and practical.<sup>90</sup> For example, HANO has restricted its criminal records inquiry to an enumerated list of criminal activity, and if more than three years has passed since the conviction (or, alternatively, one year since release), criminal history will no longer factor into the admissions analysis.<sup>91</sup> Moreover, in adopting an “individualized assessment” approach with a three-person review panel, HANO has provided a list of relevant mitigating evidence as well as factors that it will consider, giving applicants a clear view of how the admissions process will proceed and thus making HANO more accountable to those applicants.<sup>92</sup> In addition to substantive and procedural changes, the HANO policy also led to a important shift in attitudes about people with criminal records: now, when applicants are subject to a criminal history review, they are placed on a track for “further review” rather than “denial,” thereby affirming to both the applicant and housing authority staff that automatic denials should now be a thing of the past.<sup>93</sup> In operation for just over a year, HANO has reviewed seventeen applicants and admitted fifteen, with the other two withdrawing their applications from consideration.<sup>94</sup>

PHAs officials who have adopted programs to help people with criminal records are often the first to tout their benefits. When individuals who have left the criminal justice system are able to reunite with their families openly, for example, PHAs do not have to deal with the unknown of a shadow population living off lease, which can ease their administrative duties. Conversations with PHA officials have also revealed that they incur far fewer administrative costs and spend less valuable staff time when they shift the focus of their admissions process to providing people with housing rather than keeping out individuals with criminal records. These administrative savings result from the decreased demand for informal hearings for applicants who have been denied housing and frees up the PHA’s limited resources for more pressing problems. Furthermore, these policy changes have not negatively impacted the level of crime at their properties. Some PHAs have even found that these programs have actually helped to reduce recidivism in their communities. In Pennsylvania, the Union County Housing Authority provides housing vouchers and support services to individuals on parole or probation who have a substance abuse disorder and who exhibit a high risk of recidivism. Whereas the recidivism rate in Pennsylvania and Union County are 60% and 53% respectively, the rate of recidivism among the program participants over the last four years is 22% – a fraction of the state and county rates.<sup>95</sup> PHAs looking to reunite families, reduce administrative

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<sup>90</sup> Katy Reckdahl, *Housing Authority Eliminates Ban of Ex-Offenders*, SHELTERFORCE (July 5, 2016), [http://www.shelterforce.org/article/4535/housing\\_authority\\_eliminate\\_ban\\_of\\_ex-offenders/](http://www.shelterforce.org/article/4535/housing_authority_eliminate_ban_of_ex-offenders/)

<sup>91</sup> HOUS. AUTH. OF NEW ORLEANS, CRIMINAL BACKGROUND SCREENING PROCEDURES 2-4 (2016), [https://www.hano.org/agency\\_plans/2016%20CRIMINAL%20BACKGROUND%20PROCEDURES%20-%20FINAL.pdf](https://www.hano.org/agency_plans/2016%20CRIMINAL%20BACKGROUND%20PROCEDURES%20-%20FINAL.pdf).

<sup>92</sup> *Id.* at 6-7.

<sup>93</sup> *Id.* at 5.

<sup>94</sup> Jessica Williams, *A Year Later, HANO’s Criminal Background Check Policy Still Not In Effect At Some Developments*, NEW ORLEANS ADVOCATE (Apr. 22, 2017), [http://www.theadvocate.com/new\\_orleans/news/politics/article\\_9d783f04-278c-11e7-9ee0-7fb36744c917.html](http://www.theadvocate.com/new_orleans/news/politics/article_9d783f04-278c-11e7-9ee0-7fb36744c917.html).

<sup>95</sup> DIANA T. MYERS & ASSOCS., INC., JUSTICE BRIDGE HOUSING PROGRAM: A SUCCESSFUL REENTRY PROGRAM OF THE HOUSING AUTHORITY OF UNION COUNTY, PENNSYLVANIA: REPLICATION TOOLKIT 9 (2016), <http://www.unioncountyhousingauthority.org/Documents/JBHP%20Toolkit%20FINAL-PRINT.pdf>.



costs, and reduce recidivism should be considering adopting more reasonable criminal records policies.

We commend the leadership that these PHAs have shown in advancing the housing rights of people with criminal records. Given that they represent only a handful of the more than 3300 PHAs that operate across the country, however, more impactful change will require bold, clear-eyed leadership from HUD.

#### **IV. Recommendations for the West Virginia Advisory Committee to the U.S. Commission on Civil Rights**

We commend the West Virginia Advisory Committee to the U.S. Commission on Civil Rights for taking a close look at the issue of the collateral consequences of a felony record, particularly in the housing arena. Although progress has been made on the federal, state, and local levels, more must be done to ensure that millions of people across the country are not unfairly shut out of the housing that they may need to leave the criminal justice system behind them. We urge the Commission to take the following further steps to address the collateral consequences of a criminal record.

First, we respectfully request that the Committee study the state of housing for people with a criminal record in West Virginia. For the most informed perspective on the effects of these barriers, we recommend that the Committee speak directly with individuals who have left the criminal justice system about their experiences. It is also our suggestion that the Committee expand its inquiry to all criminal records because housing barriers do not always make a meaningful distinction between felonies and misdemeanors.

Such a study could include the policies of subsidized housing providers, including but not limited to public housing and Housing Choice Vouchers, as well as major providers on the private rental market. It could also look at the state of homelessness in West Virginia and the extent to which this population includes people with criminal histories. Finally, given that West Virginia houses the most federal prisons per capita of any U.S. state, it is worth looking at how this unique mix impacts West Virginians who have left the criminal justice system and are seeking safe, decent, and affordable housing.

We thank the Committee for its time and attention to the various collateral consequences that hinder the reentry of justice-involved individuals and look forward to future discussions around these topics.

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Ms. Ivy L. Davis, Director  
Eastern Regional Office - USCCR  
1331 Pennsylvania Ave., NW, Suite 1150  
Washington, DC 20425

Dear Ms. Davis:

I am writing to provide comment relative to a hearing to be conducted by the West Virginia Advisory Committee to the U.S. Commission on Civil Rights. I understand the hearing will examine the impact a felony record can have on state residents' access to housing, employment, occupational licenses and public benefits. I will not be able to attend the hearing and hope my comments may be inserted into the record.

I have a long history relative to planning and implementing services for people with mental illness and/or substance use disorders. Currently, I am an instructor in the Human Services and Rehabilitation Studies (HSRS) program at BridgeValley Community and Technical College in South Charleston, WV.

I had knowledge of the issues regarding people with felonies seeking to return from prison to the community. I was a contact in the behavioral health section of the WV Department for Health and Human Resources when prisoners were being considered for parole. I was asked to assist in finding housing, treatment, and other resources for people who were ready to be released. The major impediment to locating such services was the fact that the person had been incarcerated due to a felony. Felons were generally and typically denied access to housing and to many benefits such as Medicaid, food stamps, etc. As a result, they were denied parole and continue to remain in prison until their term had been served. At that point, they were discharged - but still denied access to benefits.

Faced with no opportunity for housing or other benefits to sustain themselves, many persons discharged ended up homeless and risked being charged with another offense.

More recently, in my capacity as a community college instructor, I have seen anew the damaging effects on people with felony charges. Community colleges in general and the HSRS program specifically attract non-traditional students - individuals who have had little or no college level instruction but are many years beyond their high school years. Some of those individuals in HSRS are people who have experienced treatment for a mental illness and/or a substance use disorder. And some of those folks are individuals with a felony record.

One of the requirements of the HSRS program is a practicum. Students apply what they have learned by working in a behavioral health program. There is considerable evidence of the value of a person with lived experience working in a behavioral health program.

All behavioral health providers are required to conduct a criminal background check of all applicants for employment. Most providers have a policy to not employ anyone with a felony record. Some providers will assist potential employees with a process to expunge their record - but standard practice is to deny employment. Unfortunately, this employment denial sometimes comes after all other issues are resolved and the person has already enrolled in the company's orientation activities. These are individuals whom the company believes has the essential knowledge and skills to perform - but the felony record prevents them from being employed. This tragic outcome is a result of licensing regulations as well as company policy.

I am reminded of the particularly tragic event for a former student of mine. She had a life of addiction that had turned around. She had been in recovery for several years before I met her. She was an excellent Dean's List student and had the essential knowledge, skills, and compassion to be an excellent worker in behavioral health studies. She had firm plans to continue her education beyond the AA degree. Then came the point of seeking a placement for her practicum. She had a felony record.

Potential placements all refused her based solely on the felony record. Advocating for her did not result in any success. She became depressed and even with supports and treatment, she relapsed. It was just too much to have gone for years clean and sober and helping herself with college work. She felt rejected and worthless.

I hope the Advisory Committee will make recommendations that will remedy this situation. Should all persons with felony records be exonerated? Perhaps not. But, certainly, individuals in recovery with non-lethal felony records should be provided access to housing, education, employment, licensing, and public benefits.

I appreciate the opportunity to comment and apologize for not being able to attend the public hearing.

Sincerely,

Ted J. Johnson

**WV Association of Licensing Boards\***

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\* <http://www.wvlicensingboards.com>