



**Written Statement of
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**On behalf of the
National Association of Criminal Defense Lawyers**

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

Re: “Collateral Consequences”

June 26, 2014

Introduction

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

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

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

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

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

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

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

³ *Drug and Crime Facts*, BUREAU OF JUSTICE STATISTICS, available at <http://www.bjs.gov/content/DCF/enforce.cfm>.

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

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

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

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

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

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

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

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

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

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

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

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

I. Congress should repeal or limit existing collateral consequences.

A. Mandatory collateral consequences are rarely appropriate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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