COLLATERAL CONSEQUENCES

Policy:
David Singleton
Ohio Justice & Policy Center
215 E 9th St Fl 600
Cincinnati, Ohio 45202-2149
513-421-1108
Email: dsingleton@ohiojpc.org

Practice:
Amanda David
Federal Defenders of New York - Eastern District (Eastern District of New York)
300 Cadman Plz W Fl 16
Brooklyn, New York 11201-3226
Email: amanda_david@fd.org

NACDL's Race Matters Seminar

September 14-15, 2017
Greektown Hotel, Detroit, MI

Collateral Consequences of a Conviction

Amanda L. David
Federal Defenders of New York, Inc.
1 Pierrepont Plaza, 16th Floor
Brooklyn, NY 11201
(718) 330-1208
amanda_david@fd.org

Introduction

Collateral consequences are legal and regulatory limitations and prohibitions our clients face as a result of their criminal convictions. They can prevent clients from obtaining or maintaining employment, getting licenses, being eligible for housing programs, being able to vote, pursuing educational opportunities, being able to travel, volunteering or fostering a child, among numerous other things. Even an arrest or contact with the criminal justice system can result in a collateral consequence in some cases.

On face value the concept of having collateral consequences to further protect the public from individuals with certain criminal convictions seems to fall squarely within the government's reasonable concerns about public safety. However, the debilitating, permanent and disproportionate impact that these consequences have on whole populations as well as the underlying history of these consequences speaks to a bigger picture. It necessitates that we force courts to confront the inherent problems in exacting sentences without regard to these consequences and that we, as advocates, advise our clients of these consequences throughout our representation in order to be effective and zealous attorneys.

A New Caste System

In recognizing that a number of these consequences are permanent, multi-generational, and life altering, it is hard to ignore the bigger picture described in depth in literature analyzing the history of race, discrimination and criminal law in this country. Put simply by Michelle Alexander, "you are no longer part of 'us,' the deserving."[1] In very much the same way that Jim Crow disenfranchised and trapped black Americans in a level of inferiority that they would experience for their entire lifetimes and would impact successive generations, the collateral consequences faced by those with criminal convictions when combined with the disproportionate impact that the criminal justice system has on people of color, has perpetuated an alarming problem.

That many of these consequences are entirely unnecessary to protect the public from individuals who have served their time and that they are for the most part entirely counterproductive to any kind of rehabilitation, means that our clients are usually completely unaware of their existence. When faced with the prospect of long term imprisonment, clients' overwhelming expressed goal is to make the series of choices

---

[1] Michelle Alexander, The New Jim Crow, at 142. (2010).

that will prevent or at least shorten their removal from society. The concept of having "done one's time" is one that most of our clients fervently believe in. They are left confounded by the idea that choices they made sometimes decades prior will continue to have consequences that last a lifetime. Particularly when told by the justice system that they are expected to become productive members of society upon release – it is impossible to understand how one can do so with restrictions on where they can live, little prospect of employment and unable to avail themselves of educational opportunities.

Advising Clients

The age old adage of "knowledge is power" is important in a system where our clients often feel, rightfully so, powerless against the enormous resources of state and federal governments. With limited choices to begin with, it is critical that clients are given the information needed to make informed choices. Similar to the level of effort we place into researching the law and investigating facts that will determine whether or not a client should challenge evidence, plead or go to trial or accept a particular plea offer, it is important to know what the ramifications of a particular conviction could be for a client before they make important choices in their criminal cases. In order to do so it is necessary for us to conduct in depth interviews of our clients, understand their goals, their families, and unearth any of their concerns about the larger impact of a criminal conviction. This inquiry is something that starts in the initial interview and continues as we build relationships with our clients and their families and as we gain a deeper understanding of their cultural backgrounds and communities.

There are a myriad of resources available to advocates that assist in understanding the wide range of potential consequences that can result from federal and state convictions. Below is a non-exhaustive list of internet resources, some with searchable databases.

1. National Inventory of Collateral Consequences of Conviction

This site is supported by a grant from the Bureau of Justice Assistance. It allows users to search applicable consequences by jurisdiction, category of consequence, type of consequence (i.e. mandatory, discretionary, background check etc) and offense. Website: https://niccc.csgjusticecenter.org/map/

2. Compilation of Federal Collateral Consequences

A project of the Collateral Consequences Resource Center. The data on this site is derived from the National Inventory of Collateral Consequences of a Conviction database but this site has reorganized the data to allow for easier user access, and a more streamlined search function. Users can search by keywords and consequence categories. Website: http://federal.ccresourcecenter.org/consequence-search

3. Internal Exile : Collateral Consequences of Conviction in Federal Laws and Regulations

A collaboration of the American Bar Association on Effective Criminal Sanctions and the Public Defender Service for the District of Columbia. Research was completed in January 2009 and designed to provide an overview of many consequences up to that date. It is an excellent visual depiction of the sheer volume of federal consequences. The 247 paged document is available at: https://www.americanbar.org/content/dam/aba/migrated/cecs/internalexile.authcheckdam.pdf

4. CIVICC – Civil Impacts of Criminal Convictions under Ohio Law

Ohio's online database about the civil impact of criminal convictions. Allows user to search by civil impact, or search by offense. Website: http://civiccohio.org/

5. 50-State Comparison Consideration of Criminal Records in Licensing and Employment

A resource website from the Restoration of Rights Project. An analysis that allows state by state comparisons showing patterns in rights restoration law and policies, as well as mechanisms for avoiding or limiting collateral consequences. Website: http://restoration.ccresourcecenter.org/

6. Columbia Law School's Collateral Consequences Calculator - New York State

Resource providing overview of collateral consequences associated with New York State Penal Law. Focus is on immigration and public housing eligibility in New York City. Searchable by offense/penal code.
Website: https://calculator.law.columbia.edu/

7. Wisconsin Compilation of Collateral Consequences

Website maintained by the Wisconsin State Public Defender in partnership with Collateral Consequences Resource Center (CCRC). Searchable by consequence categories, jurisdiction (federal and Wisconsin state) and keywords. Website: http://wisconsin.ccresourcecenter.org/consequence-search/

Importance in Plea Bargaining

In some cases educating the government about the full consequences of a conviction can assist in changing prosecutors perspectives about charging decisions and/or assist in plea bargaining. We are starting to see this increasingly in cases where our clients are facing significant immigration consequences. Some prosecutors are recognizing that the now very real potential of lifetime exile from the country is far too great a punishment for a client who is facing conviction for a minor offense. Some state prosecutors have stopped requesting maximum jail sentences for lower level crimes, have initiated policies to notify defense attorneys about the potential immigration consequences of their clients' cases or have taken proactive steps to educate themselves and their offices about those consequences.[2]

Laying out the potential collateral consequences to the government in writing and asking them to reconsider their charging decision can create benefits for individual clients as well. If the government's interest is in curbing recidivism in a poverty driven crime there is a compelling argument that creating conditions that will prevent a client from being employed are entirely counter to those interests. In some jurisdictions attorneys send "considered letters" to prosecutors in which they lay out the myriad of consequences to a client that will result from a particular plea offer.

Importance at Sentencing

As practitioners we spend a significant amount of time framing the narrative of who are clients are beyond what they have been accused and convicted of to allow

[2] "Prosecutors Conviction Lead to a Life Sentence of Deportation" New York Times. July 31, 2017 Available at: https://www.nytimes.com/2017/07/31/us/prosecutors-dilemma-will-conviction-lead-to-life-sentence-of-deportation.html

judges to have context about the criminal behavior that the government remains myopically focused on. At sentencing it becomes imperative to talk about our client's upbringing, their struggles the why/how of what brought them before the Court in the first place. But just as judges concern themselves with the tail end of the narrative – where will our clients be after sentencing and how that impacts the community at large, so must we as advocates in concluding that narrative. How will this sentence impact our client's reentry into the community? This is an important question for our individual clients and for public safety.

Thinking critically about reentry with your client before sentencing is important. Assessing goals, changes in their support system and health issues are part of that discussion. Including social workers, treatment counselors, evaluations from medical professionals and talking to family members can only enhance arguments at sentencing. The more information that you have, the greater ability you have to paint a full picture of what a client's life will look like post-sentencing and then be able to effectively argue the impact of the sentencing options available to the court.

Courts make decisions based on the client specific information that we present them at sentencing. In federal court the factors as governed by 18 U.S.C. Section 3553(a) require that judges take into consideration "the nature and circumstances of the offense and the history and characteristics of the defendant" as well as "the need for the sentence imposed to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." In considering the kinds of sentences and ranges available courts have looked at the collateral consequences of a conviction, looking beyond the period of supervision or incarceration.

> In fact beyond the offender's actual deprivation of liberty when incarcerated, a host of other penalties and burdens always attend criminal conviction, to name a few: losses of family life, of socioeconomic status, of employment and career opportunities, diminution of civil rights and entitlements; and countless humiliations and indignities commonly associated with living in confinement… In essence, the court's discretion to depart is a manifestation of the necessity for a just sentencing scheme to include provisions for that reasoned intuitive judgment…[3]

[3] *United States v. Mateo*, 299 F. Supp.2d 201, 210 (S.D.N.Y. 2004).

Courts across the country have factored in the collateral consequences of conviction when making sentencing determinations. Looking at the impact on employment[4], education[5] and finances[6] among other factors, some courts have departed from the federal sentencing guidelines in part because of these considerations. Given the very real effect that collateral consequences have on defendants, courts have recognized the need to take them into consideration at the very important stage of determining punishment.

Case Study: Nesbeth Decision

Nineteen year old Chevelle Nesbeth was a college student with aspirations of becoming a teacher when she was arrested and charged with importation of cocaine into the United States. She had never been arrested, had no prior convictions, was fully engaged in college campus extracurricular activities, worked part time jobs to help pay for school and had no conception of what it would mean to be found guilty at trial of federal drug crime. In some ways it was impossible not to always see the general collateral consequences of a conviction for Ms. Nesbeth because they were so glaring in face of her goals. The question was how much the court would consider them in making a sentencing determination if she lost at trial.

After a jury convicted Ms. Nesbeth of importation and possession with intent to distribute cocaine Ms. Nesbeth was scheduled to be sentenced by the Court. At Ms. Nesbeth's initial sentencing date Judge Block, struck by Ms. Nesbeth's youth, education, work history and career prospects inquired about what specific consequences would apply to Ms. Nebseth as a result of her conviction. Judge Block had recently read The New Jim Crow, by Michelle Alexander and readily identified the themes surrounding the impact the criminal justice system had on clients of color through history. Requesting that all parties, the defense, the government and probation report back about the potential collateral consequences of Ms. Nesbeth's conviction – he articulated that it would be helpful for him to take these specific consequences into consideration in his sentencing options.

---

[4] *See United States v. Nowak*, 2007 WL528194 (E.D. Wis. Feb 15, 2007) (imposing a probation sentence after finding that the court "can and should consider the collateral consequences in deciding the appropriate sentence"); *United States v. Wachowiak*, 412 F.Supp.2d 958 (E.D. Wis. 2006) ("…the guidelines failed to account for the significant collateral consequences defendant suffered as a result of his conviction… [h]is future career as a teacher was ruined.")

[5] *See United States v. Stall*, 581 F.3d 276 (6th Cir. 2009).

[6] *See United States v. Adelson*, 441 F.Supp.2d 506 (S.D.N.Y. 2006)

In choosing to sentence Ms. Nesbeth to one year of probation on both counts of the indictment, rather than sentence her within the 33 to 41 month range recommended by the sentencing guidelines, Judge Block took into consideration a number of collateral consequences specific to Ms. Nesbeth, including that a longer period of supervision would trigger additional consequences.[7] Notably the Court also discussed the fact that its hands were tied on the issue of whether or not these consequences would attach at all and that the only power it had was to mitigate those consequences.

Policy Recommendations for the Judiciary

Judges have expressed frustration with their ability to do more than attempt to mitigate those consequences with carefully constructed sentences. In *Doe v. United States*, 110 F. Supp. 3d 448 (E.D.N.Y. 201) Judge Gleeson discussed the 13 year impact that Ms. Doe's fraud conviction had on her ability to obtain/maintain employment, pay taxes and simply care for her family. The Court attempted to expunge her arrest and conviction but the decision was later overturned with a finding from the Second Circuit that the Court lacked jurisdiction to do so. Similarly in another Eastern District of New York case, *Stephenson v. United States*, No. 10-MC-712 (October 2015) the Court reflected on the astounding evidence that a criminal conviction can render individuals "unemployable for a lifetime."

The American Law Institute has recommended, consistent with Judge Block's opinion that judges include and address collateral consequences in the sentencing process. In addition, it recommends that courts ensure that clients are aware of the collateral consequences they may face, and that courts permit relief from consequences where the underlying conviction is not reasonably related to the benefit or opportunity sought by the person convicted.

Conclusion

There is a myriad of scholarship recommending changes in legislation and practice that would allow for individuals with criminal records to not be subject to the thousands of permanent, multi-generational consequences of their convictions. That these consequences, similar to the rest of the criminal justice system, disproportionately impact people of color, cannot be ignored or overstated. Fighting against them as advocates for our clients is also one step closer to creating broader change and addressing a civil rights issue that has only changed shape over time.

---

[7] *See United States v. Nesbeth*, 15-CR-18 (E.D.N.Y. May, 2016).

Attachments

Federal Defenders
OF NEW YORK, INC.

Eastern District
One Pierrepont Plaza - 16th Floor, Brooklyn, NY, 11201
Tel: (718) 330-1200 Fax: (718) 855-0760

David E. Patton
Executive Director and
Attorney-in-Chief

Eastern District
Peter Kirchheimer
Attorney-in-Charge

September 10, 2015

The Honorable Judge Frederic Block
United States District Court Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: **United States v. Chevelle Nesbeth 15-CR-18**

Dear Judge Block:

At the time of her arrest Chevelle Nesbeth was nineteen years old. She was a college student who had worked part time through her adolescence to help support herself and her family, balancing work and school [REDACTED]. She had aspirations of becoming a teacher and eventually a principal. With a love for working with young children, a supportive family who instilled in her a hard work ethic that she embraced for her entire young life, Chevelle Nesbeth dreamt of becoming an educator, a mentor to children of other immigrants and a source of pride for her mother. But on January 6, 2015 when Chevelle was arrested at the airport she quickly felt those dreams fade away, unrealized, and she has remained devastated by that monumental loss. Chevelle's mother, describes with tears in her eyes, the impact that her daughter's first and only contact with the criminal justice system has had on Chevelle. [REDACTED], the prospect of serving time in prison, [REDACTED]. The seriousness of the charges and her experience with the criminal justice system is far from lost on now twenty year old Chevelle. As she comes before this court facing a significant sentence within the guidelines, Chevelle, through counsel, requests that the court consider who she is beyond the offenses for which she has been convicted, taking into account her background, her support system and her future goals. Despite the many obstacles that a federal criminal conviction will create for her, this is a young woman who still has the ability and the desire to be a contributing and productive member of society as she advances further into adulthood. For these reasons

and as discussed further in this sentencing submission, counsel requests that the Court depart from the guidelines and sentence Chevelle Nesbeth to a period of probation.

I. APPLICABLE GUIDELINE RANGE

As an initial matter we have no objection to the guideline range. Probation calculates a base offense level of 24 with a 4 point reduction for minimal role. At the writing of this letter, Ms. Nesbeth has not qualified for a safety valve adjustment leaving her total offense level at 20.[1]

II. BACKGROUND

Chevelle Nesbeth comes from a hardworking family that immigrated to the United States from Jamaica in order to afford themselves career and educational opportunities and a better standard of living. [REDACTED] Chevelle has lived with her mother since that time. She previously lived with her father, paternal grandmother and aunt in Jamaica where the three still reside. The move was a significant change for Chevelle who since relocating has only been able to see her father occasionally, a significant shift from living with him for years. She had to adapt to life in a new country at an age where being accepted by one's peer group and being easily influenced by others in an effort to do so is not at all unusual. Chevelle recalls having a difficult year her first year of school in the United States. However she was able to quickly turn things around, getting good grades in high school [REDACTED] Chevelle persevered in school during the academic year and spent her summers working part time jobs. As a result she successfully graduated high school after four years.

[REDACTED] All of Chevelle's sibling are employed and the notion of the need and importance of working hard for items needed or desired was instilled in Chevelle at a relatively young age. She obtained her first job when she was fifteen years old and has worked almost consistently since then, balancing employment with her extracurricular activities and school. She has taken pride in the fact that much of what she has she has contributed to purchasing or purchased herself and finds value in being able to keep a schedule that allows her to support herself and her family in addition to advancing her studies and her career goals. [REDACTED]. She sees these jobs as a way to bring in income but wanting to engage

[1] The defense is requesting an adjournment to determine whether or not Ms. Nesbeth can qualify for this additional adjustment before we proceed to sentencing.

in work that was directly related to her career interests she also applied for and obtained an internship working with underprivileged children as a counselor.

Living not only a law abiding life but also a productive life required that Chevelle ignore many of the distractions that deter many young people from realizing the goals that they set out for themselves. In some ways, her mother believes, this helped Chevelle remain sheltered from and ignorant of the negative influences that are inevitable in many urban neighborhoods where financial resources are scarce, [redacted] For the most part her circle of friends reflected that naiveté, however, admittedly those same characteristics have made Chevelle more trusting of individuals who are more street-savvy than her. Ms. Brown Nesbeth's comments about the instant offenses for which Chevelle was convicted is telling of this. Ms. Brown Nesbeth strongly believes that her daughter was taken advantage of by others. This seems a fair and an accurate characterization, regardless of the ultimate verdict at trial, given Chevelle's background, her lack of criminal history or even contact with the justice system and the path she had forged for her future based on her hard work and self-determination. An arrest and conviction for drug importation and possession with intent to distribute drugs is completely out of character for a young woman with Chevelle's history and goals.

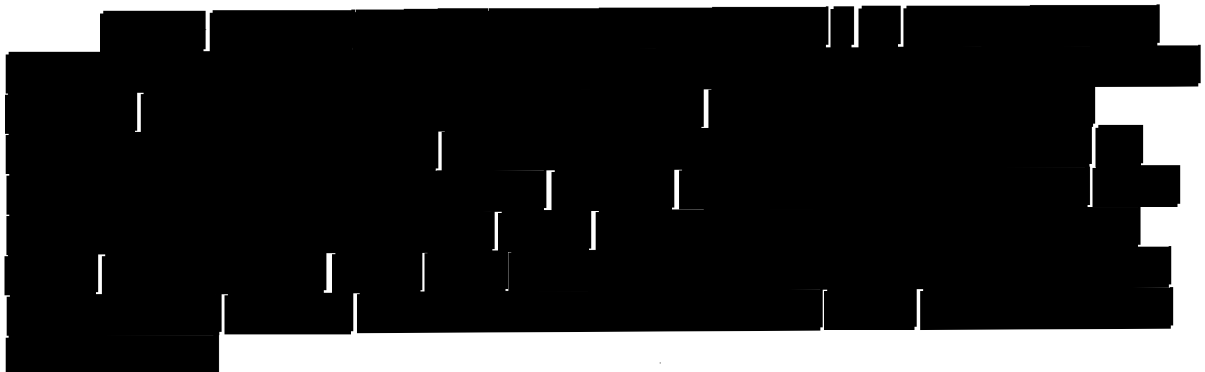
III. CONDUCT POST - CONVICTION

Since her conviction Chevelle has deeply struggled with both the known and unknown consequences of having a federal criminal record. It has had a substantial impact on her ability to hope for and envision her future. However, when school resumed approximately one week prior to the writing of this submission, Chevelle had no hesitation in attending. [redacted] she remains hopeful that she will be able to find a rewarding career where she is still able to help young people even if that help is in a different context than she originally envisioned. She now hopes to use her own experiences as somewhat of a cautionary tale, to reinforce the importance of being mindful of your peer group, and to share her experience of trying to overcome the substantial obstacles that come with having a criminal record.

[redacted] in part to focus more directly on her studies and balance working her now two part-time jobs. She takes her education even more seriously because she knows that she will need to work even harder to overcome the stigma and collateral consequences of her criminal convictions.

IV. REASONABLE SENTENCE UNDER 18 U.S.C. SECTION 3553

The factors that are used to assess and predict future recidivism, such as prior criminal history, education and employment, alcohol and drug problems, anti-social behavior, and ties to the community, all support the argument that Chevelle Nesbeth is highly unlikely to be rearrested. In the pre-sentence report addendum the probation officer describes her as being at a low risk of recidivism because of her supportive family and the fact that she has led a law abiding life. Chevelle has no prior criminal history. She has no problems with drugs or alcohol and positive ties to her community demonstrated by her strong education history, impressive employment history for her age, her work with children in the community and her desire to contribute so greatly to society through her future career. Chevelle has no desire to find herself in front of a criminal court again. This experience has terrified her and reinforced her belief that only through her education and hard work can she realize her goals. If placed on a period of probation the court will be able to monitor her progress and her compliance and ensure itself that Chevelle has taken this experience very seriously.



Chevelle Nesbeth has never experienced life behind the bars of a jail cell. It is a vision she has carried with her, invading her thoughts and [redacted] for months. The thought of being separated from her loved ones, not being allowed to finish her education after working hard to be accepted into school, of being in an environment with individuals with criminal sophistication she lacks and an environment with a higher probability of violence and anti-social behavior completely apposite to her experiences at home and at school, has truly affected her. She is not a young woman who in her own mind can in anyway afford to run afoul of the law for any reason.

V. CONCLUSION

This conviction is an aberration in the life of Chevelle Nesbeth. A period of probation would be a sentence sufficient but not greater than necessary to comply with the purposes of sentencing. It would provide just punishment for the offense and reflect the seriousness of the offense, be an adequate deterrent to future criminal conduct, protect the public and provide

Chevelle the opportunity to continue her education and obtain and maintain the type of support she needs to continue to be a productive and law abiding member of society.

Given Chevelle Nesebth's history and characteristics we respectfully submit that a period of incarceration will not achieve the statutory purposes of sentencing and therefore ask for a probationary sentence.

Respectfully Submitted,

/s/Amanda David
Amanda David
Assistant Federal Defender
Counsel to Chevelle Nesbeth
Federal Defenders of New York, Inc.
One Pierrepont Plaza, 16th Floor
Brooklyn, NY 11201
(718) 330-1208

Copies to:
Paul Scotti, Assistant United States Attorney (via ECF)

Federal Defenders
OF NEW YORK, INC.

One Pierrepont Plaza-16th Floor, Brooklyn, NY 11201
Tel: (718) 330-1200 Fax: (718) 855-0760

David E. Patton
Executive Director and
Attorney-in-Chief

Deirdre D. von Dornum
Attorney-in-Charge

January 26, 2016

The Honorable Frederic Block
United States District Court Judge
United States District Courthouse
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: **United States v. Chevelle Nesbeth 15-CR-18 (FB)**

Dear Judge Block:

> "Many of the forms of discrimination that relegated African Americans to an inferior caste during Jim Crow continue to apply to huge segments of the black population today --- provided they are first labeled felons. If they are branded felons by the time they reach the age of twenty-one (as many of them are), they are subject to legalized discrimination for their entire adult lives.[1]"

Introduction

At the time of her sentencing Ms. Chevelle Nesbeth will come before the Court 21 years old, having been convicted after trial of a felony in federal court. Ms. Nesbeth, a young African American female who at the time of her arrest was only 19 years old with her whole life ahead of her, is a college student who had been studying to become a teacher. Her dream was to eventually become a school principal. She held internships working with young children for the first two years of her college tenure at Southern Connecticut State University. After Ms. Nesbeth was convicted by a jury this past summer of felony drug offenses (importation of cocaine into the United States and possession with intent to distribute cocaine), she became a felon and with that came all

[1] Michelle Alexander, The New Jim Crow, at 186-7 (2010)

of the consequences that follow. As the Court is aware and scholarship like Michelle Alexander's New Jim Crow discuss in detail, those consequences extend far beyond a custodial or supervisory sentence ordered by the Court. They will include numerous other implications for Ms. Nesbeth's life that are long lasting and in several instances, simply lifelong. This memorandum will discuss the universe of statutorily mandated collateral consequences both federal and state, with some specific focus on Connecticut, the state in which Ms. Nesbeth currently resides, attends college and had hoped to begin her career. In addition this memorandum will discuss the probability of success in seeking relief for these consequences, concluding that the extreme difficulty in achieving that success necessitates that courts sentencing defendants address these consequences in a full and meaningful way prior to the conclusion of a criminally accused person's case. Specifically, greater understanding of the lifelong and even multi-generational impacts of these consequences mean that they should be contemplated in 18 U.S.C § 3553a factors and factor heavily in the sentencing decisions ultimately made by judges.

Federal Collateral Consequences

A. Education

Students, like Ms. Nesbeth, who are convicted of drug-related offenses become ineligible for grants, loans or work assistance.[2] The period of time of ineligibility ranges based on the type of offense (possession or sale) and whether or not it is a first, second or third offense. In Ms. Nesbeth's case she will be ineligible for a period of two years, the duration of her college career. A student whose aid has been suspended may resume eligibility before their period of ineligibility is over only if they complete an approved drug rehabilitation program and pass two unannounced drug tests or the conviction is reversed or set aside.

In addition, federal law prevents individuals with felony drug convictions from getting the American Opportunity Tax Credit, a complement to Pell grants that provide a partially refundable tax credit for help with academic costs.[3] A person with a felony drug conviction is also ineligible for the Hope Scholarship Credit if the conviction

[2] 20 U.S.C. § 1091

[3] Rebecca Vallas, Melissa Boteach, Rachel West and Jackie Odum, Removing Barriers to Opportunity for Parents with Criminal Records and Their Children: A Two Generation Approach, Center for American Progress (December 2015).

occurred before the end of the taxable year within the year that that the academic year ends. (CITE)[4]

B. Travel Restrictions

Individuals convicted of a felony federal or state drug offense that used a passport or crossed an international line when committing the offense may have their passport revoked or be denied issuance of a passport.[5] The disqualification lasts for any term of imprisonment as well as any terms of parole or supervised release following a term of imprisonment or a conviction. This provision is particularly relevant for Ms. Nesbeth whose father, grandmother and extended family all reside abroad. But for trips to visit them, Ms. Nesbeth has not seen them with any regularity. The inability to do so will undoubtedly impact these important familial relationships.

C. Employment

As aforementioned, Ms. Nesbeth's career goals have primarily been focused on becoming an educator. The Safe and Drug-Free Schools and Communities Act, Title IV, Part A of the Elementary and Secondary Education Act of 1965, provides for funding for background checks for all employees of educational agencies. The background checks are to determine whether current or potential employees have been convicted of any crime that would impact their fitness to be responsible for the safety of children, be generally employed by the agency or is related to the specific position within the agency for which they are seeking to be employed or are currently employed.[6]

At 21 it is impossible for even Ms. Nesbeth to anticipate the universe of her future career goals as she continues her education and has new life experiences. Not limited to individuals wanting to be educators, felonies impact a person's ability to obtain or maintain a position in federal law enforcement, provide childcare for federal workers or work as a security screener at an airport. Federal law enforcement officers who have been convicted of felonies can be terminated without exception.[7] Convictions for a drug felony can be used as grounds for denying employment for potential employees who want to be involved in providing care to children under age 18. Child

[4] 20 U.S.C. 25A(b)(2(D)
[5] 22 U.S.C. §§2714(a), (b).
[6] 20 U.S.C. § 7115
[7] 5 U.S.C. § 7371

care services include child protective services, social services, health care services, day care, education, foster care, residential care, recreational or rehabilitative programs, and any correctional or treatment services.[8] Anyone who applies to work as an airport security screener is barred from such employment with no potential for waiver if the conviction occurred within the previous 10 years of employment.[9] Additional bans include statutes banning employment that involves transporting hazardous material with a commercial vehicle operator license if a conviction was within five years of an application, working for a private transport company, possessing or selling firearms or explosives, working for a foreign exchange student sponsor program sponsored by the Department of State, working for a hospice if the applicant would have contact with patient records and the conviction was within the past three years, working in an FDIC insured depository institution if the conviction was within 10 years absent prior approval, and working a s a customs broker.[10]

A felony conviction can also prevent an individual from obtaining certain federal licenses. This includes for example a merchant mariner's license (to permit individuals to transport cargo and passengers in and out of the navigable waters of the United States)[11] commodity dealers,[12] certificate or authorization to be a pilot or flight instructor,[13] and broadcast licensing.[14]

D. Jury Service and Voting

Serving on a jury is an important right and responsibility of any American citizen. At age 21 Ms. Nesbeth has never had that experience and now more than likely will never have the experience of serving on a felony jury. A felony conviction in both federal and state court disqualifies an individual from serving on either a federal grand or petit jury unless the person's civil rights have been restored – the only means of doing so being through pardon.[15]

---

[8] 42 U.S.C. § 13041

[9] 49 U.S.C. § 44936(b)(B)

[10] See Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations, Appendix A. http://www.americanbar.org/content/dam/aba/migrated/cecs/internalexile.authcheckdam.pdf

[11] 46 U.S.C. § 7703

[12] 7 U.S.C. § 12a

[13] 14 C.F.R. § 61.15

[14] 47 C.F.R. § 73.4280

[15] 28 U.S.C. § 1865(b)(5).

The right to vote, a right that young Chevelle Nesbeth has yet to exercise, may also be severely compromised by her felony drug conviction. The Fourteenth Amendment gives states the power to deny the right to vote because of a criminal conviction.[16]

E. Volunteer Positions

Not at all a stranger to hard work and service, Ms. Nesbeth now finds herself unable to assume certain desired volunteer positions previously available to her. Felony convictions can also prevent an individual from participating in certain volunteer and service positions. Federal grants for programs geared towards mentoring the children of incarcerated individuals require that all potential mentors undergo background checks. Individuals with convictions that would cause them to be ineligible to adopt or foster a child may also be excluded from acting as potential mentors for the children of incarcerated individuals.[17] National Service volunteer positions such as Senior Corps and AmeriCorps also require background checks.[18] While there are no specific bars for individuals convicted of felonies involving controlled substances, it is notable that current AmeriCorps volunteers can be terminated if they are convicted of a felony or the sale or distribution of a controlled substance during the time of service. Service can be in reinstated after conviction if the volunteer has enrolled in a drug rehabilitation program.[19] In addition, an individual may not act as a court appointed special advocate if it is determined they could be a risk to children.[20]

F. Other Consequences

Numerous other consequences include: ineligibility to enlist in any service of the armed forces, unless an exception is made[21]; disqualification from serving in different capacities in a labor organization or employee benefits plan;[22] and ban from participating in any activity by the Civilian Marksmanship Program.[23]

---

[16] U.S. Const. amend. XIV, Section 2.
[17] 42 U.S.C. §671
[18] 45 C.F.R. 2522.205
[19] 45 C.F.R. 2522.230
[20] 42 U.S.C. 13013
[21] 10 U.S.C. § 504
[22] 29 U.S.C. §§ 504, 1111
[23] 36 U.S.C. 40723

State Collateral Consequences with a Focus on Connecticut

There are several important state statutory collateral consequences that can and/or will impact Ms. Nesbeth as well. Some state laws require that upon conviction of a drug related felony a person's driver's license be suspended or that there be a delay in the issuance of a driver's license.[24] In addition, there is a federal lifetime ban from Temporary Assistance to Needy Families and food stamps if someone is convicted of a felony drug conviction. States can choose to opt out of this ban.[25] However, Connecticut continues to ban individuals with a felony drug conviction from receiving access to food stamps.[26]

Connecticut also automatically bars individuals convicted of controlled substance felonies from being eligible for a teaching certificate if they have completed serving a sentence for their conviction within the five years immediately preceding their application.[27] Discretionary denial is permitted for any applicant convicted of a crime involving moral turpitude or any crime that the board believes would impair the standing of certificates issued by the board.[28]

The Stigma of a Felony Conviction and the Long Term Impact of Collateral Consequences

National attention to initiatives like "ban the box," a civil rights movement to encourage employers to remove the check box that requires applicants to answer whether or not they have a criminal record, have directed attention to the struggles that individuals with criminal convictions encounter in finding employment. In November 2015 President Obama directed federal agencies to ban the box, and not ask potential employees about their criminal records on job applications.[29] The President discussed the importance of allowing individuals with criminal records to have real opportunities at a second chance to be productive members of society. The stigma that individuals with criminal histories face is real and palpable. Now that technology has allowed information to be more easily accessible there are a number of websites purporting to be able to provide background checks for a nominal fee, revealing arrest records and

---

[24] After Prison: Roadblocks to Reentry. http://lac.org/roadblocks-to-reentry/main.php?view=law&subaction=3
[25] 21 U.S.C. 862(a)(a)
[26] http://www.ct.gov/dcf/lib/dcf/agency/pdf/foodstampbasics.pdf
[27] Conn. Gen. Stat. § 10-145i
[28] Conn. Gen. Stat. § 10-145b(m)
[29] http://www.usatoday.com/story/news/politics/2015/11/02/obama-tells-federal-agencies-ban-box-federal-job-applications/75050792/

convictions. A federal drug arrest can easily be accessed because of media coverage of drug trafficking at the nation's airports.[30] This makes the sigma almost inescapable and it is incredibly difficult to prevent potential employers from having easy access to this information before any real consideration of an applicant's candidacy.

Felony convictions also have serious implications for an individual's family life. The Federal Adoption and Safe Families Act of 1997 (ASFA) prevents individuals with certain convictions from being able to adopt or foster children. Approval may be denied if an applicant has for instance been convicted of a drug related offense in the past five years.[31] As of 2011 eighteen specific states, including New York, disqualify a prospective adoptive parent if they or anyone they live with has been convicted of a drug related offense within the previous five years.[32]

Setting aside the potential impact a criminal record has on just starting a family, it also has a grave impact on family stability and an individual's future generations. One study published by the Center for American Progress explores the intergenerational effects of a criminal conviction.[33] First focusing on a conviction's impact on employment and income generally and how that in turn effects families, the study found that the increased likelihood of long term unemployment, ban from public assistance, and barriers to education prolong the impoverishment. Children in lower income households "tend to develop vocabulary at a slower rate… ultimately have more limited language skills, affecting school performance."[34] The impact of convictions on housing can also have long lasting consequences for a defendant's children. Housing instability has been related to poor academic outcomes because of the disruptions in education, lower quality living conditions and parental preoccupation with finding a stable living situation. Children experiencing residential instability are also more likely to have emotional and behavioral problems.[35] Unsurprisingly the barriers to education also had long term negative impacts on families, as did inability to create savings due to economic instability. The study encourages changes in legislation that would allow

---

[30] A simple google search of Chevelle Nesbeth's name reveals several articles about her arrest from various media sources.
[31] See 42 U.S.C. 671(a)(20)(A)
[32] Criminal Background Checks for Prospective Foster and Adoptive Parents, Child Welfare Information Gateway (August 2011), https://www.childwelfare.gov/pubPDFs/background.pdf.
[33] Rebecca Vallas, Melissa Boteach, Rachel West and Jackie Odum, Removing Barriers to Opportunity for Parents with Criminal Records and Their Children: A Two Generation Approach, Center for American Progress (December 2015)
[34] Id. at 5
[35] Id. at 11

individuals with criminal convictions greater opportunities which in turn would enlarge their children's future opportunities as well.

Federal Courts's Attention to Collateral Consequences

The long term devastating and extraordinarily disproportionate impact of a federal conviction on an individual's ability to be a productive member of society has been highlighted in recent cases heard in the Eastern District by the Honorable Judge John Gleeson and the Honorable Judge Raymond Dearie. In Doe v. United States, the Court discussed the 13 year impact that Ms. Doe's fraud conviction had on her ability to obtain and/or maintain employment, be able to pay taxes and simply care for her family.[36] Finding that Ms. Doe's "case highlights the need to take a fresh look at policies that shut people out from social, economic and educational opportunities they desperately need in order to reenter society successfully" the Court ordered that her arrest and conviction be expunged.[37]

Although the Court held in another case that it was forced to deny relief based on controlling precedent, it reflected that "there is now a great deal of solid evidence establishing that a criminal conviction often is a significant obstacle employment, in some situations even creating the dire financial circumstances, that in turn, are strongly linked with recidivism."[38] Recognizing the limited issuance of pardons and lack of legislation on the federal level permitting expungement, the Court highlighted the public and permanent impact of a criminal record, rendering individuals unemployable for a lifetime.[39]

18 U.S.C. § 3553(a) and Considering Collateral Consequences during Sentencing

Courts across the country have considered these consequences in their evaluation of the factors under 18 U.S.C § 3553(a). Determining that conceptualizing punishment necessitates more than the consideration of a prison guideline range, courts have looked at the everyday impact of the conviction on an individual being sentenced.

> In fact beyond the offender's actual deprivation of liberty when incarcerated, a host of other penalties and burdens always attend criminal conviction, to name a few: losses of family life, of socioeconomic status, of employment and career opportunities, diminution of civil rights and entitlements; and countless

---

[36] 110 F. Supp. 3d 448, (E.D.N.Y. 2015)

[37] Id. at 457.

[38] Stephenson v. United States, No. 10-MC-712 (October 2015)

[39] Id.

> humiliations and indignities commonly associated with living in confinement… In essence, the court's discretion to depart is a manifestation of the necessity for a just sentencing scheme to include provisions for that reasoned intuitive judgment…[40]

Courts across the country have factored in the collateral consequences of conviction when making sentencing determinations. Looking at the impact on employment[41], education[42] and finances[43] among other factors, courts have departed from the sentencing guidelines in part because of these considerations. Given the very real effect that collateral consequences have on defendants courts have recognized the need to take them into consideration at the very important stage of determining punishment.

Recent reform and policy considerations have reflected the importance of including the numerous collateral consequences impacting the criminally accused and convicted into the sentencing process.[44] There has not been meaningful legislative reform reducing the impact of collateral consequences, leading legal scholars and reformists to turn to proposals recommending the revision of the sentencing process to address these consequences in a way that will prevent the type of debilitating impact that the consequences have on individuals seeking to reintegrate into society and live productive lives post-conviction.[45]

In a tentative draft of the Model Penal Code's sentencing provisions composed by the American Law Institute (ALI) in April 2014, the ALI provides recommendations of how courts should include and address collateral consequences in the sentencing process. First the draft suggests that the sentencing commission should as part of its sentencing guidelines comprise a list of all collateral consequences both mandatory and discretionary that could be imposed either by state or federal law. The consequences include any ramifications resulting from an individual's conviction but are not part of

---

[40] United States v. Mateo, 299 F. Supp.2d 201, 210 (S.D.N.Y. 2004).
[41] See United States v. Nowak, 2007 WL528194 (E.D. Wis. Feb 15, 2007) (imposing a probation sentence after finding that the court "can and should consider the collateral consequences in deciding the appropriate sentence"); United States v. Wachowiak, 412 F.Supp.2d 958 (E.D. Wis. 2006) ("…the guidelines failed to account for the significant collateral consequences defendant suffered as a result of his conviction… [h]is future career as a teacher was ruined.")
[42] See United States v. Stall, 581 F.3d 276 (6th Cir. 2009).
[43] See United States v. Adelson, 441 F.Supp.2d 506 (S.D.N.Y. 2006)
[44] See Margaret Love, Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code, WIS. L. REV. 2 (2015).
[45] Id.

the court's specifically outlined sentence.[46] The draft also recommends that sentencing commissions construct guidelines for the courts to consider relief petitions from mandatory collateral consequences. More fundamentally, the MPC draft mandates that courts at the time of sentencing ensure that the criminally convicted individual has been apprised of the list of collateral consequences they may face, cautioned that those consequences could change as a function of time or their decision to relocate to another jurisdiction. Furthermore, defendants should be informed of their right to petition for relief from these consequences.[47]

Granting relief both at and after sentencing upon successful petition is also encouraged by the MPC draft. It recommends that courts not deny relief to punish individuals or without a finding that the underlying conviction is "reasonably related to the benefit or opportunity that individual seeks to obtain."[48] For those individuals who have completed their sentence and are seeking relief or are seeking relief from a jurisdiction different from that which they were convicted the MPC draft recommends that they be required to make a showing of clear and convincing evidence for their need for relief.[49] Additionally it is suggested that courts can provide a certificate restoring an individual's rights and demonstrating their rehabilitation after they have shown themselves to be law abiding after a period following sentencing. This certificate could then be used to obtain lost benefits and opportunities, with the idea being that when a person's sentence has ended so should the additional consequences impacting them.[50]

The central thrust of the MPC draft is to give courts the ability to adequately address collateral consequences in the sentencing process, specifically considering and having the tools to lessen the crippling impact these consequences can have on successful reintegration into society. It allows for case by case analysis of the efficacy of these consequences – tasking the court to determine (in considering granting relief) if the consequences relate to the underlying conduct or are based in arbitrary punishment.[51]

---

[46] Id. at 256 citing MODEL PENAL CODE: SENTENCING (Tentative Draft, No. 3, Apr. 24, 2014) § 6x.02(1).
[47] Id. at 266-267.
[48] Love, Managing Collateral Consequences and the Revised MPC, at 268 citing MODEL PENAL CODE: SENTENCING APRIL DRAFT § 6x.04-.06.
[49] Id. at 268-269.
[50] Id. at 270.
[51] See Love, Managing Collateral Consequences (2015)

Conclusion

At 21 years old Chevelle Nesbeth has her entire life ahead of her. However, the serious consequences that result from her federal drug conviction cannot be overstated. Compacting these consequences with a period of incarceration or even a lengthy period of supervision would be a severe and an unnecessary punishment.

Respectfully submitted,

/S/ Amanda David
Amanda David
Counsel for Chevelle Nesbeth
Federal Defenders of New York, Inc.
One Pierrepont Plaza, 16th Floor
Brooklyn, NY 11201
718.330.1208

cc: AUSA Paul Scotti

By **CRIMESIDER STAFF** / **AP** / *August 8, 2017, 3:36 PM*

From jail to Yale: Man faces scrutiny in bid to become lawyer

Reginald Dwayne Betts / **ALEX BRANDON / AP**

11 Comments / Share / Tweet / Stumble / Email

HARTFORD, Conn. -- A convicted felon who graduated from Yale Law School and won acclaim as a poet is being asked by a Connecticut committee to prove his "good moral character" before he is allowed to practice law.

Reginald Dwayne Betts passed the state bar exam in February, but a panel of judges and lawyers that decides who joins the state bar flagged his file because of three felony convictions for a carjacking he committed two decades ago as a teenager.

The Connecticut Bar Examining Committee will investigate and hold a hearing on Betts' bid for admission to the bar. Like most states, Connecticut does not prohibit felons from becoming attorneys, but a felony conviction creates a presumption that the applicant lacks "good moral character and/or fitness to practice law." Such applicants must prove otherwise by "clear and convincing evidence."

A lawyer for Betts, William Dow III, said people from many walks of life who know Betts have indicated they are willing to support him and testify on his behalf if necessary in the Bar Examining Committee proceedings.

"It's an honor to represent this young man," Dow said. "He has a resume that is absolutely breathtaking. He personifies what people talk about when they speak of second chances."

Sponsored by The Salvation Army

When You Donate Your Used Clothing, Lives Are Restored.

Your used goods and clothing help fund rehabilitation programs that do beautiful things. Schedule a pickup today.

Betts, 36, has been working for the state public defenders' office in New Haven. He declined to comment. Bar Examining Committee officials also declined to comment on Betts, saying the review process is confidential.

Betts grew up in Suitland, Maryland, near Washington, D.C., and was convicted of a carjacking at a Virginia mall when he was 16. He served eight years in prison. He went on to graduate from the University of Maryland, win a Harvard University fellowship and earn a Yale law degree.

Along the way, he has written two books of poetry that received good reviews from media critics. A third book, "A Question of Freedom: A Memoir of Learning, Survival, and Coming of Age in Prison," won a 2010 NAACP Image Award. He is now married with two children.

Only three states -- Kansas, Mississippi and Texas -- ban felons from becoming lawyers, according to the National Conference of Bar Examiners. Many states have "good moral character" standards similar to those in Connecticut.

Felons applying to become lawyers have mixed results.

The Ohio Supreme Court last year rejected a request to become a lawyer by John Tynes, who served prison time after repeatedly trying to meet girls for sex, but said he could reapply in 2018. Also in Ohio, in the late 1990s, the same court allowed convicted murderer Derek Farmer to become a lawyer, which upset law enforcement officials.

In 2013, the Washington state Supreme Court allowed convicted bank fraud felon and former Colorado State University football player Cleodis Floyd to become a lawyer after the state Bar Association held a hearing on his character.

Former Connecticut Judge Anne Dranginis, chairwoman of the Connecticut Bar Examining Committee, said she could not discuss specific cases. She said the panel has approved convicted felons in the past, but it is not a common occurrence.

"It is not an automatic disqualifer," she said of a felony conviction. "There are many times where we see things that happen early in a person's life that cease to be problems for them. What we do see is ... people take responsibility for their past conduct and very often have been rehabilitated."

© 2017 The Associated Press. All Rights Reserved. This material may not be published, broadcast, rewritten, or redistributed.

11 Comments / Share / Tweet / Stumble / Email

SHOW COMMENTS +

Recommended

Sponsored Links by Taboola

White-Haired Baby Surprises Doctors Until They Realize
HealthSkillet

How to Tell If You Have Schizophrenia
WebMD

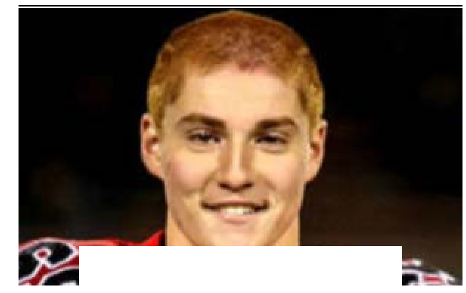
There Are 10 Types of Irish Last Names - Which One Is Yours?
Ancestry

Featured in Crimesider

Popular

Sponsored Links by Taboola

Duck Dynasty Cast Without Beards Look



read

Lawyers want Penn State live-in frat adviser to testify

58 PH

Notorious teacher sex scandals

read

Charges in death of 3-year-old in day care's hot van

read

Alabama judge calls teacher sex charges unconstitutional

Alabama judge calls teacher sex charges unconstitutional

Judge says that when students are old enough to consent, prosecutors must prove teachers used a "position of authority" to "coerce" sexual contact

Lawyers want Penn State live-in frat adviser to testify

Defense attorneys want Tim Bream, who is also the school's head athletic trainer, to testify about what he knew about the alcohol-fueled pledge event

Strange
Daily Feed

Beautiful 55+ Senior Living Apartments in Brooklyn
Retirement Home Sponsored Ads

Glasses-Lovers Are Going Crazy Over This Site
GlassesUSA.com

People want these kitchen designs so bad they are switching once they see them.
Kitchen Remodeling | Sponsored Listings

Challenge: How far can you take your app in 30 days?
Microsoft

Stunning New Luxury Sedans Now Available!
Luxury Sedan Sponsored Ads

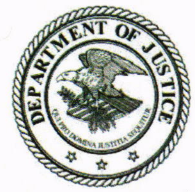
We Tried Bombas Socks. Here's What Happened:
Business Insider | Bombas Socks

View Top Luxury Senior Apartments in Brooklyn
Luxury Senior Living (Sponsored Ads)

read s

Abandoned newborn girl found covered in ants

Copyright © 2017 CBS Interactive Inc.
All rights reserved.



U.S. Department of Justice

United States Attorney
Eastern District of New York

JJD:PGS
F. #2015R00067

610 Federal Plaza
Central Islip, New York 11722

September 10, 2015

By Hand and ECF

The Honorable Frederic Block
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Chevelle Nesbeth
Criminal Docket No. 15-018 (FB)

Dear Judge Block:

The government respectfully submits this letter in anticipation of the defendant's sentencing scheduled for September 11, 2015, at 4:00 p.m. For the reasons stated below, the government respectfully requests that the Court impose a sentence within the applicable United States Sentencing Guidelines (the "Guidelines") range of 33 to 41 months' imprisonment.

I. Background

On January 6, 2015, at John F. Kennedy International Airport ("JFK"), a Customs and Border Protection ("CBP") officer arrested the defendant after a search of the defendant's two suitcases revealed over 600 grams of cocaine hidden in the extendable pull-handles of both suitcases. See Presentence Investigation Report ("PSR") at ¶ 5. The defendant had entered the United States from Montego Bay, Jamaica. Id.

The defendant was indicted by a Grand Jury in this District on two counts: knowingly and intentionally importing a controlled substance into the United States in violation of 21 U.S.C §§ 952(a), 960(a)(1), and 960(b)(3), and knowingly and intentionally possessing with the intent to distribute a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). On June 17, 2015, the defendant was found guilty by jury trial of both counts. Id. at ¶ 1.

II. Guidelines Calculation

Based on the foregoing, the government sets forth the following Guidelines calculation:

Base Offense Level (§§ 2D1.1(a)(5) and 2D1.1(c)(8))		24
Less:	Minimal Role (§ 3B1.2(a))	-4
Total:		20

The defendant's total offense level is 20 and her criminal history category is I.

III. Section 3553(a) Factors

We recognize that, pursuant to the United States Supreme Court's decisions in United States v. Booker, Kimbrough v. United States and Gall v. United States, the Guidelines are advisory rather than mandatory, and the sentencing court has the authority to fashion a reasonable and appropriate sentence in a given case. Under Booker, the sentencing court must consider the Guidelines in formulating an appropriate sentence, along with all the factors in 18 U.S.C. § 3553, which include the nature and circumstances of the crime, the history and characteristics of the defendant, the appropriate Sentencing Guidelines range and the purposes of sentencing, such as just punishment, promoting respect for the law, deterrence, protecting the public and rehabilitation. See 18 U.S.C. §§ 3553(a)(2)(A)-(D).

Interpreting the Supreme Court's decision in United States v. Booker, the Second Circuit has held that "sentencing judges remain under a duty with respect to the Guidelines . . . to 'consider' them, along with the other factors listed in section 3553(a)." United States v. Crosby, 397 F.3d 103, 111 (2d Cir. 2005); see 18 U.S.C. § 3553(a). In Gall v. United States, 128 S. Ct. 586, 596 (2007), the Supreme Court explained the proper procedure and order of consideration for sentencing courts to follow: "[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." 128 S. Ct. at 596 (citation omitted). Next, a sentencing court should "consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, the court may not presume that the Guidelines range is reasonable. Instead, the court must make an individualized assessment based on the facts presented." Id. at 596-97 (citation and footnote omitted).

The "starting point and the initial benchmark" in this case, a Guidelines sentence of 33 to 41 months, is appropriate and reasonable because it accurately reflects the seriousness of the defendant's conduct in importing more than 600 grams of cocaine into the United States. See 18 U.S.C. § 3553(a)(1), (a)(2)(A). The defendant's young age and lack of criminal history do not, on their own, remove this case from the heartland of drug importation cases. A sentence within the Guidelines range is necessary to deter her from

committing the same offense in the future, as well as to deter others contemplating similar acts. See 18 U.S.C. § 3553(a)(2)(B). The Guidelines calculation results in a sentencing range that is sufficient, but not greater than necessary, to achieve Section 3553(a)'s purposes.

IV. Conclusion

For the foregoing reasons, the government respectfully requests that the Court impose a sentence that is sufficient, but not greater than necessary to achieve the goals of sentencing, see 18 U.SC. § 3553(a)(2), which, in this case, is within the applicable Guidelines range of 33 to 41 months in custody.

Respectfully submitted,

KELLY T. CURRIE
Acting United States Attorney

By: /s/ Paul G. Scotti
Paul G. Scotti
Assistant U.S. Attorney
(631) 715-7836

cc: Amanda David, Esq. (by ECF)
Steven S. Guttman, U.S. Probation Officer (by Email)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2015

(Argued: April 7, 2016 Decided: August 11, 2016)

Docket No. 15-1967-cr

JANE DOE, 14 MC 1412,

Petitioner-Appellee,

v.

UNITED STATES OF AMERICA,

Respondent-Appellant.

Before:

POOLER, LIVINGSTON, and LOHIER, *Circuit Judges.*

In this appeal we address whether a district court has ancillary jurisdiction to expunge all records of a valid conviction. In 2001 petitioner-appellee Jane Doe was convicted in the United States District Court for the Eastern District of New York (Gleeson, *J.*) of health care fraud and was sentenced principally to five years' probation. In 2014 Doe moved to expunge all records of her conviction because it prevented her from getting or keeping a job as a home health aide. Relying on this Court's decision in United States v. Schnitzer, 567 F.2d 536 (2d Cir. 1977), the District Court held that it had jurisdiction to entertain Doe's motion and granted it. Because we conclude that Schnitzer applies only to arrest records, we hold that the District Court lacked jurisdiction to consider

1 Doe's motion. We therefore **VACATE** and **REMAND** with instructions to
2 dismiss Doe's motion for lack of jurisdiction. Judge LIVINGSTON concurs
3 in a separate opinion.
4
5 NOAM BIALE (Michael Tremonte, Emily
6 Burgess, Sher Tremonte LLP, New York, NY;
7 Bernard H. Udell, Brooklyn, NY, *on the brief*), Sher
8 Tremonte LLP, New York, NY, *for* Petitioner-
9 Appellee.
10
11 BRADLEY T. KING (David C. James, *on the brief*),
12 Assistant United States Attorneys, *for* Robert L.
13 Capers, United States Attorney for the Eastern
14 District of New York, Brooklyn, NY.

15 Gabriel P. Harvis, Alex Lesman, Harvis & Fett
16 LLP, New York, NY; *for amicus curiae* The
17 Association of the Bar of the City of New York.

18 Leigh A. Krahenbuhl, Jones Day, Chicago, IL;
19 Lawrence D. Rosenberg, Paul V. Lettow, Jones
20 Day, Washington, DC; *for amicus curiae* Collateral
21 Consequences Resource Center, Inc.

22 Judith Whiting (Estee Konor, Emily Hoffman, *on*
23 *the brief*), The Community Service Society of New
24 York, New York, NY; Deborah H. Karpatkin,
25 New York, NY; *for amici curiae* The Community
26 Service Society of New York, National
27 Employment Lawyers Association of New York,
28 The Bronx Defenders, Center for Community
29 Alternatives, The Fortune Society, The Legal Aid
30 Society, Legal Action Center, MFY Legal Services,
31 National Employment Law Project, Open Hands
32 Legal Services, Sargent Shriver National Center
33 on Poverty Law, Urban Justice Center, Youth
34 Represent.

35 Frederick M. Oberlander, Montauk, NY; Richard
36 E. Lerner, New York, NY; *for amicus curiae*
37 Frontiers of Freedom Institute, Inc.

38 Joel B. Rudin, New York, NY; Harry Sandick,
39 Joshua A. Goldberg, Juvaria S. Khan, Patterson
40 Belknap Webb & Tyler LLP, New York, NY; *for*

1 *amici curiae* The New York Council of Defense
2 Lawyers & The National Association of Criminal
3 Defense Lawyers.

4 LOHIER, *Circuit Judge*:

5 In this appeal we address whether a district court has ancillary
6 jurisdiction to expunge all records of a valid conviction. The case arises
7 from Jane Doe's health care fraud conviction in 2001 after a jury trial in the
8 United States District Court for the Eastern District of New York (Gleeson,
9 J.). The District Court sentenced Doe principally to five years' probation.
10 In 2014, seven years after her term of probation ended, Doe moved to have
11 her record of conviction expunged because her conviction prevented her
12 from getting or keeping a job as a home health aide. Relying on United
13 States v. Schnitzer, 567 F.2d 536 (2d Cir. 1977) and Kokkonen v. Guardian
14 Life Insurance Company of America, 511 U.S. 375 (1994), the District Court
15 held in a decision and order dated May 21, 2015 that it had ancillary
16 jurisdiction to consider and grant Doe's motion. It then directed the
17 Government to seal all hard copy records and to delete all electronic
18 records of Doe's conviction. The Government appeals that decision as well
19 as a related order.

1 We hold that the District Court lacked jurisdiction to consider Doe's
2 motion to expunge records of a valid conviction. We therefore **VACATE**
3 and **REMAND** with instructions to dismiss Doe's motion for lack of
4 jurisdiction.

5 **BACKGROUND**

6 To resolve this appeal, we accept as true the following facts taken
7 from the District Court's opinion and order granting Doe's expungement
8 motion. See Doe v. United States, 110 F. Supp. 3d 448 (E.D.N.Y. 2015).
9 In 1997 Doe, a single mother with no prior criminal history, worked
10 as a home health aide but struggled to pay her rent. Id. at 449-50. That
11 year Doe decided to join an automobile insurance fraud scheme in which
12 she posed as a passenger in a staged car accident. As part of the scheme
13 she feigned injury and recovered $2,500 from a civil claim related to the
14 accident. Id. at 449-50. In 2001 a jury convicted Doe of "knowingly and
15 willfully" participating in a "scheme . . . to defraud any health care benefit
16 program" in violation of 18 U.S.C. § 1347. Id. at 450; 18 U.S.C. § 1347(a)(1).
17 On March 25, 2002, the District Court imposed a sentence of five years'

1 probation and ten months' home detention, as well as a restitution order of
2 $46,701. Doe, 110 F. Supp. 3d at 450.
3 By 2008 Doe had completed her term of probation. But she could
4 not keep a job in the health care field, the only field in which she sought
5 work. Doe was sometimes hired as a home health worker by employers
6 who did not initially ask whether she had been convicted of a crime. But
7 she was fired when the employers eventually conducted a background
8 check that revealed her conviction. Id. at 451-52.
9 On October 30, 2014, Doe filed a pro se motion asking the District
10 Court to expunge her conviction "because of the undue hardship it has
11 created for her in getting — and especially keeping — jobs." Id. at 448-49.
12 Doe had by all accounts led an exemplary life since her conviction thirteen
13 years earlier. Id. at 455.
14 Relying first on Schnitzer, 567 F.2d at 539, the District Court
15 determined that it had ancillary jurisdiction to consider Doe's motion.
16 Doe, 110 F. Supp. 3d at 454 & n.16; see Schnitzer, 567 F.2d at 538-39
17 (holding that "[a] court, sitting in a criminal prosecution, has ancillary
18 jurisdiction to issue protective orders regarding dissemination of arrest

records," and that "expungement . . . usually is granted only in extreme circumstances" (quotation marks omitted)). In doing so, the District Court acknowledged that the Supreme Court in Kokkonen had "limited ancillary jurisdiction of collateral proceedings to instances where it is necessary '(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent,' and '(2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.'" 110 F. Supp. 3d at 454 n.16 (quoting Kokkonen, 511 U.S. at 379-80). But the District Court determined that Doe's motion satisfied both of these categories. Id.

First, the District Court explained, the motion's "sole focus is the record of the conviction that occurred in this case, and the exercise of discretion it calls for is informed by, inter alia, the facts underlying the conviction and sentence and the extensive factual record created while Doe was under this Court's supervision for five years." Id. Second, the court pointed out, "few things could be more essential to 'the conduct of federal-court business' than the appropriateness of expunging the public records that business creates." Id. (quoting Kokkonen, 511 U.S. at 381).

The District Court also cited three reasons why the consequences of Doe's conviction were "extreme" enough to warrant expungement of her criminal record. First, Doe's offense of conviction "is distant in time and nature from [her] present life," and "[s]he has not even been re-arrested, let alone convicted, in all th[e] years" since her conviction. Id. at 455 (quotation marks omitted). Second, Doe's "criminal record has had a dramatic adverse impact on her ability to work," as "[s]he has been terminated from half a dozen [home health aide] jobs because of the record of her conviction" – a difficulty that was "compounded" by the fact that Doe is over 50 years old and black. Id.; see also id. at 449, 452. Third, "[t]here was no specter at the time that she had used her training as a home health aide to help commit or cover up her crime," and "[t]here is no specter now that she poses a heightened risk to prospective employers in the health care field." Id. at 457.

For these reasons, the District Court granted Doe's motion and ordered "that the government's arrest and conviction records, and any other documents relating to this case, be placed in a separate storage facility, and that any electronic copies of these records or documents and

1 references to them be deleted from the government's databases, electronic

2 filing systems, and public record."[1] Id. at 458.

3 This appeal followed.

4 **DISCUSSION**

5 "Federal courts . . . are courts of limited jurisdiction." Wynn v. AC

6 Rochester, 273 F.3d 153, 157 (2d Cir. 2001). "Even where the parties are

7 satisfied to present their disputes to the federal courts, the parties cannot

8 confer subject matter jurisdiction where the Constitution and Congress

9 have not." Id. We conclude that the District Court did not have

10 jurisdiction over Doe's motion pursuant to 18 U.S.C. § 3231 because Doe's

11 conviction was valid and the underlying criminal case had long since

12 concluded.

13 Citing the Federal Rules of Criminal Procedure, Doe argues that

14 federal courts broadly retain subject matter jurisdiction over criminal cases

15 even after judgment has been entered. We agree that certain motions may

[1] Although Doe's petition was termed a motion to "expunge" her criminal conviction, we agree with Doe and certain amici that the term "expunge" does not accurately describe what the District Court ultimately ordered. In effect, the District Court ordered the records of Doe's conviction sealed rather than expunged or destroyed. Consistent with the parties' briefs, however, we use the term "expunge" or "expungement" to resolve the question presented.

1 be raised after the entry of judgment in criminal cases. We also recognize
2 that the time limits for bringing those motions are often non-jurisdictional.
3 But we are not persuaded that the District Court had subject matter
4 jurisdiction to decide Doe's motion in this case. The relevant Rules of
5 Criminal Procedure all provide for limited jurisdiction over specified types
6 of post-judgment motions. See, e.g., Fed. R. Crim. P. 35(b) (allowing
7 motions to reduce a sentence based on substantial assistance to the
8 government). None of these rules remotely suggests, however, that
9 district courts retain jurisdiction over any type of motion years after a
10 criminal case has concluded.

11 Nor are we persuaded that the District Court had ancillary
12 jurisdiction to consider Doe's motion. "The boundaries of ancillary
13 jurisdiction are not easily defined and the cases addressing it are hardly a
14 model of clarity," but "[a]t its heart, ancillary jurisdiction is aimed at
15 enabling a court to administer justice within the scope of its jurisdiction."
16 Garcia v. Teitler, 443 F.3d 202, 208 (2d Cir. 2006) (emphasis added)
17 (quotation marks omitted). "Without the power to deal with issues
18 ancillary or incidental to the main action, courts would be unable to

1 effectively dispose of the principal case nor do complete justice in the
2 premises." Id. (quotation marks omitted).
3 With that in mind, we turn briefly to Schnitzer, on which the District
4 Court relied to decide that it had ancillary jurisdiction to grant Doe's
5 motion. In Schnitzer, the defendant filed a motion to expunge his arrest
6 record following an order of dismissal in his criminal case. After the
7 district court denied his motion, the defendant argued on appeal that the
8 district court lacked jurisdiction to decide his motion in the first place. We
9 rejected the defendant's argument. We held that "[a] court, sitting in a
10 criminal prosecution, has ancillary jurisdiction to issue protective orders
11 regarding dissemination of arrest records." 567 F.2d at 538.
12 Although Schnitzer involved an arrest record, the District Court was
13 not alone in thinking that it extends to records of a valid conviction. See
14 United States v. Mitchell, 683 F. Supp. 2d 427, 430 n.10 (E.D. Va. 2010). But
15 we think it is clear that Schnitzer applies only to arrest records after an
16 order of dismissal. See Schnitzer, 567 F.2d at 538 (holding that "[a] court,
17 sitting in a criminal prosecution, has ancillary jurisdiction to issue
18 protective orders regarding dissemination of arrest records" (emphasis

1 added)); id. at 539 (noting that "[n]o federal statute provides for the
2 expungement of an arrest record," but that "expungement lies within the
3 equitable discretion of the court" (emphasis added)). Our reading is
4 supported by the fact that Schnitzer itself relied on decisions that were
5 confined to the expungement of arrest records following dismissal of a
6 criminal case. See Morrow v. District of Columbia, 417 F.2d 728, 741 (D.C.
7 Cir. 1969) (holding that the district court's exercise of ancillary jurisdiction
8 over a motion to expunge arrest records was proper); United States v.
9 Linn, 513 F.2d 925, 927 (10th Cir. 1975) (same); United States v. Rosen, 343
10 F. Supp. 804, 806 (S.D.N.Y. 1972) (exercising jurisdiction over a motion to
11 expunge arrest records); United States v. Seasholtz, 376 F. Supp. 1288, 1289
12 (N.D. Okla. 1974) (same). In Morrow, for example, the D.C. Circuit
13 explained that "an order regarding dissemination of arrest records in a
14 case dismissed by the court is reasonably necessary to give complete effect
15 to the court's order of dismissal." 417 F.2d at 741. We therefore conclude
16 that Schnitzer is confined to the expungement of arrest records following a
17 district court's order of dismissal and as such does not resolve whether the

1 District Court had ancillary jurisdiction to expunge records of a valid
2 conviction in this case.[2]

3 The District Court also cited Kokkonen in support of its decision to
4 exercise ancillary jurisdiction over Doe's motion. In Kokkonen, the
5 Supreme Court determined that a district court had improperly exercised
6 ancillary jurisdiction to enforce a settlement agreement in a civil suit that it
7 had previously closed without expressly retaining jurisdiction to enforce
8 the agreement. As the District Court recognized, the Supreme Court
9 instructed that ancillary jurisdiction may be exercised "for two separate,
10 though sometimes related, purposes: (1) to permit disposition by a single
11 court of claims that are, in varying respects and degrees, factually
12 interdependent, and (2) to enable a court to function successfully, that is, to
13 manage its proceedings, vindicate its authority, and effectuate its decrees."
14 Kokkonen, 511 U.S. at 379-80. Given the facts in Kokkonen, the Court held
15 that enforcing a settlement agreement upon which the dismissal was

[2] Although it is unnecessary for us to decide the issue today, we do not view the Supreme Court's decision in Kokkonen as necessarily abrogating Schnitzer. To the contrary, exercising ancillary jurisdiction to expunge (seal, delete) arrest records following a district court's order of dismissal appears to comport with Kokkonen (insofar as it applies to criminal cases) because it may serve to "effectuate [that] decree[]." Kokkonen, 511 U.S. at 380.

1 predicated fell into neither category. The Court explained that "the facts
2 underlying respondent's dismissed claim . . . and those underlying its
3 claim for breach of settlement agreement have nothing to do with each
4 other," and "the only order here was that the suit be dismissed, a
5 disposition that is in no way flouted or imperiled by the alleged breach of
6 the settlement agreement." Id. at 380.

7 Relying on Kokkonen, Doe argues that the District Court's exercise
8 of ancillary jurisdiction served to "vindicate its sentencing decree" issued
9 in 2002. Appellee's Br. 27. The District Court phrased the same point
10 slightly differently by characterizing its original decree as having
11 "sentenced [Doe] to five years of probation supervision, not to a lifetime of
12 unemployment." Doe, 110 F. Supp. 3d at 457.

13 We reject Doe's argument. The District Court's sentence had long
14 ago concluded and its decrees long since expired by the time Doe filed her
15 motion. Under those circumstances, expunging a record of conviction on
16 equitable grounds is entirely unnecessary to "manage [a court's]
17 proceedings, vindicate its authority, [or] effectuate its decrees."
18 Kokkonen, 511 U.S. at 380. "Expungement of a criminal record solely on

1 equitable grounds, such as to reward a defendant's rehabilitation and
2 commendable post-conviction conduct, does not serve any of th[e] goals"
3 identified in Kokkonen's second prong. Sumner, 226 F.3d at 1014; see also
4 United States v. Lucido, 612 F.3d 871, 875 (6th Cir. 2010) (holding that a
5 district court lacked jurisdiction to consider a motion to expunge records
6 of a valid indictment and later acquittal because "[t]hese criminal cases
7 have long since been resolved, and there is nothing left to manage,
8 vindicate or effectuate").

9 Doe alternatively argues that the District Court's supervision of her
10 criminal proceedings (including the sentence) and its subsequent handling
11 of her motion to expunge her conviction on equitable grounds were
12 "factually interdependent" under Kokkonen, 511 U.S. at 379. We agree
13 that the District Court's review of Doe's motion may have depended in
14 part on facts developed in her prior criminal proceeding. See Doe, 110 F.
15 Supp. 3d at 454 n.16 ("[T]he exercise of discretion [that Doe's expungement
16 motion] calls for is informed by, inter alia, the facts underlying the
17 conviction and sentence and the extensive factual record created while Doe
18 was under this Court's supervision for five years."). But we fail to see how

1 these two analytically and temporally distinct proceedings can be
2 described as "factually interdependent."

3 To the contrary, a motion to expunge records of a valid conviction
4 on equitable grounds will ordinarily be premised on events that are
5 unrelated to the sentencing and that transpire long after the conviction
6 itself. For example, in this case the facts underlying the District Court's
7 sentencing were clearly independent of the facts developed in Doe's
8 motion filed years later. Conversely, the District Court granted Doe's
9 motion based on facts and events (her repeated efforts to obtain
10 employment) that transpired years after her sentencing and term of
11 probation. Id. at 452, 456-57; see United States v. Coloian, 480 F.3d 47, 52
12 (1st Cir. 2007) (holding that "[a]s in Kokkonen, the original claims brought
13 before the district court in this [criminal] case have nothing to do with the
14 equitable grounds upon which Coloian seeks the expungement of his
15 criminal record"). And the collateral employment consequences Doe faces
16 today arise from the very fact of her conviction, not from the District
17 Court's sentencing proceedings or Doe's probationary term. For these
18 reasons, we conclude that Doe's original sentencing and her motion to

1 expunge are not "mutually dependent." Merriam-Webster Dictionary (3d
2 ed.) (defining "interdependent").

3 Finally, we note that Congress has previously authorized district
4 courts to expunge lawful convictions under certain limited circumstances
5 not present in this case. See 18 U.S.C. § 3607(c) (upon the application of
6 certain drug offenders who have been placed on prejudgment probation
7 and were less than twenty-one years old at the time of the offense, "the
8 court shall enter an expungement order" expunging all public "references
9 to his arrest for the offense, the institution of criminal proceedings against
10 him, and the results thereof"); 18 U.S.C. § 5021(b) (repealed 1984)
11 (providing that after sentencing a youth offender to probation, a district
12 court "may thereafter, in its discretion, unconditionally discharge such
13 youth offender from probation . . . which discharge shall automatically set
14 aside the conviction"). We think it significant (though not dispositive) that
15 Congress failed to provide for jurisdiction under the circumstances that
16 exist here.

17 In summary, we hold that the District Court's exercise of ancillary
18 jurisdiction in this case served neither of the goals identified in Kokkonen.

1 Our holding is in accord with that of every other sister Circuit to have
2 addressed the issue since Kokkonen. See United States v. Field, 756 F.3d
3 911, 915-16 (6th Cir. 2014); Lucido, 612 F.3d at 875-76; Coloian, 480 F.3d at
4 52; United States v. Meyer, 439 F.3d 855, 859-60 (8th Cir. 2006); United
5 States v. Dunegan, 251 F.3d 477, 480 (3d Cir. 2001); Sumner, 226 F.3d at
6 1014-15.[3]
7 The unfortunate consequences of Doe's conviction compel us to
8 offer a few additional observations. First, our holding that the District
9 Court had no authority to expunge the records of a valid conviction in this
10 case says nothing about Congress's ability to provide for jurisdiction in
11 similar cases in the future. As described above, Congress has done so in
12 other contexts. It might consider doing so again for certain offenders who,
13 like Doe, want and deserve to have their criminal convictions expunged
14 after a period of successful rehabilitation. Second, only a few months ago
15 (while this appeal was pending), the Attorney General of the United States

[3] At oral argument, Doe waived any argument in support of sealing only the judicial records of conviction in her case, rather than all available records retained by the Government. See Oral Arg. Tr. 20; cf. Gambale v. Deutsche Bank AG, 377 F.3d 133, 141-42 (2d Cir. 2004).

recognized and aptly described the unfortunate lifelong toll that these convictions often impose on low-level criminal offenders:

> Too often, Americans who have paid their debt to society leave prison only to find that they continue to be punished for past mistakes. They might discover that they are ineligible for student loans, putting an education out of reach. They might struggle to get a driver's license, making employment difficult to find and sustain. Landlords might deny them housing because of their criminal records – an unfortunately common practice. They might even find that they are not allowed to vote based on misguided state laws that prevent returning citizens from taking part in civic life.

Attorney General Loretta E. Lynch Releases Roadmap to Reentry: The Justice Department's Vision to Reduce Recidivism through Federal Reentry Reforms (Apr. 25, 2016), https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-national-reentry-week-event. "[T]oo often," the Attorney General said, "the way that our society treats Americans who have come into contact with the criminal justice system . . . turns too many terms of incarceration into what is effectively a life sentence." Id.

1 **CONCLUSION**

2 For the foregoing reasons, we **VACATE** the District Court's May 21
3 and 22, 2015 orders and **REMAND** with instructions to dismiss Doe's
4 motion for lack of jurisdiction.

LIVINGSTON, *Circuit Judge*, concurring:

I concur fully in the majority opinion, with two exceptions. First, I do not join footnote two, addressing whether *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), abrogated our decision in *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977). The majority implies, in dicta, that *Schnitzer*'s jurisdictional holding may have survived *Kokkonen*. The weight of authority from other circuits appears to the contrary.[1] Regardless of the proper resolution

[1] *See United States v. Lucido*, 612 F.3d 871, 875-76 (6th Cir. 2010) (holding that "federal courts lack ancillary jurisdiction to consider expungement motions directed to the executive branch," and in the process abrogating a prior Sixth Circuit precedent to the contrary on the basis that it "c[ould not] be reconciled with *Kokkonen*"); *United States v. Coloian*, 480 F.3d 47, 51-52 (1st Cir. 2007) (holding that federal jurisdiction does not "provide[] ancillary jurisdiction over equitable orders to expunge because such orders do not fit within *Kokkonen*'s purposes for ancillary jurisdiction," and distinguishing *Schnitzer* on the ground that it "predate[s] *Kokkonen* . . . which raises questions as to [its] continued viability"); *United States v. Meyer*, 439 F.3d 855, 859-601 (8th Cir. 2006) (though factually addressing only expungement of a conviction (rather than an arrest record), stating that "[i]n light of the Supreme Court's instruction narrowing the scope of ancillary jurisdiction in *Kokkonen* . . . , we are convinced that a district court does not have ancillary jurisdiction to expunge a criminal record based solely on equitable grounds"); *United States v. Dunegan*, 251 F.3d 477, 479-80 (3d Cir. 2001) (citing *Kokkonen* for the proposition that "in recent years [the Supreme Court] has held that ancillary jurisdiction is much more limited," and relying on *Kokkonen* to hold that "in the absence of any applicable statute enacted by Congress, or an allegation that the criminal proceedings were invalid or illegal, a District Court does not have the jurisdiction to expunge a criminal record, even when ending in an acquittal"); *United States v. Sumner*, 226 F.3d 1005, 1015 (9th Cir. 2000) (relying on *Kokkonen* to hold "that a district court does not have ancillary jurisdiction in a criminal case to expunge an arrest or conviction record where the sole basis alleged by the defendant is that he or she seeks equitable relief"); *cf. Lucido*, 612 F.3d at 876 (listing cases, including *Schnitzer*, that hold that

of this question, having found that *Schnitzer* is inapposite to this case, I would not further opine on its continued validity.

Second, I do not join the majority's discussion of the merits of affording courts jurisdiction to expunge criminal convictions, which begins on page 17. I am sympathetic to the concerns the majority raises in this dicta, but I note that there are other significant considerations — including the value of governmental and judicial transparency — that must also be assessed in the context of this policy debate. Having concluded that we lack jurisdiction to reach the merits of this case, I would not suggest to Congress how it might go about assessing and weighing these equities.

---

federal courts have jurisdiction to equitably expunge particular criminal records in at least some circumstances, but observing that such authority "comes from decisions that predate *Kokkonen* . . . or that never discuss or even cite [it]").

The New York Times | https://nyti.ms/2udQXih

U.S.

Prosecutors' Dilemma: Will Conviction Lead to 'Life Sentence of Deportation'?

By VIVIAN YEE JULY 31, 2017

The drunken-driving case seemed straightforward, the kind that prosecutors in Seattle convert into a quick guilty plea hundreds of times a year: a swerving car, a blood-alcohol level more than twice the legal limit, a first-time offense that caused no injuries.

The only complication was the driver. A 23-year-old undocumented immigrant studying at the University of Washington, she had gained some assurance against deportation through a federal program for people who had entered the country illegally as children. If she pleaded guilty to driving under the influence, the punishment any Washington resident might face could be compounded by a more permanent penalty. She could lose her protected status; she could be deported.

Which, for the prosecutor, presented a difficulty: Was this what justice should look like?

Now that President Trump's hard line has made deportation a keener threat, a growing number of district attorneys are coming to the same reckoning, concluding that prosecutors should consider potential repercussions for immigrants before

7
ARTICLES REMAINING

SUBSCRIBE NOW Subscriber login

criminal justice system treats immigrants, hoping to hopscotch around any unintended immigration pitfalls.

These shifts may inaugurate yet another local-versus-federal conflict with the Trump administration, which is already tussling with many liberal cities over other protections for immigrants.

For prosecutors, such policies are also stretching, if not bursting, the bounds of the profession. Justice is supposed to be blind to the identity of a defendant. But, the argument goes, the stakes might warrant a peek.

"There's certainly a line of argument that says, 'Nope, we're not going to consider all your individual circumstances, we want to treat everybody the same,'" said Dan Satterberg, the prosecuting attorney for Seattle and a longtime Republican, who instituted an immigration-consequences policy last year and strengthened it after the presidential election. "But more and more, my eyes are open that treating people the same means that there isn't a life sentence of deportation that might accompany that conviction."

With that in mind, his office allowed the student to plead guilty to reckless driving instead of driving under the influence. The deal, which included three days of community service and two years of probation — milder than the standard driving-under-the-influence penalty of 24 hours in jail, a few days' community service and five years' probation — did not jeopardize her protected status.

But many prosecutors remain wary, hesitant to meddle in what they regard as the federal government's business and even more reluctant to depart from what they say is a bedrock principle of the system.

"There's probably hundreds if not thousands of issues that I suppose we could take into consideration," said Brian McIntyre, the county attorney in Cochise County, Ariz., "and when we do that, we necessarily wind up not being as fair to someone else."

Cochise prosecutors are not supposed to consider the collateral effects of a conviction, whether it be to a child custody case or a military career.

If he made accommodations for an immigrant, Mr. McIntyre said, he felt that he would also owe a citizen in similar circumstances the same option, "because is he not being, essentially, negatively impacted by his U.S. citizenry?"

A criminal record often has different stakes for an immigrant than it does for a citizen. It can mean losing a green card or being barred from citizenship. Those who lack legal status can lose any chance to gain it. Those with legal status, as well as those without, can face automatic deportation.

In many cases, the city-and-state-level changes dovetail with broader criminal justice reforms that were already underway before Mr. Trump took office.

But to the administration, policies that help noncitizens duck immigration penalties are tantamount to an assault on the rule of law.

"It troubles me that we've seen district attorneys openly brag about not charging cases appropriately under the laws of our country," Attorney General Jeff Sessions said in April.

The local efforts to help immigrants may not always work. The Trump administration has made clear that anyone without legal status may be deported, regardless of whether they have been convicted of a crime.

But reducing criminal penalties can help immigrants by keeping them out of jail, which can make it more difficult for Immigration and Customs Enforcement to find them, or by preserving their options in immigration court.

In May, Denver stopped imposing a maximum jail sentence of 365 days for some lower-level crimes, like shoplifting. A conviction with a potential sentence of a year or longer — even if the actual sentence is far shorter — can disqualify noncitizens from most forms of legal status or render them deportable.

"Whether you committed a physical assault on someone or were caught urinating in the park, you were subject to the same maximum penalties, which doesn't make sense," the mayor, Michael B. Hancock, said in an interview.

The Denver shift builds on state laws in California and Washington State that cap misdemeanor penalties at 364 days. That ceiling applies retroactively in California, a major benefit for people detained by the immigration authorities over old convictions.

Immigration lawyers say they frequently see immigrants stripped of green cards or visas over convictions for lower-level crimes, exposing them to deportation.

"Not only do you do your time and pay your fine under criminal court," said Jeannette Zanipatin, a lawyer at the Mexican American Legal Defense and Educational Fund, "but you're literally banished from your family and everyone you know."

In some states, interventions have come from as high up as the governor's mansion. In recent months, Democratic governors in Colorado, Virginia and New York have tried to help immigrants facing deportation by pardoning their old crimes, though the results have been mixed. One was released after a pardon, but another has been deported and a third remains detained.

Prosecutors who take immigration status into account say this consideration will not be extended to serious or violent crimes. They argue that showing flexibility in nonviolent, minor cases will help build trust with immigrants in their communities, making them more likely to report crimes and serve as witnesses.

The acting Brooklyn district attorney, Eric Gonzalez, went further than most in April, when he announced that his prosecutors would begin notifying defense lawyers about the potential immigration fallout of their clients' cases and that he would hire two in-house immigration lawyers to consult on prosecutions.

Days later, the state's attorney for Baltimore, Marilyn J. Mosby, said she had told her staff members to use their discretion when it came to cases with an immigration factor, considering defendants' prior records and community ties.

"There's no set standard," she said. "You have to base it on everything that's in front of you."

It is not yet clear what that will look like in Baltimore or Brooklyn. But in Santa Clara County, Calif., whose district attorney was among the first to outline an official policy, prosecutors often allow a noncitizen to plead guilty to a lesser charge in exchange for more jail time or probation.

"If we're giving something, we're going to get something," said the district attorney, Jeff Rosen.

California law now requires immigration consequences to be factored into criminal cases. The state has also passed a law allowing people to erase or revise old convictions if they successfully argue that they were not advised at the time that a guilty or no-contest plea would endanger their immigration status.

Occasionally, cases involving noncitizens have boomeranged on local officials. In April, Mr. Rosen's office was plunged into a controversy surrounding a domestic-violence case in which a green-card holder from India was charged with felony domestic violence against his wife, a citizen, but ultimately pleaded guilty to lesser charges. The woman has criticized the plea deal as too lenient.

Although prosecutors considered the potential loss of the man's green card in negotiations, Mr. Rosen said, they felt there was not enough evidence to prove the initial charges in court.

In Boston, a suspect in the double murder of two physicians in May, a legal resident from Guinea-Bissau, had been able to keep his green card despite robbing two banks in recent years after his lawyer negotiated a plea deal that allowed him to plead to larceny instead of unarmed bank robbery. The sentence he received from a judge was also one day short of the 365-day threshold that could have led to his deportation.

But backlash has been infrequent, and prosecutors have continued to take immigrants' status into account.

Luke Larson, the deputy prosecutor on the case of the Washington State student charged with drunken driving, said several factors favored a milder charge, including her strong academic record and lack of a criminal history.

Most unsettling, for him, was that she had not been back to her home country since she was a toddler. She got the deal.

"It's easier to say, 'I don't want to know about the potential immigration consequences, and I don't care,'" said his boss, Mr. Satterberg. "It's harder when you want to know. Then it does require you to know more and to be more creative and to take more of a risk with the case."

Follow Vivian Yee on Twitter @vivianhyee.

A version of this article appears in print on August 1, 2017, on Page A1 of the New York edition with the headline: Deal With Prosecutor to Avoid A 'Life Sentence of Deportation'.

© 2017 The New York Times Company

ARTICLE 6X. COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION

§ 6x.01. Definitions.

(1) For purposes of this Article, collateral consequences are penalties, disabilities, or disadvantages, however denominated, that are authorized or required by state or federal law as a direct result of an individual's conviction but are not part of the sentence ordered by the court.

(2) For purposes of this Article, a collateral consequence is mandatory if it applies automatically, with no determination of its applicability and appropriateness in individual cases.

(3) For purposes of this Article, a collateral consequence is discretionary if a civil court, or administrative agency or official is authorized, but not required, to impose the consequence on grounds related to an individual's conviction.

Comment:

a. Collateral consequences, generally. When the Model Penal Code was adopted by the American Law Institute in 1962, the primary consequence of conviction was typically a fine, probation, or a period of incarceration. Collateral consequences were limited in most cases to a temporary loss of the right to vote, hold public office, serve on a jury, and testify in court. Since then collateral consequences have proliferated, and now include mandatory deportation, inclusion on a public registry, loss of access to public housing and benefits, financial aid ineligibility, and occupational licensing restrictions. Some of these consequences last for the duration of the convicted individual's life. This section, and those that follow (§§ 6x.02-6x.06), address legal mechanisms by which convicted individuals may seek and obtain relief from some types of collateral consequences.

b. Scope. The term-of-art "collateral consequences" has been defined to include a host of legally imposed or authorized sanctions, usually denominated as civil or regulatory measures triggered by criminal conviction. The Code uses the term to refer specifically to the negative consequences of conviction that are authorized by state or federal law as a result of an individual's conviction. It excludes from the definition of collateral consequences all informal, locally imposed, private, and extralegal consequences of conviction. It also excludes all direct consequences of conviction; that is, those consequences that are authorized by a sentencing court as part of an offender's criminal sentence. (Those direct consequences may include not only fines and terms of community supervision or custody imposed as a penalty for a criminal offense, but also the conditions of supervision and/or institutional restrictions, such as security classification, imposed in connection with the service of the criminal sentence.)

Subsections (2) and (3) define two distinct categories of collateral consequences, distinguished by their legal modes of operation. Mandatory collateral consequences are those imposed automatically by force of law as a result of conviction. The non-individualized nature of mandatory consequences implicates the Code's policies against mandatory punishments that allow no room for individualization by a sentencing

judge, see § 6.06 and Comment *m*. Discretionary collateral consequences are those consequences that may, but need not, be imposed on an individual as a result of criminal conviction. Although these consequences can be long-lasting, they allow room for consideration of individual circumstances by discretionary decisionmakers, and are therefore less problematic under the Code.

---

§ 6x.02. Sentencing Guidelines and Collateral Consequences.

(1) As part of the sentencing guidelines, the sentencing commission [or other designated agency] shall compile, maintain, and publish a compendium of all collateral consequences contained in [the jurisdiction's] statutes and administrative regulations.

(a) For each crime contained in the criminal code, the compendium shall set forth all collateral consequences authorized by [the jurisdiction's] statutes and regulations, and by federal law.

(b) The commission [or designated agency] shall ensure the compendium is kept current.

(2) The sentencing commission shall provide guidance for courts considering petitions for orders of relief from mandatory collateral consequences under §§ 6x.04 and 6x.05. The commission's guidance shall take into account the extent to which a mandatory consequence is substantially related to the elements and facts of the offense and likely to impose a substantial and unjustified burden on the defendant's reintegration.

Comment:

a. Scope. The goal of this new provision is to aggregate in one location as much information as possible about collateral consequences so that the public, defendants, counsel, and courts can easily access information regarding the full consequences of conviction. This provision requires the sentencing commission to collect and maintain information on all collateral consequences as defined in § 6x.01, whether mandatory or discretionary, and to make that information accessible to the public.

The provision requires the commission to regularly maintain and publish its compendium, making it a reliable and easily accessible resource for individuals and their lawyers at every stage of a criminal prosecution, from charging through sentencing.

b. Information collected. Under subsection (1), the sentencing commission is required to "compile, maintain, and publish a compendium of all legislatively authorized collateral consequences of criminal conviction." Section 6x.02(1)(a) requires the sentencing commission to set forth in a compendium "all collateral consequences authorized by [the relevant jurisdiction's] statutes and regulations, and by federal law." Excluded from the commission's compendium are all non-federal, extra-jurisdictional collateral consequences, and all disqualifications and sanctions not contained in statutes or administrative code provisions, such as municipal ordinances.

c. Distribution. Subsection (1) requires the sentencing commission to "publish a compendium of all collateral consequences contained in . . . statutes and administrative regulations." The provision does not mandate how publication should occur or to whom the compendium should be distributed; however, by mandating publication, it implies that the compendium should be widely available. Electronic methods of publications may prove most simple, accessible, and cost-effective.

d. Organization. Subsection (1)(a) requires the sentencing commission to provide information about all mandatory collateral consequences that apply to every offense listed in the criminal code, arranged by crime. This requirement is designed to ensure that the compendium is accessible both to legal professionals and to general users who want to know the full consequences of conviction of any given offense. Cf. ABA Standards on Mandatory Collateral Consequences, Standard § 19-1.2(a)(iii) (designated agency should "provide the means by which information concerning the mandatory collateral consequences that are applicable to a particular offense is readily available"). Although not required by the Code, the compendium would most usefully be organized to distinguish between mandatory and discretionary collateral consequences in order to provide parties and courts with an easy-to-use reference for determining which consequences can be subject to a petition for relief under § 6x.04(2).

e. Challenges of nonstatutory collateral consequences. Many collateral consequences (particularly those that relate to residency) are imposed at the local level, by ordinance or common practice. These low-visibility restrictions change often and are difficult to track. In order to ensure that collateral consequences are fairly publicized and scrutinized, states would ideally mandate that all collateral consequences be imposed at the state, rather than the local, level. Nevertheless, recognizing the significant challenges involved in indexing local restrictions as they are currently compiled, subsection (1) requires the sentencing commission to track only those sanctions and disqualifications that are contained in federal and state statutes and regulations.

f. Guiding courts on petitions for relief. Subsection (2) requires sentencing commissions to develop guidance for courts on how best to exercise their discretion when ruling on petitions for relief from mandatory collateral consequences under § 6x.04(2). This Section allows individual commissions to guide courts by developing standards for determining when there is a clear or close connection between a mandatory collateral consequence and the crime of conviction or the facts underlying the criminal case. The "substantial relationship" standard is meant to embody the type of connection that will warrant imposition of a mandatory consequence and, conversely, that will warrant its relief.

Requiring commissions to provide guidance to courts exercising their discretion under § 6x.04(2) furthers the public interest in equitable decisions while preserving judicial discretion. Because such guidance is not currently available from most sentencing commissions, this subsection leaves room for commissions to experiment with offering guidance in forms that differ from traditional structured guidelines. Alternative formats might take the form of bulletins providing relevant data or supplemental information about the purposes and operation of certain mandatory collateral consequences in terms of their public-safety purposes, and collateral consequences most or least likely to advance public safety for certain categories of offenses or offenders. Thus, for example, a mandatory bar to certification as an operator of a commercial vehicle might have a substantial relationship to a crime involving a driving offense, a tenuous

relationship to a crime involving drugs or violence, and little or no relationship to a crime involving theft or false statements. A mandatory bar to public housing might have a substantial relationship to a crime involving serious violence and major drug trafficking, but little or no relationship to dated fraud offenses. A third example is a mandatory bar to a day-care operator's license, which has a clear nexus to violence and sexual assault, but a less clear relationship to a minor drug crime or gambling offense.

The commission's guidance to courts considering motions for relief may also take into account a particular defendant's circumstances that bear on public safety risk, such as other criminal history, age at the time of the offense, time elapsed since the offense, participation in treatment for mental-health or substance-abuse problems, and evidence of rehabilitation.

It is important to bear in mind that, as provided in § 6x.04(3), an order of relief from a mandatory consequence under § 6x.04(2) does not prevent an authorized decisionmaker from later considering the conduct underlying the conviction when making an individualized determination whether to confer the benefit or opportunity in question. In such cases, the benefit or opportunity may be denied notwithstanding the court's order of relief if the conduct underlying the conviction is determined to be reasonably related to the benefit or opportunity the individual seeks to obtain.

---

§ 6x.03. Voting and Jury Service.

(1) No person convicted of a crime shall be disqualified on that basis from exercising the right to vote [, except that an individual serving a custodial sentence as a result of a felony conviction may be disqualified while incarcerated].

(2) A person convicted of a crime may be disqualified on that basis from serving on a jury only until the sentence imposed by the court, including any period of community supervision, has been served.

Comment:

a. Scope. This provision closely tracks § 306.3 of the Model Penal Code (First), with one primary difference. The original Code *required* that incarcerated voters be disqualified from voting, while § 6x.03(1) favors a prohibition on disenfranchisement altogether. The provision offers a bracketed alternative that permits disenfranchisement only during the period of incarceration for those convicted of felony offenses. The original Code required juror disqualification for the full duration of the sentence. Subsection (2) permits, but does not require, juror disqualification during the term of sentence. Subsection (2) does not permit disqualification from jury service after the full sentence has been served.

b. Period of disqualification, voting rights. This provision offers jurisdictions a choice with respect to voter disqualification. The favored option prohibits disenfranchisement as a consequence of conviction in all cases. Although disenfranchisement has been justified as a fitting punishment for transgressing the rules

of civil society, the legal justification for collateral consequences is that they serve regulatory functions, not punitive ones. (This is why collateral consequences can be applied retroactively and are ordinarily not subject to challenge under the Eighth Amendment.) For that reason, punishment alone cannot justify the denial of voting rights to convicted individuals, and there is no evidence suggesting that ballots cast by prisoners are any more likely to be fraudulent than those cast outside prison walls. Furthermore, there are few logistical obstacles to allowing convicted individuals to vote in prison or jail. Two states, Maine and Vermont, already allow prisoners to vote, and both authorize prisoners to complete absentee ballots.

Even though there are few principled or practical arguments in favor of disenfranchising prisoners, a bracketed alternative is included in subsection (1) that would authorize disenfranchisement on the basis of conviction for individuals convicted of felony offenses during the period of imprisonment only. Under this alternative, individuals would regain the right to vote automatically upon release from prison.

c. Full opportunity to exercise the right to vote. Retaining the right to vote while incarcerated has little meaning if those behind bars are unable to exercise their civic rights. To give meaning to the non-bracketed language of subsection (1), individuals serving jail and prison sentences must be given adequate opportunity to exercise the right to vote. This includes the opportunity to register to vote in the jurisdiction where the prisoner is entitled to vote, and to exercise the right, either by absentee ballot or as otherwise permitted by the jurisdiction in which the prisoner is registered.

d. Period of disqualification, jury service. Recognizing the logistical challenges of arranging for jury service in a custodial setting, this provision allows convicted individuals to be excluded from jury service during the custodial phase of any sentence. Additionally, because jury service (particularly in the context of grand-jury proceedings) may expose jurors to confidential information about law-enforcement operations, subsection (2) allows individuals serving terms of community supervision to be excluded from jury service as well. Once an individual has completed his or her sentence, subsection (2) does not allow the individual to be barred from future jury service on the basis of past conviction alone.

---

§ 6x.04. Notification of Collateral Consequences; Order of Relief

(1) At the time of sentencing, the court shall confirm on the record that the defendant has been provided with the following information in writing:

(a) A list of all collateral consequences that apply under state or federal law as a result of the current conviction;

(b) a warning that the collateral consequences applicable to the offender may change over time;

(c) a warning that jurisdictions to which the defendant may travel or relocate may impose additional collateral consequences; and

(d) notice of the defendant's right to petition for relief from mandatory collateral consequences pursuant to subsection (2) during the period of the sentence, and thereafter pursuant to §§ 6x.05 and 6x.06.

(2) At any time prior to the expiration of the sentence, a person may petition the court to grant an order of relief from an otherwise-applicable mandatory collateral consequence imposed by the laws of this state that is related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business.

(a) The court may dismiss or grant the petition summarily, in whole or in part, or may choose to institute proceedings as needed to rule on the merits of the petition.

(b) When a petition is filed, notice of the petition and any related proceedings shall be given to the prosecuting attorney;

(c) The court may grant relief from a mandatory collateral consequence if, after considering the guidance provided by the sentencing commission under § 6x.02(2), it finds that the individual has demonstrated by clear and convincing evidence that the consequence imposes a substantial burden on the individual's ability to reintegrate into law-abiding society, and that public safety considerations do not require mandatory imposition of the consequence.

(d) Relief should not be denied arbitrarily, or for any punitive purpose.

(3) An order of relief granted under this Section does not prevent an authorized decisionmaker from later considering the conduct underlying the conviction when making an individualized determination whether to confer a discretionary benefit or opportunity, such as an occupational or professional license. In such cases, the benefit or opportunity may be denied notwithstanding the court's order of relief if the conduct underlying the conviction is determined to be substantially related to the benefit or opportunity the individual seeks to obtain. If the decisionmaker determines that the benefit or opportunity should be denied based upon the conduct underlying the conviction, the decisionmaker shall explain the reasons for the denial in writing.

Comment:

a. Scope. This provision, new to the Code, provides assurance that convicted individuals are made aware of the collateral consequences to which they will be subject, and provides courts with a mechanism for alleviating some types of mandatory collateral consequences on a case-by-case basis. This provision recognizes that although collateral consequences can serve important regulatory goals, there are instances in which the application of a particular collateral consequence will unnecessarily impede a convicted individual's successful reintegration into the law-abiding community without advancing public safety. This is likely to be most true when the consequence bears little connection to the individual's risk of criminal re-offending.

This Section has two subsections. The first, subsection 6x.04(1), requires courts at sentencing to confirm that defendants have been provided with basic written information about the sources and types of collateral consequences to which they may be subject as a result of criminal conviction. This information,

which may come from counsel or the court, includes a comprehensive list of relevant state- and federally-imposed collateral consequences (presumably drawn from the sentencing commission's compendium, see § 6x.02(1)), along with notice that the consequences may change with time or as a convicted person moves from one jurisdiction to another. While this information should be provided to the defendant at earlier points in the criminal process (such as at arraignment and plea), the sentencing court is obliged to confirm at the time of sentencing that the defendant has been given written notice of the laws that will govern his post-sentencing conduct. Such full disclosure is an improvement on current practice in most states, where individuals are provided with no (or very limited) information about the long-term collateral consequences of their convictions.

In addition to providing the defendant with notice, § 6x.04(2) authorizes the sentencing court, upon request from the convicted individual at sentencing, or at any time during the sentence, to grant relief from the automatic imposition of specific mandatory collateral consequences whose burdens outweigh their regulatory benefits in the particular case. Under § 6x.04(2), a convicted individual may petition the sentencing court at the time of sentencing or thereafter during the term of the sentence to grant relief from the mandatory nature of a collateral consequence that is imposed by state law and is related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business. Although the sentencing court is not obliged to grant relief, or even to hold a hearing on the petition, the court may grant relief when it finds, after consulting any guidance offered by the sentencing commission under § 6x.02(2), that the defendant has shown "by clear and convincing evidence that the consequence imposes a substantial burden on the individual's ability to reintegrate into law-abiding society, and that public safety considerations do not require mandatory imposition of the consequence." See § 6x.04(2)(c). When the sentencing court grants relief from a mandatory collateral consequence under § 6x.04(2), the court merely removes the mandatory nature of the consequence: it does not prevent other authorized decisionmakers, such as licensing boards, from later considering the conduct underlying the conviction when deciding whether to confer a discretionary benefit or opportunity, so long as the facts underlying the conviction are substantially related to the individual's competency to exercise the benefit or opportunity sought. See § 6x.04(3).

b. Notification of collateral consequences. Under subsection (1), the court must confirm on the record that the defendant has been given written notice of the existence of all mandatory collateral consequences that apply under federal law and the law of the relevant jurisdiction at the time of sentencing. (This information is made available by the sentencing commission, which is charged under § 6x.02(1) with "compil[ing], maintain[ing], and publish[ing] a compendium of all collateral consequences contained in [the jurisdiction's] statutes and administrative regulations.") The court must also confirm that the defendant has been informed that discretionary collateral consequences may attend conviction, though it need not specify what those may be. The court must also confirm that the defendant has been given notice of his right to seek relief from any mandatory collateral consequences that are not relieved at the time of sentencing. This notice should include information regarding the offender's right to petition for relief from specific sanctions under § 6x.05 should a need arise after the time of sentencing, and right to petition for a certificate of relief from disabilities under § 6x.06 when the proscribed amount of time has passed.

This provision addresses the obligation of courts to provide information about collateral consequences at the time of sentencing. It is not meant to limit or in any way discourage the practice of providing such information at a much earlier stage of the proceedings. The information about collateral consequences discussed by the court at sentencing should already be familiar to the defendant. Defense counsel should routinely provide and discuss such information with the client at early stages of the prosecution, and before entry of a guilty plea. Even so, ensuring on the record at the time of sentencing that the defendant has been provided with this information in writing guarantees that the individual being sentenced has been given as complete notice as possible of the consequences that attend conviction.

c. The special problem of extra-jurisdictional collateral consequences. Any attempt to limit the application of mandatory collateral consequences is subject to unavoidable jurisdictional constraints. Although a sentencing court can provide relief from some mandatory collateral consequences imposed by the relevant jurisdiction, it cannot relieve those imposed at the federal level or by other jurisdictions to which the offender may travel or move. Section 6x.04 requires the court to ensure that defendants have been advised of all mandatory federal collateral consequences that attach to them as of the date of sentencing. Subsection (1)(c) requires courts to ensure that defendants are aware that additional mandatory and discretionary collateral consequences may be imposed by other jurisdictions and that the consequences imposed by any jurisdiction may change over time.

d. Limits on court's power to grant relief from mandatory collateral consequences. Under § 6x.04(2), the court is only authorized to grant relief from mandatory collateral consequences; it may not remove any discretionary collateral consequences that attend conviction. Furthermore, under this Section the court may only grant relief from mandatory collateral consequences that relate to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business. These restrictions ensure that the court's power to grant relief is directed toward removing significant barriers to successful reintegration, rather than toward addressing collateral consequences that do not significantly impede the convicted person's ability to function as a law-abiding member of society.

e. Notice. Subsection 6x.04(2)(b) requires that the defendant provide the prosecuting attorney with notice of the mandatory collateral consequences from which relief is being sought in order to ensure that the prosecutor is given adequate opportunity to object to or support the petition.

f. Standard for relief. The strategy of the Model Penal Code is to make the law of collateral consequences consistent with overriding goals of public safety and recidivism prevention. With these objectives in mind, collateral consequences are seen as a negative force whenever they impede the successful reintegration of offenders into law-abiding society without offering a commensurate public-safety benefit. Consequently, § 6x.04(2)(b) allows a court to grant relief from mandatory collateral consequences related to "employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business" when it finds that the defendant has shown by clear and convincing evidence that "the consequence imposes a substantial burden on the individual's ability to reintegrate into law-abiding society, and that public-safety considerations do not require mandatory imposition of the consequence."

Applying this standard, courts are most likely to grant relief when a collateral sanction bears little connection to a petitioner's crime of conviction or the facts underlying the criminal case, and when the burden imposed by the consequence also impedes the individual's rehabilitative efforts. Conversely, courts are likely to deny relief in cases where there is a clear or close connection between the collateral consequences and a public-safety risk posed by the offender's criminal conduct. Examples of the latter include the loss of a motor-vehicle license by a person convicted of operating a motor vehicle while intoxicated and prohibiting receipt of a daycare operator's license by a person convicted of the sexual assault of a minor. The defendant bears the burden of proving both the burden and the lack of an adequate public-safety consideration.

g. Prohibition on arbitrary and punitive purposes. Courts have often distinguished between the direct and collateral consequences of conviction by observing that direct consequences of conviction—to which constitutional protections such as the Eighth Amendment apply—are intentionally punitive, while collateral consequences are primarily regulatory. The distinction between direct and collateral consequences is often thin, however. Subsection (2)(d) reminds courts that mandatory collateral consequences should never be justified as a way of enhancing the punishment of any offender, or for any arbitrary reason.

h. Effect of relief. When a court grants relief from a mandatory collateral consequence pursuant to subsection (2), the defendant is excused from complying with any requirements imposed by the sanction and may not be *automatically* barred from receiving specified opportunities and benefits from which he or she would otherwise be barred by virtue of conviction. As subsection (3) makes clear, however, an order of relief does not prevent authorized decisionmakers from later considering the conduct underlying the conviction when deciding whether to confer a *discretionary* benefit or opportunity, such as occupational licensure. In making this determination, the decisionmaker shall consider (a) the time elapsed since the person's conviction; (b) the person's age at the time of the conviction; (c) the seriousness of the conduct underlying the conviction; (d) the person's conduct following conviction, including the person's progress toward rehabilitation, and any information supplied by individuals familiar with the individual's conduct and character; and (e) any information indicating that granting the benefit or opportunity is likely to pose an unreasonable risk to the safety of the public or of any individual.

---

§ 6x.05. Orders of Relief for Convictions from Other Jurisdictions; Relief Following the Termination of a Sentence.

(1) Any individual who, by virtue of conviction in another jurisdiction, is subject or potentially subject in this jurisdiction to a mandatory collateral consequence related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business, may petition the court for an order of relief if:

(a) The individual is not the subject of pending charges in any jurisdiction;

(b) The individual resides, is employed or seeking employment, or regularly conducts business in this jurisdiction; and

(c) The individual demonstrates that the application of one or more mandatory collateral consequences in this jurisdiction will have an adverse effect on the individual's ability to seek or maintain employment, conduct business, or secure housing or public benefits.

(2) An individual convicted in this jurisdiction whose sentence has been fully served may petition under this Section for relief from a mandatory collateral sanction if:

(a) No charges are pending against the individual in any jurisdiction; and

(b) The individual demonstrates that the application of one or more mandatory collateral consequences in this jurisdiction will have an adverse effect on his or her ability to seek or maintain employment, conduct business, or secure housing or public benefits.

(3) The court may grant relief if it finds that the petitioner has demonstrated by clear and convincing evidence a specific need for relief from one or more mandatory consequences, and that public-safety considerations do not require mandatory imposition of the consequence. In determining whether to grant relief, the court should give favorable consideration to any relief already granted to the petitioner by the jurisdiction in which the conviction occurred.

(4) A petition filed under subsection (1) or (2) shall be decided in accordance with the procedures and standards set forth in § 6x.04(2), and an order of relief shall have the effect described in § 6x.04(3).

Comment:

a. Scope. Given the length of many criminal sentences, changes occurring after the sentence has ended may turn a mandatory collateral consequence overlooked at the time of sentencing into a significant obstacle to later reintegration. Section 6x.05 allows an individual to petition the court for relief from a mandatory collateral consequence in either of two circumstances. Subsection 6x.05(1) allows an individual convicted in a foreign jurisdiction to petition the court in the jurisdiction where he "resides, is employed or seeking employment, or regularly conducts business" for relief from one or more mandatory collateral consequences imposed by that jurisdiction. Subsection 6x.05(2) permits similar petitions from individuals convicted within the jurisdiction whose sentences have expired (and over whom the court has therefore lost jurisdiction in the criminal case). In either case, to secure relief petitioners must demonstrate by clear and convincing evidence both a specific need for relief and "that public-safety considerations do not require mandatory imposition of the consequence" from which relief is sought.

b. Standard for relief. Unlike petitions for relief from mandatory collateral consequences that are made during the service of a sentence, see § 6x.04(2), petitions made after the sentence has ended or made by individuals convicted in other jurisdictions require a showing of specific need for the relief sought. Section 6x.05(3). This higher standard reflects the administrative burden of opening a new case and obtaining

information about the closed case or foreign conviction. In all other ways, the procedures to be followed and effects of a grant of relief are identical to those relevant to a petition for relief under § 6x.04(2).

c. Consideration of extrajurisdictional orders of relief. When a convicted person works, resides, or conducts business in more than one jurisdiction, he or she may seek relief from mandatory collateral consequences in each jurisdiction that imposes such consequences. Section 6x.05(3) provides that a court considering a petition under 6x.05(1) from an individual convicted in another jurisdiction should give favorable weight to any relief that has already been granted by the original jurisdiction.

---

§ 6x.06. Certificate of Restoration of Rights.

(1) Any individual convicted of one or more misdemeanors or felonies may petition the [designated agency or court] in the [county] in which the individual resides for a certificate of restoration of rights, provided that:

(a) No criminal charges against the individual are pending; and

(b) [Four] or more years have passed since the completion of all the individual's past criminal sentences with no further convictions.

(2) When a petition is filed under subsection (1), notice of the petition and any scheduled hearings related to it shall be sent to the prosecuting attorney of the jurisdiction that handled the underlying criminal case.

(3) In ruling on a petition filed under subsection (1), the court shall determine the classification of the most serious offense for which the individual has been convicted.

(a) When the individual has been convicted of one or more [fourth or fifth] degree felonies or misdemeanors, the [court or designated agency] should issue the certificate whenever the individual has avoided reconviction during the period following completion of his or her past criminal sentences, unless the prosecution makes a clear showing why the application of one or more collateral consequences should remain in effect.

(b) When the individual has been convicted of a [first, second, or third] degree felony, the [court or designated agency] may issue a certificate of restoration of rights if, after reviewing the record, it finds by a preponderance of the evidence that the individual has shown proof of successful reintegration into the law-abiding community. In making this determination, the court may consider the amount of time that has passed since the individual's most recent conviction, any subsequent involvement with criminal activity, and when applicable, participation in treatment for mental-health or substance-abuse problems linked to past criminal offending. In assessing postconviction reintegration, the [court or designated agency] should not require extraordinary achievement, and when weighing evidence of reintegration should be sensitive to the cultural, educational, or economic limitations affecting petitioners.

(4) A certificate of restoration of rights removes all mandatory collateral consequences to which the petitioner would otherwise be subject under the laws of this jurisdiction as a result of prior convictions, except as provided by Article 213. A court may specify that the certificate should issue with additional exceptions when there is reason to believe that public-safety considerations require the continuation of one or more mandatory collateral consequences. A certificate does not entitle a recipient to any discretionary benefits or opportunities, though it may be used as proof of rehabilitation for purposes of seeking such benefits or opportunities.

(5) Information regarding the criminal history of an individual who has received a certificate of restoration of rights may not be introduced as evidence in any civil action against an employer or its employees or agents that is based on the conduct of the employee or former employee.

Comment:

a. Scope. Like the original provision from which it is derived, proposed § 6x.06 "is concerned with relief from disqualifications" and with placing "appropriate limits on . . . such relief." Model Penal Code (First) § 306.6, Explanatory Note. A certificate of restoration of rights issued under this section has the effect of removing all mandatory collateral consequences, except as provided in Article 213 (now under revision) and with any specific exceptions provided by the court. Unlike §§ 6x.04-6x.05, which are meant to limit the burden of particular collateral consequences, § 6x.06 is a relief mechanism designed to grant broader relief to individuals who have served their sentences and gone on to live law-abiding lives in the community. As a result, the standard for relief under this section requires proof of law-abiding behavior over a sustained period of time. To qualify, an individual must have served his or her full sentence (including any period of supervised release) and have gone four or more years without reconviction. See § 6x.06(4). The effect of a certificate is to remove most, if not all, collateral consequences and to assist the recipient in obtaining employment by shielding employers from introduction of the petitioner's criminal history "in any civil action against an employer or its employees or agents that is based on the conduct of the employee or former employee." Section 6x.06(5).

b. Eligibility. Before petitioning for a certificate of restoration of rights, a petitioner must have fully served all of his or her sentences, including any period of supervised release, and have gone four years or more without committing any new offense. No charges may be pending at the time of application. Eligibility standards for individuals seeking a certificate of restoration of rights are divided into two categories based on the classification of the petitioner's most serious crime of conviction. Section 6x.06(3). For those convicted of misdemeanors and lower-level felony offenses who have served their full sentence plus four additional years without reconviction, the certificate is presumptively appropriate. That presumption can, however, be overcome when "the prosecution makes a clear showing why the application of one or more collateral consequences should remain in effect." Section 6x.06(3)(a).

The four-year exclusion period in subsection (1)(b) is bracketed, and could easily be shortened. There is no one period of sustained law-abiding conduct that indicates conclusively that any given individual will not return to criminal offending. Research shows, however, that in many (though not all) instances offenders

who recidivate are most likely to do so soon after a previous offense and sentence. As multiple years of life in the free community go by without incident, the statistical chances of new criminal behavior begin to decline. While risk of criminality never disappears entirely, over time the risk presented by past offenders comes very close to, or matches, the risk presented by ordinary individuals with no record of criminal involvement. Although these "redemption times" vary depending on age of first offense and the type of crime at issue, four years beyond the completion of any sentence is a conservative period of exclusion, especially for more serious crimes for which the sentence length itself may easily last a decade or more.

c. Standard for relief. The standard for obtaining relief from collateral consequences varies depending on the severity of the crime or crimes for which the petitioner has been convicted. For individuals convicted of less serious crimes, it is enough for the petitioner to demonstrate that he or she has avoided reconviction for a prolonged period of time—unless, that is, the state comes forward with clear evidence that one or more collateral consequences should remain in effect. Section 6x.06(3)(a). For those convicted of more serious offenses, a more searching inquiry is required. In cases where a petitioner has been convicted of a third- or higher-degree felony, the [court or designated agency] has discretion to issue a certificate when the petitioner proves by a preponderance of the evidence that he or she has successfully reintegrated into the law-abiding community. Section 6x.06(3)(b). Rehabilitation is personal, and therefore proof of reintegration will differ from one individual to the next. In determining whether the petitioner has met his or her burden, the [court or designated agency] should consider the lack of reconviction, but may also consider the amount of time that has passed since the individual's most recent conviction, and factors such as participation in treatment for mental-health or substance-abuse problems linked to past criminal offending.

d. Effect of relief. A certificate of restoration of rights removes all mandatory collateral consequences, with two potential exceptions. First, for individuals convicted of sexual offenses, the restrictions on relief set forth in Article 213 apply. Second, the [court or designated agency] may grant the certificate with exceptions "when there is reason to believe that public safety considerations require the continuation of one or more mandatory collateral consequences." Section 6x.06(4).

Like an order of relief issued under § 6x.04, the effect of a certificate of restoration of rights is to remove the mandatory nature of a collateral consequence, and not to prohibit the imposition of discretionary collateral consequences by authorized decisionmakers. A discretionary decisionmaker may deny a benefit or opportunity notwithstanding the certificate of restoration of rights if it finds that the facts underlying the conviction continue to call into question the individual's competency to exercise the benefit or opportunity the individual seeks to obtain, even in light of the individual's post-sentencing conduct. In evaluating the individual's post-sentencing conduct, weight should be given to the court's issuance of the certificate of restoration of rights, which "may be used as proof of rehabilitation for purposes of seeking such benefits or opportunities." Section 6x.06(4).

e. Protection for employers. In addition to removing all mandatory collateral consequences except as otherwise provided, a certificate of restoration of rights provides protection to employers who hire certificate recipients. Subsection (5) provides that "[i]nformation regarding the criminal history of an individual who has received a certificate of restoration of rights may not be introduced as evidence in any

civil action against an employer or its employees or agents that is based on the conduct of the employee or former employee." Section 6x.06(5).

Collateral Consequences and the Perpetuation of Racial Inequity

David A. Singleton

Ohio Justice & Policy Center

Professor, NKU Chase College of Law

dsingleton@ohiojpc.org; 513-543-7254 (cell)

A collateral consequence is . . .

- Any disability, penalty or disadvantage that may be imposed on a person as a result of the person's conviction of a criminal offense

A story . . .

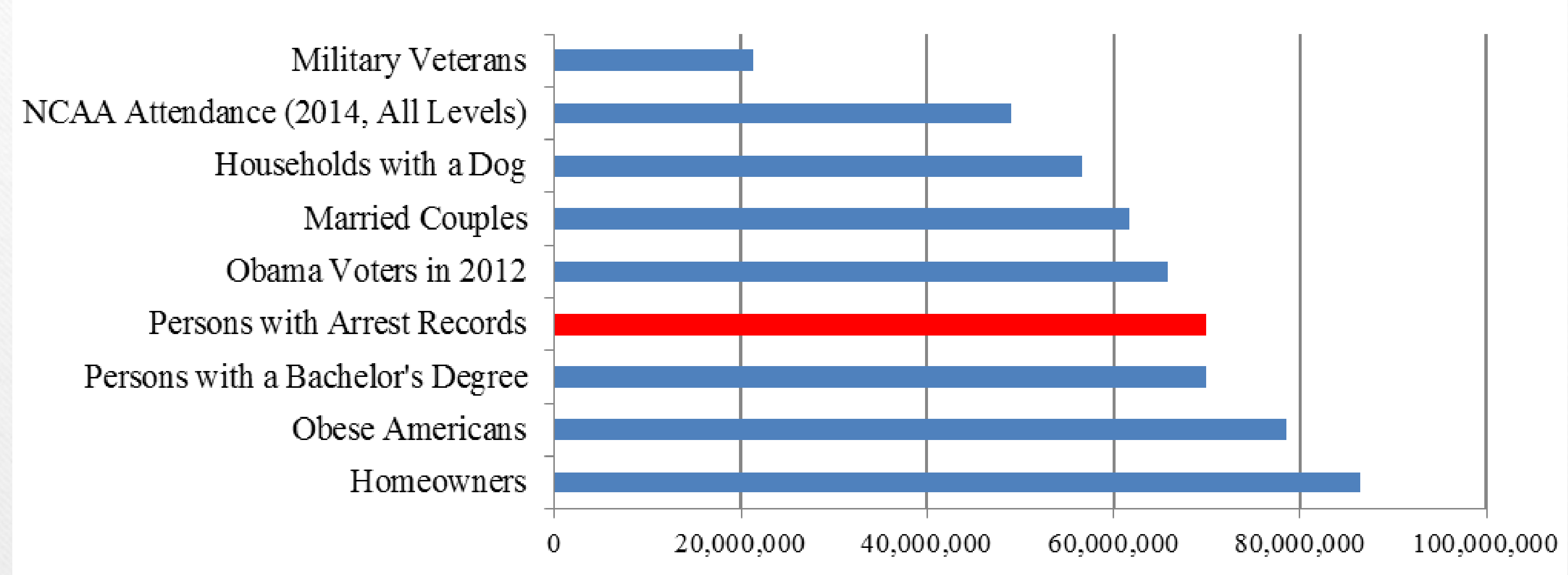
How do collateral consequences perpetuate inequality?

Short answer: It's all about the numbers.

At least 70 million people in US have a criminal record

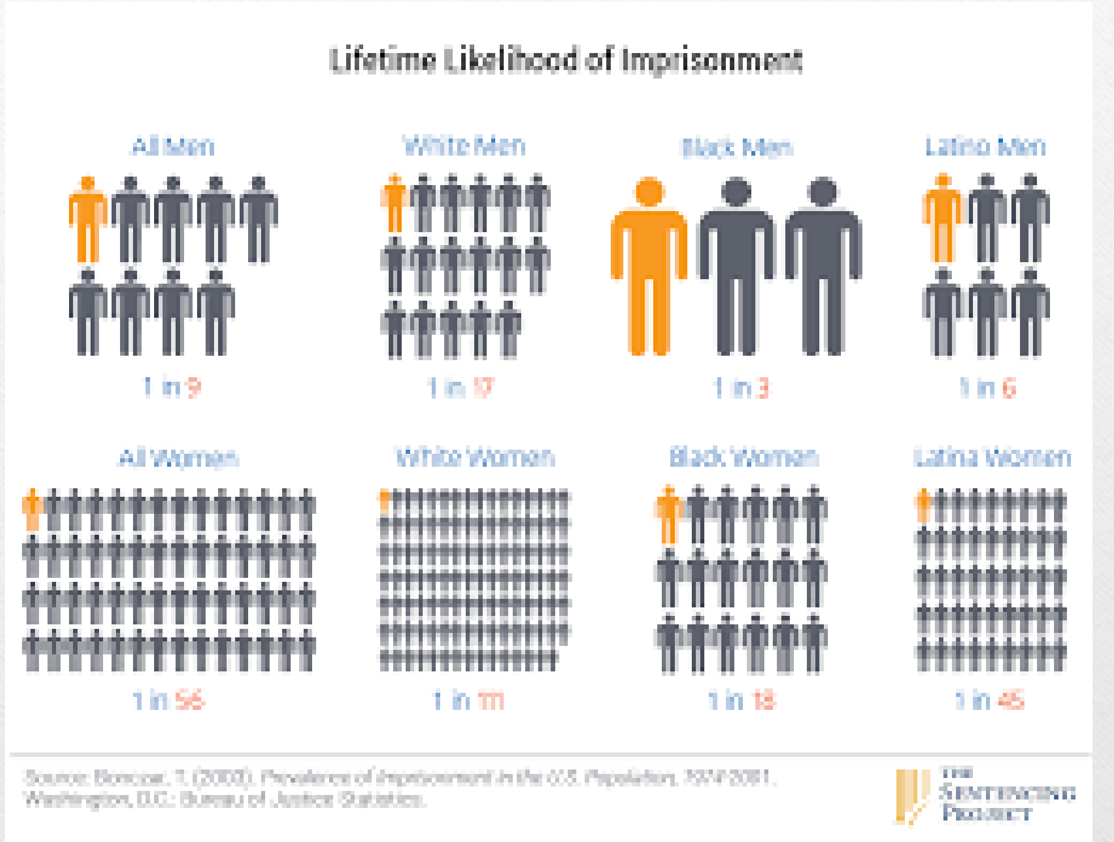
Source: The Sentencing Project

Large Groups of People in the United States

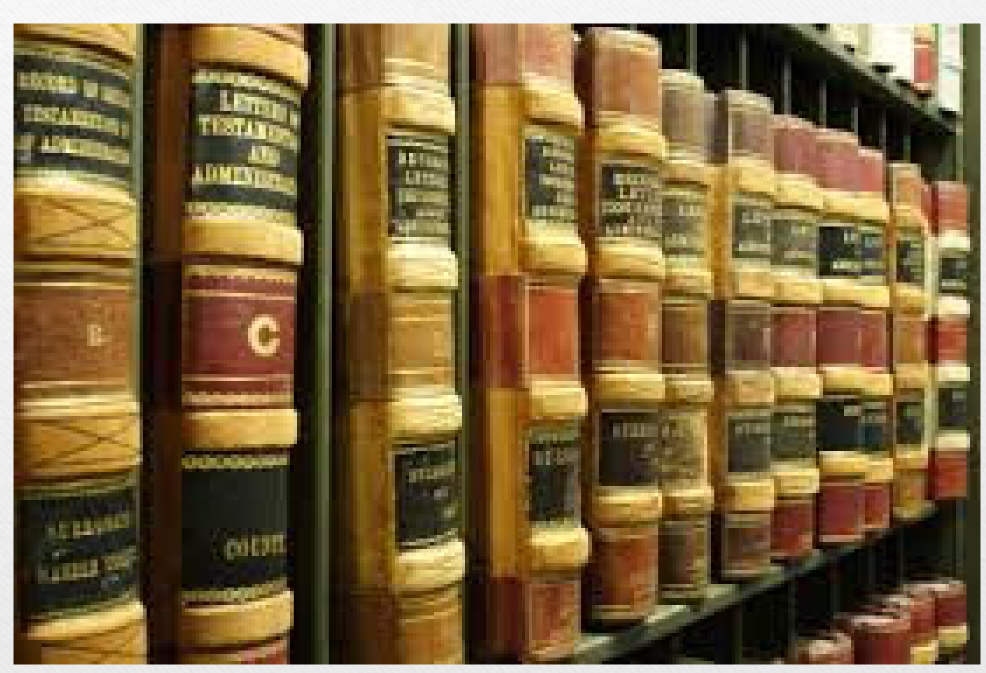


Source: The Brennan Center for Justice

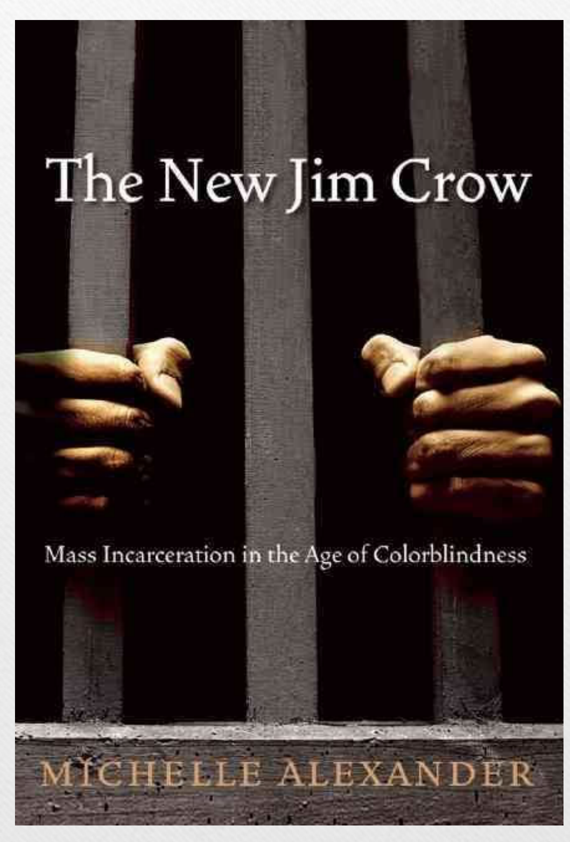
The Impact of Race



It’s also about the number of laws on the books



Why do we have so many collateral sanctions?



The devastating impact of collateral sanctions on communities of color

But there is . . .

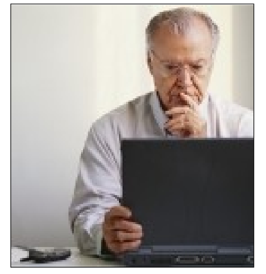
OHIO JUSTICE & POLICY CENTER
Reclaiming Lives. Renewing Communities. Restoring Justice.
215 E. Ninth St., Suite 601
Cincinnati, Ohio 45202
513-421-1108
www.ohiojpc.org

The Ohio CIVICC Database

http://CIVICCOhio.org

What is CIVICC?

1.9 million Ohioans—1 in 6—have a misdemeanor or felony conviction. They face **over 900 state statutes**, sometimes called "collateral consequences," that restrict their employment, housing, family involvement, civic participation, and other rights and privileges. Anyone who has been adjudicated a delinquent child may also face some of these restrictions. The Ohio **Civ**il **I**mpacts of **C**riminal **C**onvictions Database (http://CIVICCOhio.org) is a web-based tool created by the Ohio Justice & Policy Center and the Ohio Public Defender to answer **two questions** about these state laws:



- **What are the civil impacts that are triggered by a specific case outcome** in criminal or juvenile court?
- **What offenses and outcomes are likely to trigger a specific civil impact**?

Answers to these questions are essential for anyone who seeks a CQE (Certificate of Qualification for Employment) **or CAE** (Certificate of Achievement and Employability). In fact many people need these answers:

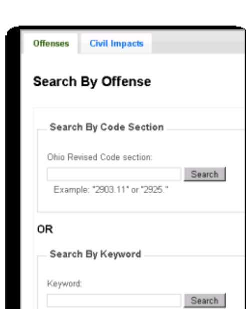
- Judges
- Prosecutors
- Defense attorneys
- Criminal defendants
- Legislators
- Career counselors
- Vocational-education admissions
- Corrections, probation, & parole
- Employers
- Soon-to-be-released inmates
- Anyone with a criminal record
- Anyone with a juvenile adjudication

Ohio is the first state to have a tool like this, linking specific offenses to specific civil impacts. With such information readily available, people with criminal records can avoid numerous barriers so they can better become productive citizens in our communities.

> The law changes often. Despite continual expansion and updating, CIVICC is no substitute for a lawyer's advice.

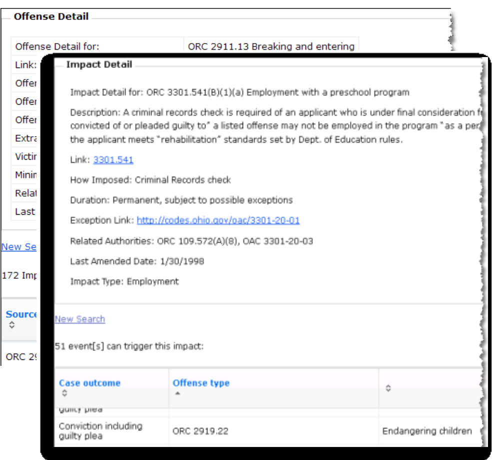
How do I search CIVICC? What results will I get?

CIVICC is free and requires no special training. Try it: **http://CIVICCOhio.org**.



Using CIVICC, you can search for offenses or civil impacts (collateral consequences) using all or part of an Ohio Revised Code section number or a keyword.

When searching for offenses, you get a link to the full statutory text and, on the *Offense Detail* page, a list of the civil impacts triggered by that offense.



When searching for civil impacts, you also get a link to the statutory text and, on the *Impact Detail* page, a list of the *Triggers* for that civil impact. Triggers may be individual offenses or they may be categories of offenses, such as "drug crime" or "offenses against a minor." If available, the Impact Detail page also will have a link to any regulation that creates an *Exception* to the civil impact.

CIVICC is designed to be easy to use, but each page has a link to the detailed **User Guide/FAQs** .

Contact Pam Thurston (pthurston@ohiojpc.org) for more information about CIVICC.

CIVICC was started with funding from the Ohio State Bar Foundation, the Ohio Department of Rehabilitation and Correction, the Toledo Bar Association Foundation, the Cincinnati Bar Foundation, the George Gund Foundation, and others.

We need your support to keep it going! http://bit.ly/CIVICCdonate

©OJPC Aug. 17, 2015

Minimizing the Impact of a Criminal Record on Employment Opportunities

Ariela Migdal, Senior Staff Attorney
American Civil Liberties Union
Women's Rights Project

August 4, 2011

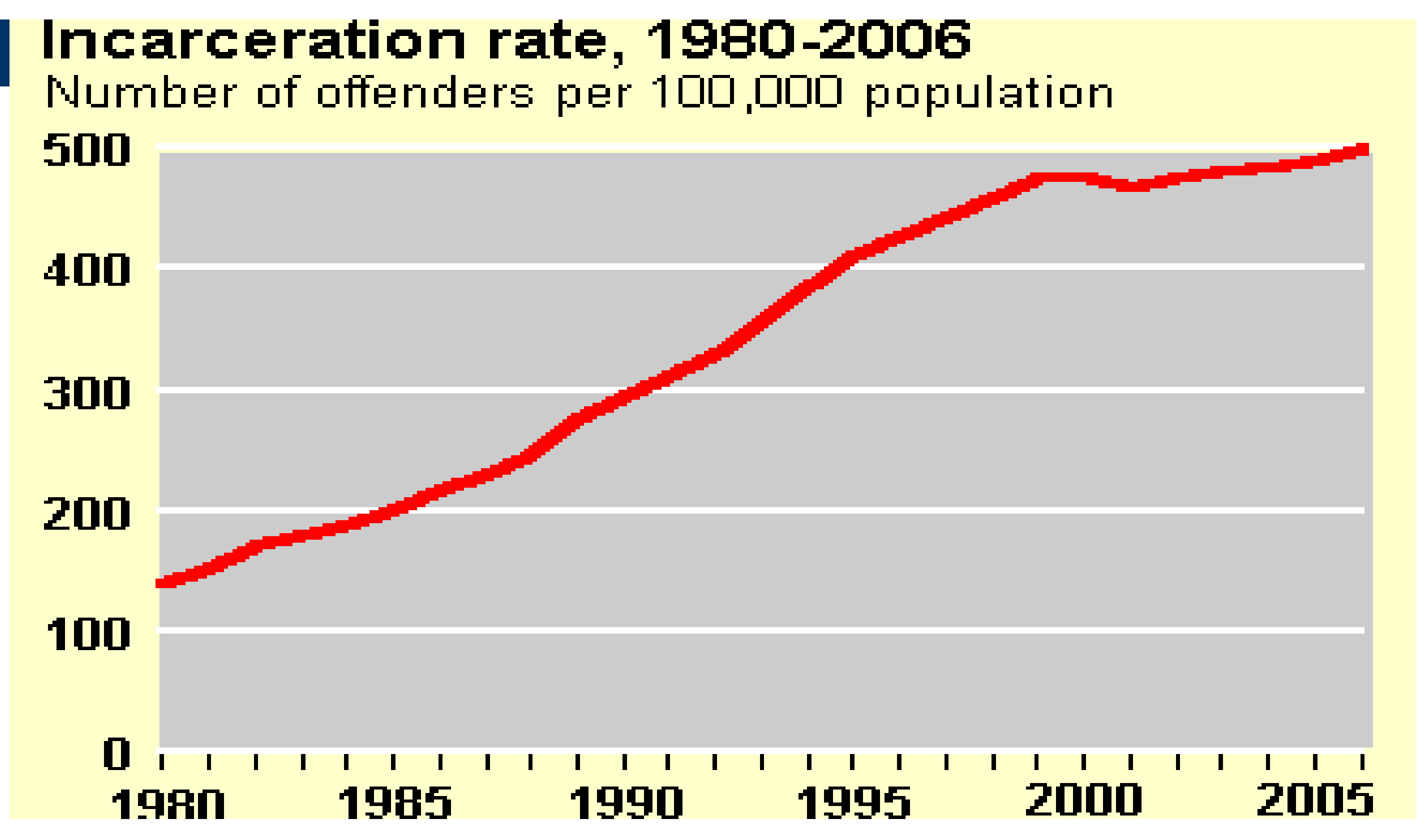
Roadmap

- The problem: Growth in incarceration & criminal records + racial disparities in criminal justice system + rise in background checking = barriers to employment opportunity
- Civil Rights remedies: Title VII, EEOC, state & local law, FCRA

Overview

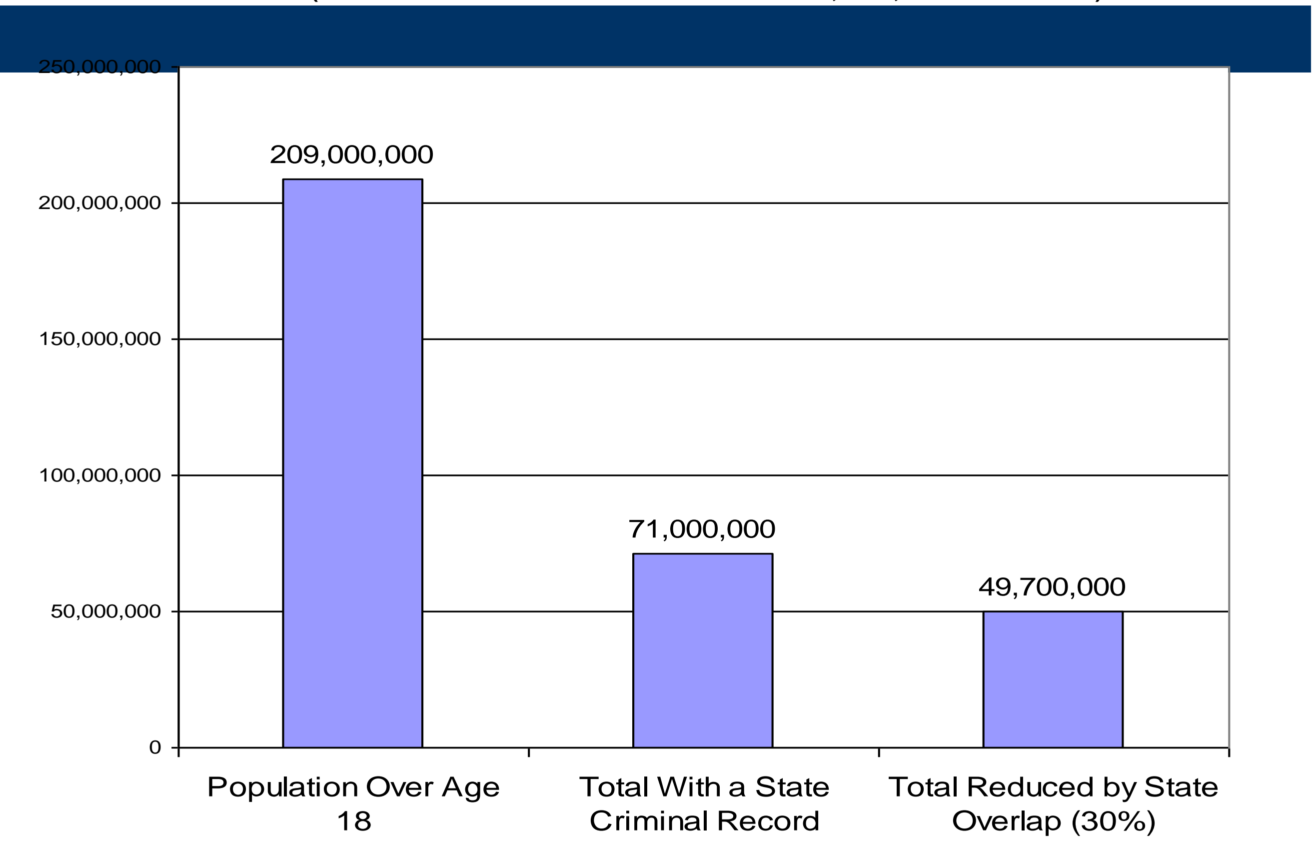
- Rise in number of people with criminal records, including growing numbers of women
- Racial disparities
- Rise in background screening as an industry serving both employers and landlords
- Next frontier – screening students?

Charts & stats (courtesy of NELP, BJS)



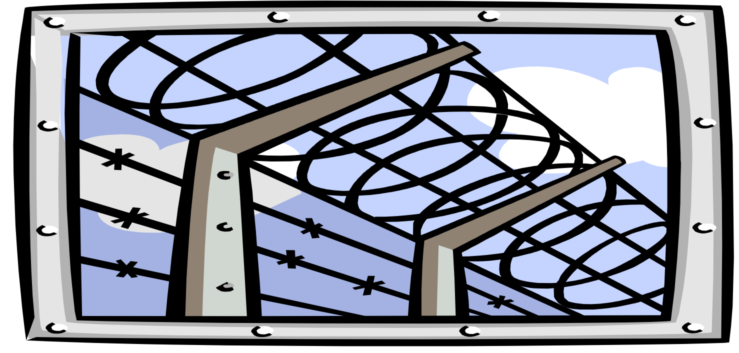
Source: Correctional Populations in the United States, 1997 and Prisoners in 2006.

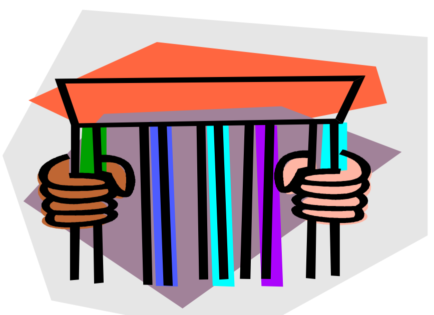
Large and growing number of people with criminal records

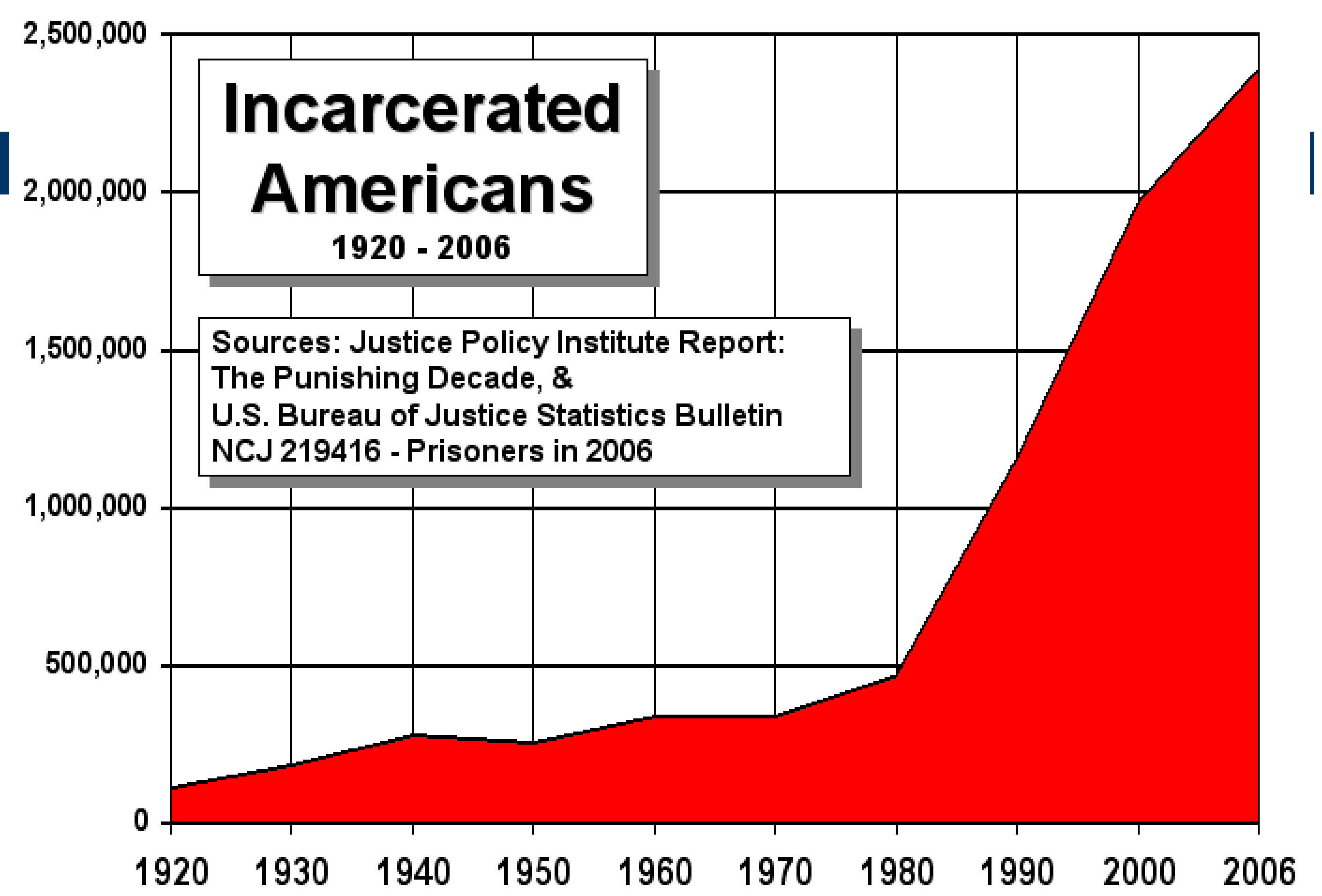


More stats…

- Between 1995 and 2005, the U.S. prison population grew an average of 44,527 inmates per year. (BJS Prisoners in 2005)
- Prisoners in state & federal facilities up 10% in 5 years: 1,305,253 in 2000 to 1,430,208 in 2005. (BJS Census of State and Federal Correctional Facilities 2005)






Incarcerated Americans
1920 - 2006
Sources: Justice Policy Institute Report:
The Punishing Decade, &
U.S. Bureau of Justice Statistics Bulletin
NCJ 219416 - Prisoners in 2006
2,500,000
2,000,000
1,500,000
1,000,000
500,000
0
1920
1930
1940
1950
1960
1970
1980
1990
2000
2006

Washington’s Prison Population has More Than Doubled in the Past 20 Years

- As of June 2011, Washington had a total confinement population in state facilities and rented beds of 18,483, up from about 7,000 in 1987. (Source: Wash. DOC)

- In 1991, 3,312 offenders were released in Washington. By 2000 that number climbed to 5,999 with over 8,000 estimated in 2006. The increase led corrections officials to focus on reentry.

- DOC reports that, of returning offenders in the summer of 2006, 85% were unemployed.

Large population with criminal records.

- This year, nearly 700,000 people will leave prison and 9 million will leave jails. (2009 Criminal Justice Transition Coalition, Smart on Crime: Recommendations for the Next Administration and Congress).
- More than 2/3 of those released will be re-arrested within 3 years. (2009 CJT Coalition, BJS).
- Of WA prisoners, 39.2% in 2011 are "readmissions" (2011 WA Docs)

African Americans are Incarcerated at a Rate Six Times that of Whites (NELP slide)

All Men and Women (ages 18 and over)

All………………………………………… 1 in 102
White……………………………………….. 1 in 245
Latino……………………………………….. 1 in 96
African American………………………… 1 in 41

Men (ages 18 and over)

All………………………………………….. 1 in 54
White……………………………………… 1 in 106
Latino……………………………………... 1 in 36
African American…………………………. 1 in 15
African American (Men ages 20 – 34).. 1 in 9

(Pew Center on the States, "One in 100: Behind Bars in America 2008")

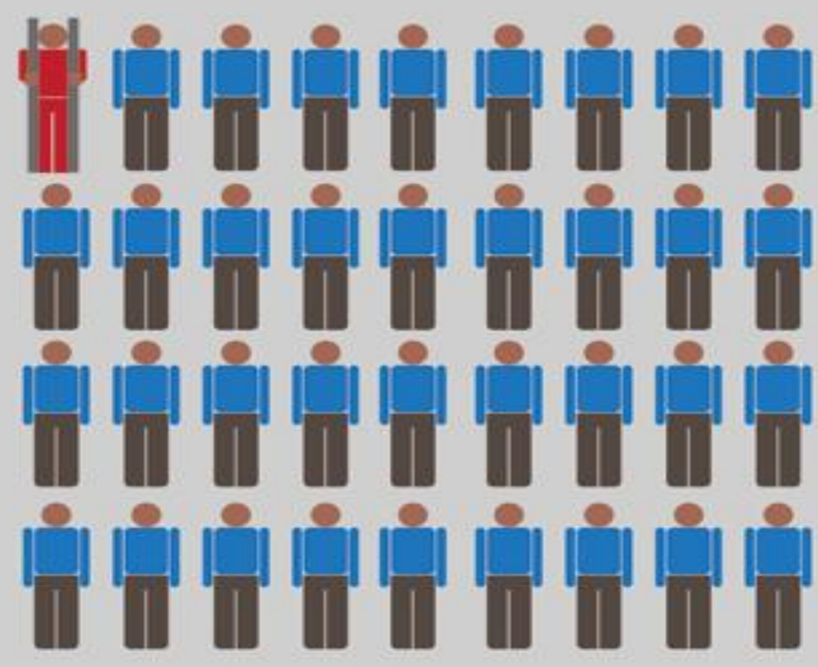
Racial disparities in WA's criminal justice system

- White people are incarcerated at a rate of 393 per 100,000 state population, African Americans are incarcerated at a rate of 2,522 per 100,000 state population, and Hispanics at 527 per 100,000 state population. (Sentencing Project, Bureau of Justice Statistics).
- Washington "is the third most prolific incarcerator of Blacks for drug offenses in America" – although they make up only 3% of Washington's population, 51% of people sent to State prisons for drug offenses are African American. (Le Roi Brashears, "Same Crime, More Time," *Seattle P-I*, (May 29, 2007))
- Demographics: Washington's African American population is concentrated in King, Pierce, and Kitsap Counties.

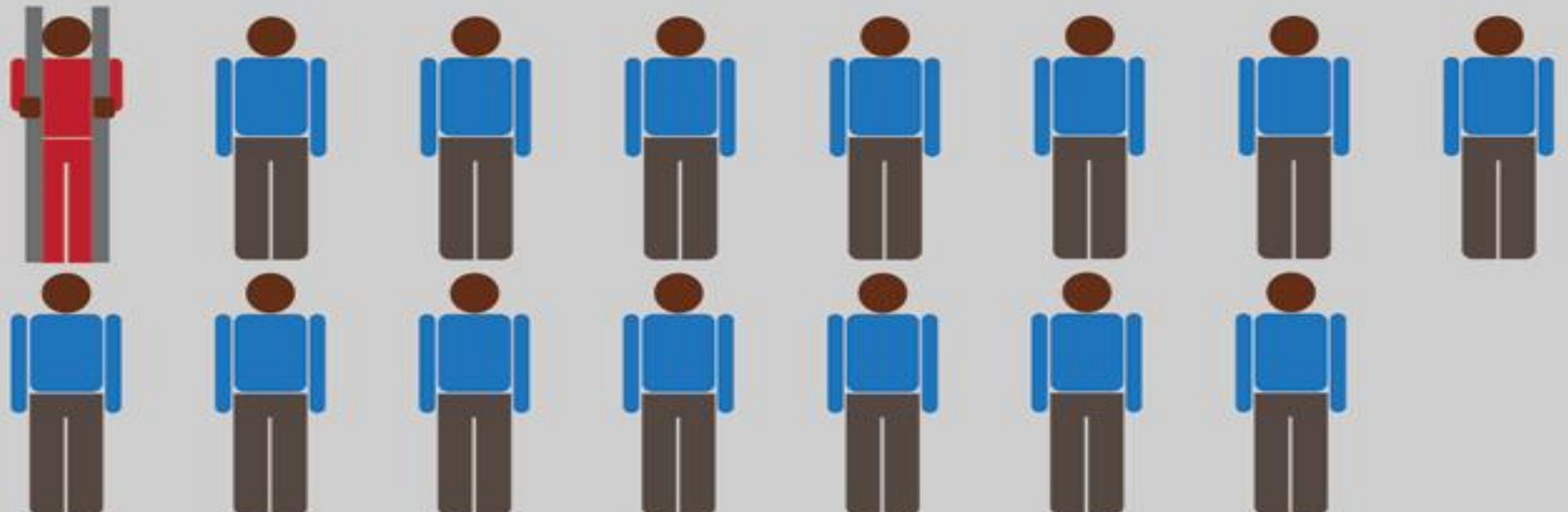
  (State of Washington Office of Financial Management for 2006.)
- Some of you may have more granular numbers

1 IN EVERY 106 WHITE MALES AGE 18 OR OLDER ARE INCARCERATED.

1 IN EVERY 36 HISPANIC MALES AGE 18 OR OLDER ARE INCARCERATED.



1 IN EVERY 15 BLACK MALES AGE 18 OR OLDER ARE INCARCERATED.

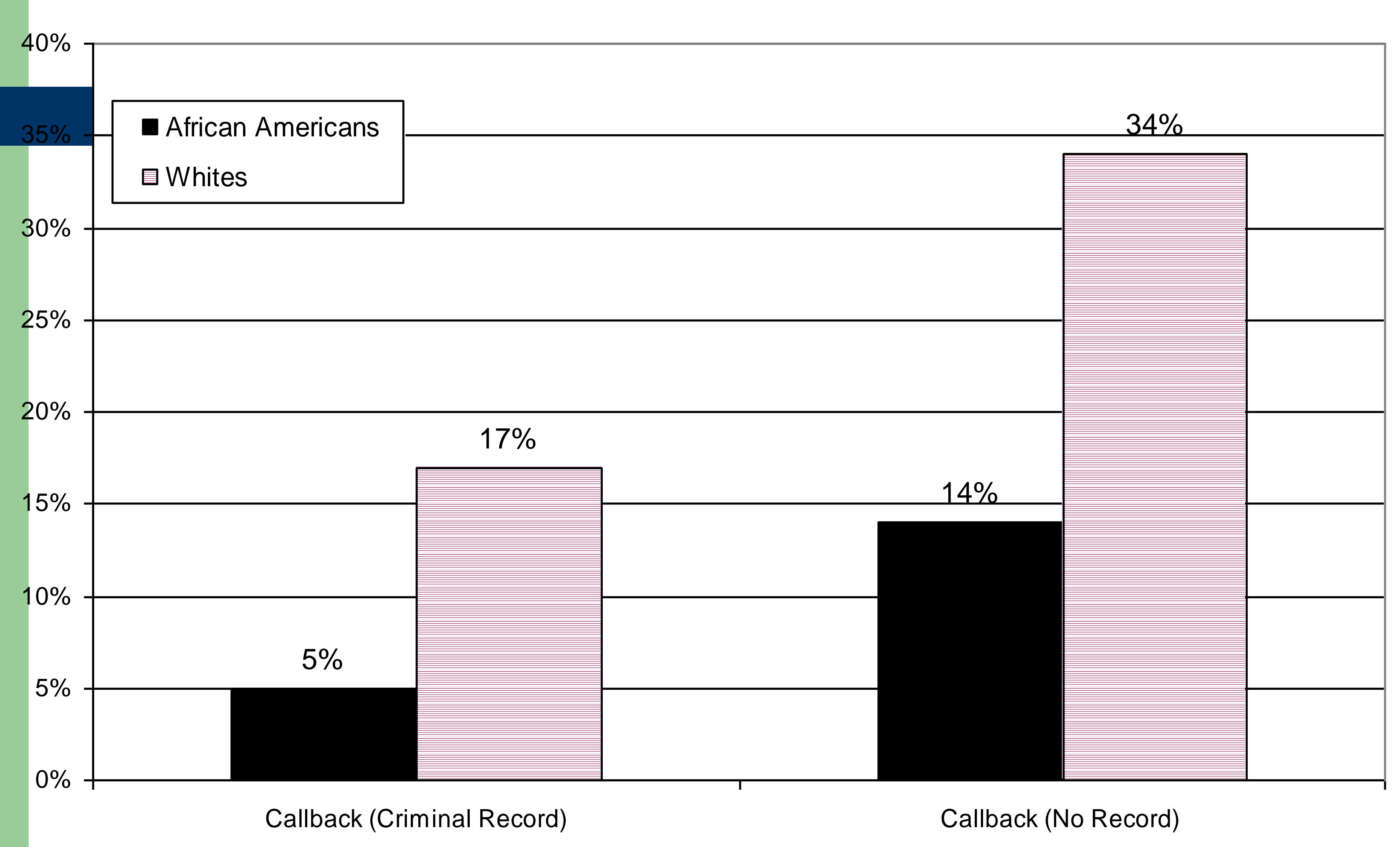


The War on Drugs' Impact on Women

- Number of women incarcerated up 800% nationwide (12,300 in 1980 to 182,271 by 2002). (Sentencing Project)
- Women of color are disproportionately affected: In 2006, 30% of incarcerated women were African American and 16% were Hispanic. (BJS)
- Women of color and white women use drugs at about the same rate.
- Women's roles in drug activity frequently minor.
- Increased use of conspiracy charges, accomplice liability, constructive possession charges, mandatory minimum sentences, and asset forfeiture laws. (ACLU, Caught in the Net)

Employment Testing Survey Documents Impact of a Criminal Record on Interview Callbacks, by Race

(Slide: NELP. Data: Devah Pager, "The Mark of a Criminal Record," *American Journal of Sociology* (March 2003).)



Instant National Criminal Background Checks, Criminal Background Records, Criminal History Search and Court Record Check. - Mozilla Firefox
File Edit View History Bookmarks Tools Help
http://www.criminalbackgroundrecords.com/?s=ad&gclid=CMGr2rWh_ZYCFQGHHgod5XKzZQ
criminal background check
Most Visited
Getting Started
Latest Headlines
Westlaw Sign Off
Annual_Conference_Agenda__Progra...
NLADA's 2008 Annual Conference Onlin...
Instant National Criminal Backgr...
Ain't I a Woman?! Campaign
Member Sign In
Criminal Background Records
www.CriminalBackgroundRecords.com
Create Account
Add To Favorites!
ORDER CRIMINAL RECORD
SEARCH CRIMINAL BACKGROUNDS
SAMPLE CRIMINAL RECORD
YOUR ORDER LOOKUP
PUBLIC RECORDS BLOG
EMPLOYMENT SCREENING
We have a new 3 Minute Survey!
Click Here to take survey.
We accept PayPal!
Quality Criminal Background Checks
---select a state---
Your home for criminal records from county to statewide to national background checks
"Serving the American Background Retrieval Marketplace"
Social Security Validation and Address History Trace now available for only $14.95
Order a criminal background record in 3 easy steps!
Person you are investigating:
*First Name:
MI:
*Last Name:
Get Results Instantly!
*Date of Birth:
Month
Day
Year
State:
Select a State
Search
Use the 7 day Order Lookup to view your orders or join as a free member and have your orders saved for 60 days.
To place an order, please choose one of the following criminal background record search options:
$24.95
Non-Instant County
$24.95
Instant State
$44.95
Instant 3 State
$59.95
Instant National
Background Checks
Instant State Criminal Search
County Criminal Search
Instant 3-State Search
National Background Search
SSN Validation & Address History Trace
Select an area to search on the interactive map:
Email us to a friend!
Find: drugs
Next
Previous
Highlight all
Match case
Phrase not found
Done

More People with Criminal Records, Combined with Increased Background Checks

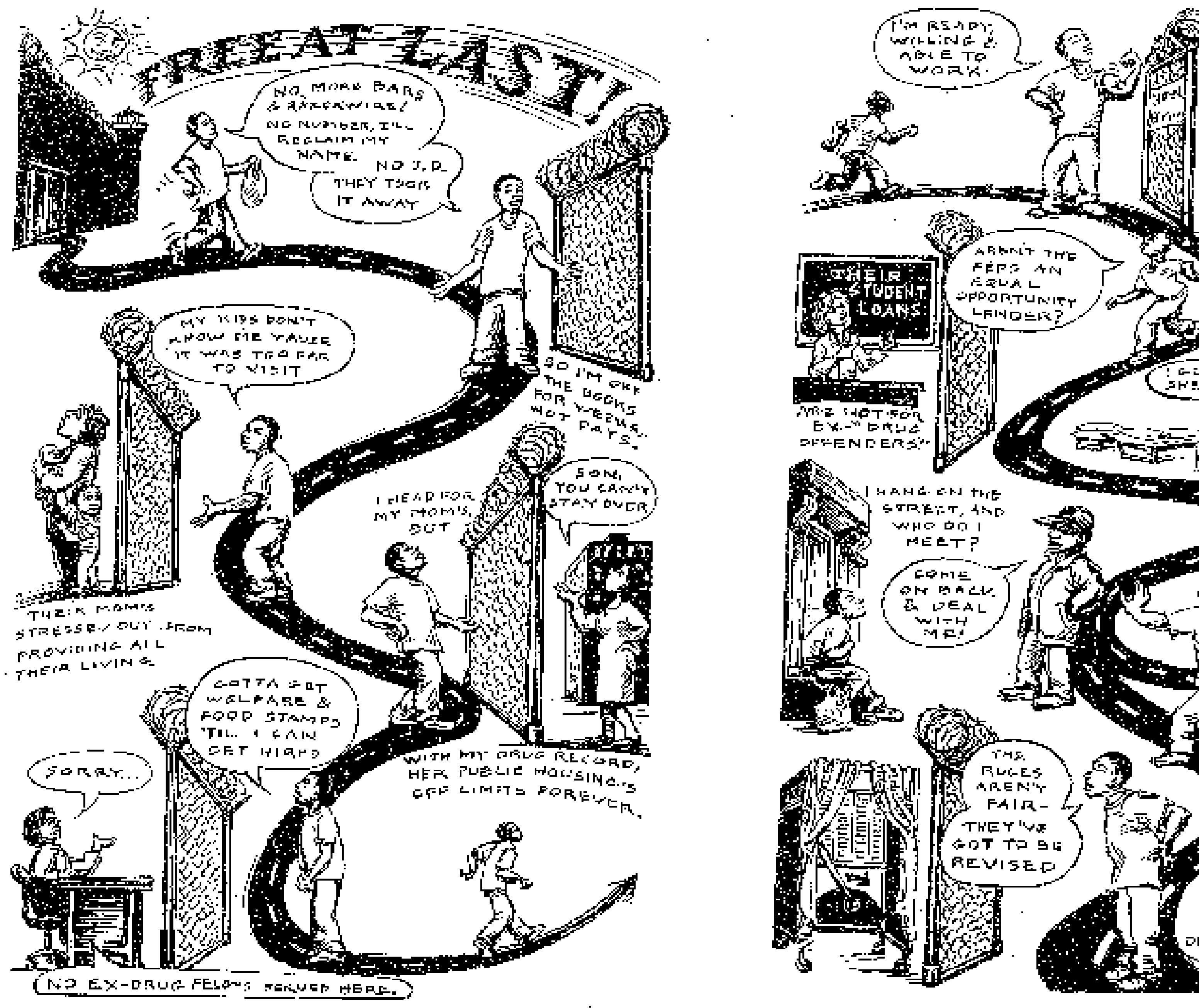
- 80% of large employers conduct criminal background checks (up 29% since 1996).
- Criminal background checks are big business, with ChoicePoint and other private screening firms now generating millions of background checks at a minimal cost of $25 to $75.
- A Los Angeles survey found that over 60% of employers would “probably not” or “definitely not” be willing to hire an individual with a criminal record.

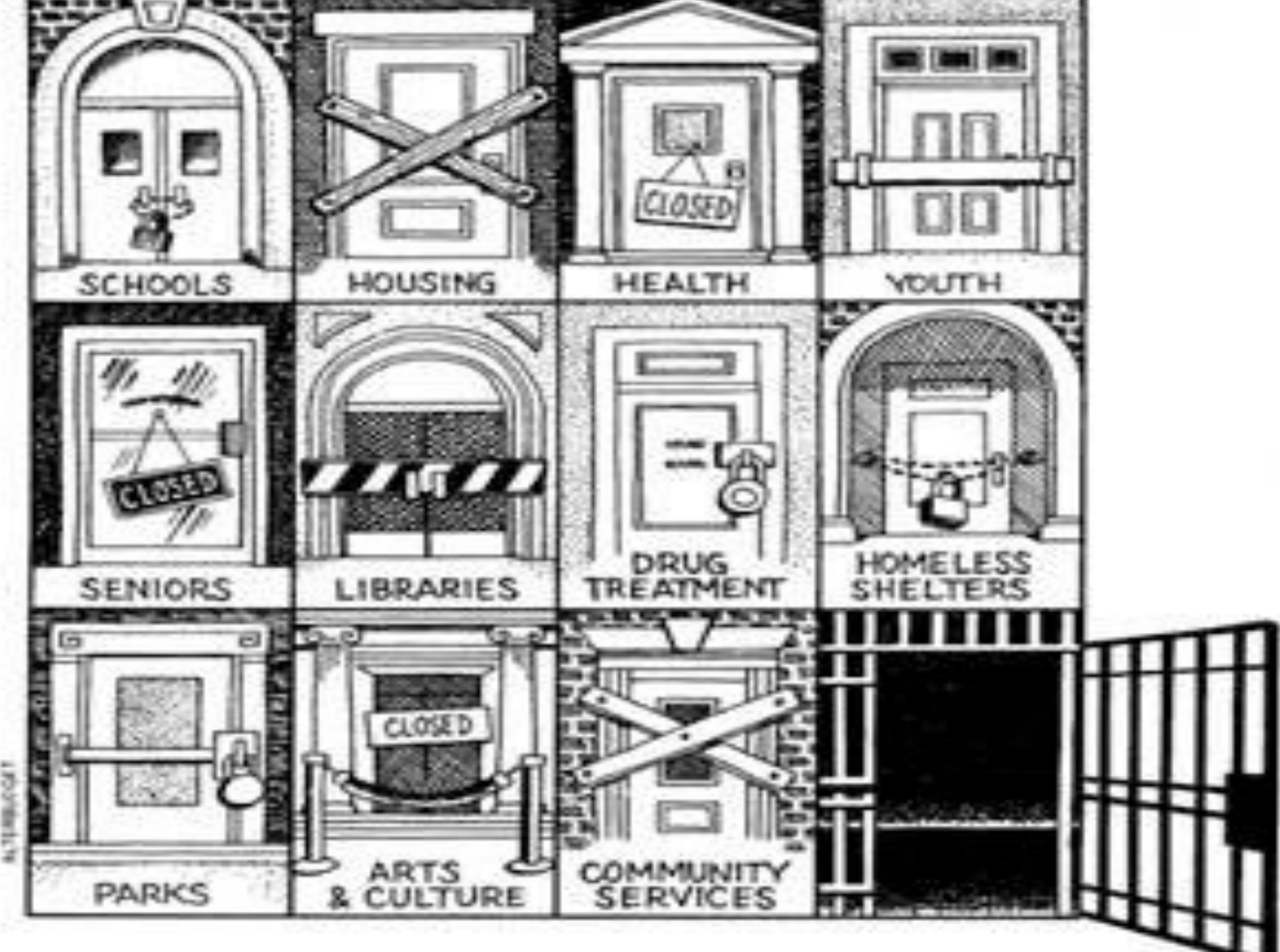
Factors in the rise of incarceration and records

- Federalization of crime
- War on drugs policies
- “Truth in sentencing”
- Mandatory minimums, sentencing guidelines

A web of obstacles to reentry

- Housing: restrictions by landlords and PHAs, statutory bans.
- Welfare: ban on TANF and food stamps for people with felony drug offenses.
- Education: federal ban on financial aid for certain offenses.
- Family unity: parental termination
- Employment
- Voting


FREE AT LAST!
NO MORE BARS & RAZORWIRE! NO NUMBER, I'LL RECLAIM MY NAME.
NO I.D. THEY TOOK IT AWAY
MY KIDS DON'T KNOW ME 'CAUSE IT WAS TOO FAR TO VISIT
SO I'M OFF THE BOOKS FOR WEEKS NOT DAYS.
THEIR MOM'S STRESSED OUT FROM PROVIDING ALL THEIR LIVING
I HEAD FOR MY MOM'S, BUT
SON, YOU CAN'T STAY OVER!
WITH MY DRUG RECORD, HER PUBLIC HOUSING'S OFF LIMITS FOREVER.
GOTTA GET WELFARE & FOOD STAMPS 'TIL I CAN GET HIRED
SORRY...
NO EX-DRUG FELONS SERVED HERE.
I'M READY, WILLING & ABLE TO WORK.
WE'LL CHECK YOUR CRIMINAL BACKGROUND FIRST.
AREN'T THE FEDS AN EQUAL OPPORTUNITY LENDER?
I NEED SOME EDUCATION IN THIS TOUGH JOB MARKET
THEIR STUDENT LOANS
ARE NOT FOR EX-DRUG OFFENDERS
I GO TO A SHELTER
BUT IT REMINDS ME OF PRISON
I HANG ON THE STREET, AND WHO DO I MEET?
COME ON BACK & DEAL WITH ME!
NO WAY!
I KNOW WHERE THAT ROAD LEADS!
THE RULES AREN'T FAIR - THEY'VE GOT TO BE REVISED
BUT I CAN'T EVEN VOTE - I'VE BEEN DISENFRANCHISED!


SCHOOLS
HOUSING
CLOSED
HEALTH
YOUTH
CLOSED
SENIORS
LIBRARIES
DRUG TREATMENT
HOMELESS SHELTERS
PARKS
CLOSED
ARTS & CULTURE
COMMUNITY SERVICES

Employment Barriers

- Statutory bars to working in particular occupations
- Licensing bars to working in particular occupations.
- Discrimination by private and public employers: the disparate racial impact of the criminal justice system is compounded by racism in employment .

Title VII and criminal records discrimination

- Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-2(k), prohibits employers from using practices that have a disparate impact on a protected class
- Unless the challenged practices is job-related and consistent with business necessity
- *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)

The leading cases on the disparate impact of criminal records are from the 1970s.

- ***Gregory v. Litton Systems***, 316 F. Supp. 401, 403 (C.D. Cal. 1970), *aff'd as modified,* 472 F.2d 631 (9th Cir. 1972)

  Disqualifying employees because of having been *arrested* discriminates unlawfully against African American applicants because, nationally, African Americans are arrested proportionately more frequently than whites.

- ***Green v. Missouri Pacific Railroad Co.***, 523 F.2d 1290, 1298 (8th Cir. 1975)

  Employer violated Title VII when it refused to hire anyone with a conviction. The court could not "conceive of any business necessity that would automatically place every individual convicted of any offense…in the permanent ranks of the unemployed."

EEOC policy codifies the case law

- excluding people from employment based on their conviction records, this has an “adverse impact on [African American and Latino workers] in light of statistics showing that they are convicted at a disproportionately higher rate than their representation in the population.”
- Rejecting applicants based on arrests records or on any conviction must show a business necessity.

Examples:
Convictions Not Job-Related (NELP Slide)

- A hit and run conviction is not job-related to a position as a kitchen worker. (EEOC Dec. No. 79-61 (May 8, 1979))
- Delivery of marijuana is not job-related to the position of utility worker in a factory. (EEOC Dec. No. 80-18 (August 18, 1980))
- Murder is not job-related to crane operator position. (EEOC Decision No. 80-17 (August 12, 1980))
- Unlawful possession of a firearm is not job-related to a factory worker position. (EEOC Dec. No. 80-10 (August 1, 1980))

In July, the EEOC held a hearing to discuss updating its policies on criminal records.

- *El v. SEPTA*, 479 F.3d 232 (3d Cir. 2007) – 40-year-old homicide conviction from when El was 15 years old. Wanted to be a para-transit driver.
- Court refused to defer to the EEOC’s guidance. But court held that Title VII requires that criminal record policies “accurately distinguish between applicants that pose an unacceptable level of risk and those that do not.”
- Since that decision, EEOC has held two hearings.

Limitations of Title VII

- Statute of Limitations
- Employer must employ 15 or more people.
- Delays in EEOC review
- Potential relief available: hiring/reinstatement, back/front pay, injunctive relief to change the employer's policy, attorney and expert witness fees
- Litigation is expert-intensive.

Some states have laws addressing rehabilitation and employment

- Washington State law expresses a policy “to encourage and contribute to the rehabilitation of felons and to assist them in the assumption of the responsibilities of citizenship, and the opportunity to secure employment or to pursue, practice or engage in a meaningful and profitable trade . . . is an essential ingredient to rehabilitation and the assumption of the responsibilities of citizenship.” (RCW 9.96A.010)

Washington Convictions Law

- Washington State law prohibits public agencies from refusing to hire someone or refusing to grant a license based solely on a criminal conviction. (RCW 9.96A.020)
- However, a person can be denied employment with a public agency or a license based on a prior felony conviction that is **directly related** to the employment and that is **less than 10 years old.**
- There are numerous exceptions, such as jobs providing unsupervised access to children.
- The provision does not apply to discrimination by **private employers.** (*Selix v. Boeing Co.*, 82 Wn. App. 736 (Wash. App. Div. 1 1996), *review denied*, (1997).)

Washington Law Against Discrimination

- Prohibits race-based discrimination and protects the right "to obtain and hold employment without discrimination." (RCW 49.60.030; *see also* RCW 49.60.180)
- Permits claims that a facially neutral practice has a disparate impact on a protected class. (*See Fahn v. Cowlitz County*, 610 P.2d 857 (Wash. 1980); *Fahn v. Civil Service Comm'n of Cowlitz County*, 628 P.2d 813 (Wash. 1981))
- Enforced by the Washington State Human Rights Commission, which has jurisdiction to investigate complaints against employers with 8 or more employees.
- HRC may issue a finding of reasonable cause and may initiate reconciliation. Where that fails, it can refer the case to the Attorney General for a hearing before an ALJ.
- Injured persons may also bring a civil action in court.

Regulations Limit Pre-Employment Inquiries

- Employers may inquire about arrests, but such inquiries must include whether charges are still pending, have been dismissed, or led to conviction of a crime involving behavior that would adversely affect job performance, and the arrest occurred within the last ten years. (WAC 162-12-140(3)(b))
- Employers may inquire about convictions and imprisonment that relate reasonably to job duties and that occurred within the last 10 years. (WAC 162-12-140)
- Exceptions for law enforcement agencies, school districts, and whenever there is a "bona fide occupational qualification," so consult the rule in specific cases.
- The regulations expressly recognize the "disparate impact on some racial and ethnic minority groups" of convictions, imprisonment, and arrests.

Title VII "red flags"

- Employers with blanket bans on hiring people with conviction or arrest records
- Job postings or written letters to applicants / provisional hires announcing bans
- Not as easy to challenge: verbal explanation of criminal record ban
- Close to impossible: Never getting called back, perhaps because of your background.

The Seattle Office for Civil Rights

- Ordinance ensures equal opportunity and prohibits employment discrimination based on race. (SMC 14.04)
- Exception for bona fide occupational qualifications reasonably necessary to operation of the business. (SMC 14.04.050)
- Not unfair for an employer "with a demonstrated security or public safety need, to discriminate on the basis of participation in activities which involve the use of force or violence or advocate or incite force or violence." (SMC 14.04.050)
- OCR can investigate discrimination complaints and resolve them through a conciliation process. (SMC 14.04.140)
- OCR can also refer a case to the City Attorney for prosecution before the Seattle Hearing Examiner. An individual may sue in Superior Court after obtaining a reasonable cause determination from OCR.
- OCR has jurisdiction over employers with *one* or more employees.

FROM Seattle Office for Civil Rights: Employment & Housing Facts for People with Criminal Records

This pamphlet provides information to help people with criminal records understand employment and housing laws.

I'm applying for a job as a gardener at a state university. I was convicted of forgery in 1995. Can they deny me employment based on my record?

No. According to RCW 9.96A, public agencies (cities, counties, public schools, etc.) in Washington State are not allowed to discriminate against someone only on the basis of a past criminal record if:

1. The conviction does not directly relate to the job.
2. It's been over 10 years since the conviction.

The law does **not** apply to law enforcement agencies and jobs providing unsupervised access to children and vulnerable adults.

I'm trying to get a job at a store in the mall. Can they decide not to hire me because I served time in prison five years ago?

Yes. Washington State does not have any standards that keep private employers from discriminating against someone in the hiring process based on a past conviction. In applications and interviews, however, an employer is only allowed to ask about past convictions relating to the job duties and if the convictions or release from prison occurred in the last 10 years.

Tacoma Human Rights and Human Services Department

- Tacoma's Municipal Code outlaws employment discrimination based on race.
  (TMC 1.29.050)
- City may refuse to hire applicants with misdemeanors or felonies in last 7 years (longer for some positions).
  (TMC 1.24.430)
- A policy or practice is justified as a business necessity under TMC if "job-related," "effective in predicting employee performance," and has "no acceptable alternative which would have less adverse impact" on the protected class. (TMC 1.29.040)
- The Tacoma Human Rights and Human Services Department investigates employment discrimination complaints. Tacoma also has a Human Rights Commission that can file complaints.

King County Office of Civil Rights

- King County's Fair Employment Ordinance prohibits employment discrimination based on race.
  (King County Code, Title 12, Ch. 18).
- The Code defines discrimination as an act or practice whose "effect" "is to adversely affect or differentiate between . . . individuals, by reason of race . . . unless based upon a bona fide occupational qualification."
  (KCC 12.18.020-030).
- King County's Office of Civil Rights has jurisdiction to review discrimination complaints involving King County government as an employer, contractors doing business with King County, and private employers in unincorporated King County with 8 or more employees.
- King County also has a Civil Rights Commission.

Federal Fair Credit Reporting Act: Restrictions on Private Screening Firms and Employer Obligations

- Reporting of Arrests: Private background check companies cannot report arrests that are more than seven years old. However, convictions can be reported indefinitely. (15 U.S.C. 1681c(a)(2) and (5))
- Authorization Required: The employer requesting the report must obtain written authorization from the job applicant. (15 U.S.C. 1681b(b)(2)(A)(ii))
- Copy of Report: If the employer takes an "adverse action" based on the report, applicants are entitled to notification, a copy of the report, and the right to dispute the accuracy or completeness of the report. (15 U.S.C. 1681b(b)(3) and 1681m(a)) NELP Slide

Think Outside the Box

- Campaigns to require or convince cities and other employers to remove the “Box” on employment applications.
- Consideration of legal history only at the finalist stage.
- Give the finalist a chance to explain.

Employing Ex-Offenders:

Researchers Develop Method for Computing "Redemption" Time

By Nancy Ritter

Author's Note: *Points of view expressed in this article do not necessarily represent the official position or policies of the U.S. Department of Justice.*

Researchers at Carnegie Mellon University have developed a method for computing the point in time when a person with a criminal record presents no greater risk of commiting another crime than people in the general population. Initial findings from a National Institute of Justice-funded project offer the first-ever empirically devised way to determine when an ex-offender has been clean long enough to be considered "redeemed" for employment purposes.

To develop this actuarial-like method, Alfred Blumstein, Ph.D., one of the nation's foremost criminologists, and Kiminori Nakamura, a doctoral student at Carnegie Mellon's Heinz College, examined the criminal-history records of 88,000 people who were arrested for the first time in 1980 in New York. Then, they 1) determined whether these ex-offenders had committed another crime during the ensuing 25 years or if they had stayed clean; 2) compared these results against data for same-age people in the general population; and 3) plotted these data on curves to see at what point the risk of re-arrest for the 88,000 ex-offenders crossed the curve representing the risk of arrest for same-age people in the general population.

The availability of an empirically based approach such as this could have tremendous ramifications regarding the employment of ex-offenders. Currently, when employers are considering hiring someone with a criminal record, they have to make a largely arbitrary decision regarding whether the person's past does — or does not — represent a continuing risk that should affect a hiring decision. Now, the preliminary results of the Blumstein-Nakamura study offer a scientifically rigorous way to help employers decide when a person's record is stale enough to be considered no longer useful or relevant in a hiring decision.

The Results of the Study

The researchers looked at three types of crime (robbery, burglary and aggravated assault) and three different ages at first arrest (16, 18 and 20 years old).

Comparing this data for the 88,000 ex-offenders in the study group to data (based on FBI Uniform Crime Reports) for people the same age in the general population, they found:

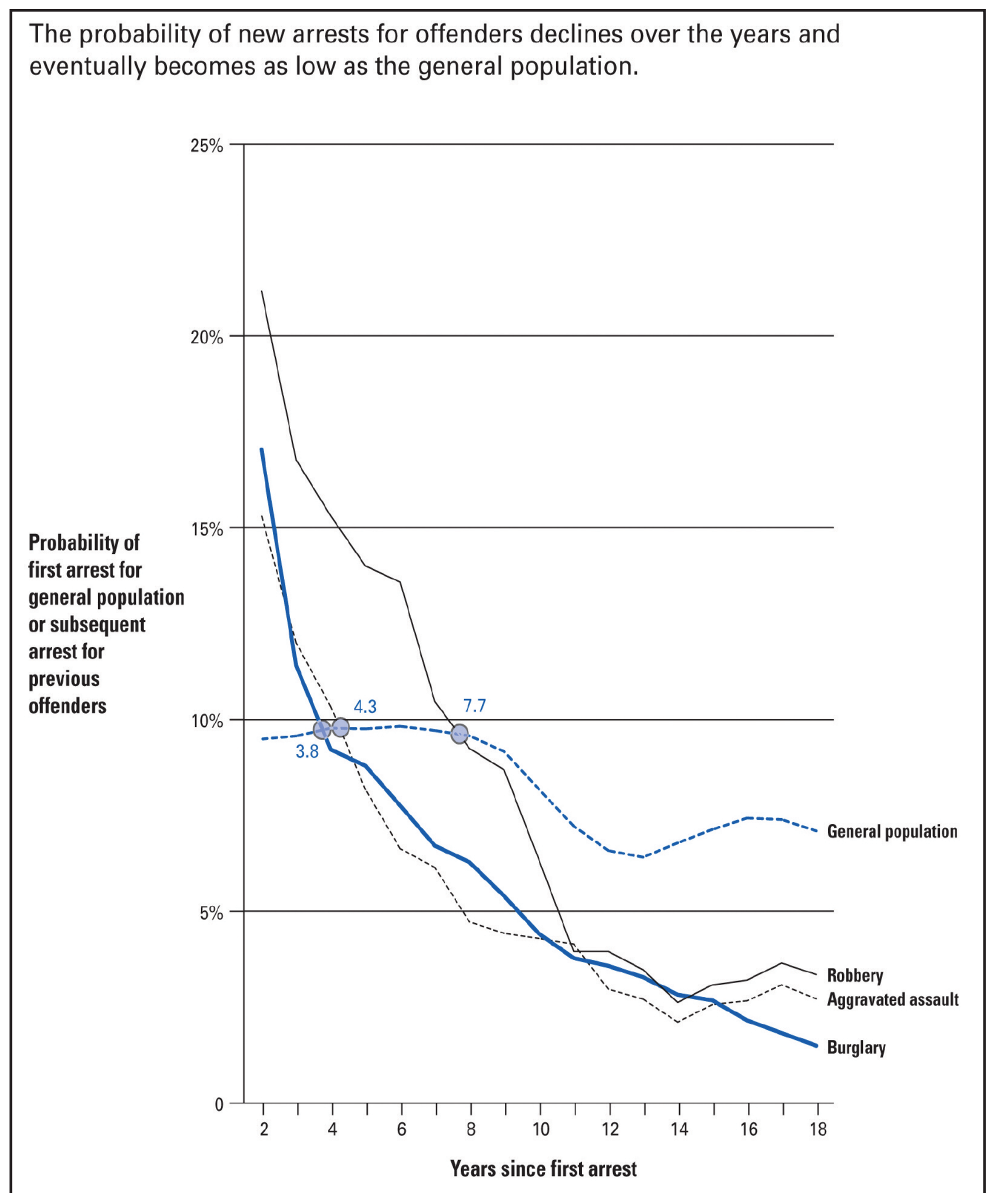
- The risk of recidivism of someone arrested for robbery when he was 18 years old declined to the point where it was the same as the risk of someone of the same age in the general population committing a crime at age 25.7 — or 7.7 years after the redemption candidate's crime (in this example, an arrest in 1980 for robbery). This means that after approximately 8 years, the probability of the robbery ex-offender committing another crime is lower than the probability of other 26-year-olds in the general population committing a crime.
- The risk of recidivism of someone who was arrested for burglary when he was 18 years old declined to the same risk as someone the same age in the general population at age 21.8, or 3.8 years after the crime.
- The risk of recidivism of someone who was arrested for aggravated assault when he was 18 years old declined to the same risk as the general population at age 22.3 or 4.3 years after the crime.

The researchers found that people who were arrested for robbery at age 18 had to stay clean longer than those who were arrested for burglary or aggravated assault to reach the same risk of arrest as same-age people in the general population. The following figure illustrates this concept: how the probability of a new arrest for offenders declines over the years and eventually becomes as low as the risk of arrest for the general population.

With respect to the factor of an arrestee's age at first arrest (again, remember that the researchers used data for 88,000 ex-offenders who were first arrested in New York in 1980), the researchers found that:

- People who were first arrested for robbery when they were 18 years old had the same risk of arrest after 7.7 years as same-age individuals in the general population;
- People who were first arrested for robbery at age 16 had the same risk of arrest after 8.5 years as same-age individuals in the general population; and
- People who were first arrested for robbery at age 20 had the same risk of arrest after 4.4 years as same-age individuals in the general population.

Figure 1. First-Time 18-Year-Old Offenders Compared to General Population



The researchers empirically demonstrated what the criminal justice community had long known to be true: The younger an offender is when he first commits a crime, the longer he has to stay clean to have the same risk of arrest as people his same age in the general population. What is so promising about this study, however, is that it appears to be possible to scientifically compute the precise point — using a variety of factors, such as type of crime and age at first arrest — at which the risk of recidivism for an ex-offender becomes the same as the risk of someone in the general population.

The Potential Impact of This Model

One of the goals in President Barack Obama's crime and law enforcement agenda is breaking down employment barriers for people who have committed a crime, but then stay out of trouble for a number of years. Although readers of *Corrections Today* know first-hand how many people are affected by such barriers, one need only look at how widespread the computerization of criminal-history records is in the U.S. to understand the potential impact of the Blumstein-Nakamura research.

For example, in its 2005 survey of U.S. employers, the Society for Human Resource Management found that more than 80 percent perform criminal background checks on prospective employees.[1] The number of criminal-history records is also a factor:

- In 2006, there were nearly 81 million criminal records in the states, 74 million of which were in automated databases (see the 2006 Bureau of Justice Statistics *Survey of State Criminal History Information Systems*, available at www.ojp.usdoj.gov/bjs/crs.htm).

Continued on page 102

- In 2008, there were 14 million arrests (see the FBI's *Crime in the United States*, 2008, available at www.fbi.gov/ucr/cius2008).

Considering all these factors — the number of criminal-history records, the number of employers performing background checks, and advancements in information technology that allow access to records — one can begin to understand how challenging it has become for ex-offenders to find a job.

Certainly, employers have varying sensitivities regarding a potential employee's criminal record. Those serving vulnerable populations, such as children and the elderly, would be particularly sensitive to a prior record involving violence, while a bank hiring a teller would be sensitive to a record of property crimes. On the other hand, a construction company hiring crew might be far less sensitive to most prior records.

Factors such as these can be taken into account using the model that Blumstein and Nakamura have developed. They also used this model to compare data of the study group (ex-offenders who were arrested for robbery, burglary or aggravated assault in New York in 1980) to people in the general population who had never been arrested to show when the risk of recidivism of those with a prior record came "close enough" (as far as what employers might require) to the risk of people who had never committed a crime.

Blumstein and Nakamura believe that this model, which they continue to study and refine, makes it possible to identify when the risk of recidivating has declined sufficiently to be empirically regarded — based on an employer's particular parameters — as irrelevant in a hiring decision. "Our preliminary findings and our ongoing research offer an important opportunity for this nation to think about when an ex-offender might be considered redeemed for employment purposes," Blumstein said.

ENDNOTE

[1] Burke, M.E., 2006. *2004 Reference and Background Checking Survey Report: A Study by the Society for Human Resource Management*, Alexandria, Va.: Society for Human Resource Management.

For More Information: [Graphics, box this information]

Blumstein, Alfred, and Kiminori Nakamura. 2009. Redemption in the presence of widespread criminal background checks. Criminology, 47(2).

Blumstein, Alfred, and Kiminori Nakamura. 2009. 'Redemption' in an Era of Widespread Criminal Background Checks," NIJ Journal, 263(June):10-17 (available at www.ojp.usdoj.gov/nij/journals/263/redemption.htm).

Watch a video of Blumstein and Nakamura at the 2009 NIJ Conference: www.ojp.usdoj.gov/nij/journals/263/redemption.htm.

Nancy Ritter is a writer and editor at the National Institute of Justice.

Reclaiming Lives: Employment

Removing Barriers for Job Seekers with Criminal Records

1 in 6 Ohioans have a misdemeanor or felony conviction record – and nearly 1 in 3 have been arrested. These records prevent qualified people from obtaining gainful employment long after they are unlikely to reoffend. Over **90% of companies run background checks** on prospective employees. The majority of employers are **unlikely to hire applicants with a criminal record**. Additionally, **over 600 barriers in Ohio law** restrict employment opportunities for people with criminal records. **This is a problem** because stable employment and livable wages are important predictors of successful re-entry and desistance from crime. Employment saves taxpayer dollars on prisons and public benefits.

WHAT SHOULD EMPLOYERS DO?

Getting qualified, loyal workers

Denying employment for *any* criminal record limits qualified, loyal workers, and it can also be illegal. Federal laws and policies encourage employers to **individually assess applicants** with criminal records, considering the gravity the offense, time since the offense, and nature of the job. If an employer intends to reject the applicant based on a criminal record, the employer must provide **contact information for the background-checking agency or a copy of the background check**. Employers must **not use arrest records** as exclusive proof of criminal conduct. Job applicants may be able to sue to protect their rights under federal law (Title VII or FCRA).

EQUAL EMPLOYMENT OPPORTUNITIES
Federal guidance: http://ojpc.co/EEOCguide

FEDERAL TRADE COMMISSION
Info for employers: http://ojpc.co/FCRAguide

BROKEN RECORDS

Incomplete & inaccurate background checks

Not all background-checking services – whether from an online company or a governmental entity – are reliable. Employers must give applicants an opportunity to correct or explain information in a background check.

NATIONAL CONSUMER LAW CENTER
NCLC report: http://ojpc.co/NCLCreport

WHAT SHOULD JOB APPLICANTS DO?

The legal tools to remove barriers

Certificates of Qualification for Employment

CQEs are a new benefit for employers and workers that became available in 2013. CQEs remove "collateral consequences" – the mandatory legal barriers restricting access to jobs and professional licenses. For example, if a state law prohibited a hospital from employing a job-candidate with certain felony convictions, the hospital could hire that candidate if he or she had a CQE that addressed the relevant state law. CQEs also give the employer total immunity – or protection – from negligent-hiring liability lawsuits.

OHIO JUSTICE & POLICY CENTER
Get free legal assistance:
http://ojpc.co/2ndChanceClinics
http://ojpc.co/CQE1pg

Clear Up Background Checks

Job seekers with criminal records might be able to **seal or expunge** some records. For example, a dismissed or not-guilty case can still show up on a background check – but, often, a person can "seal" the record so it will no longer appear. Job seekers should also ask prospective employers for copies of their background check to **ensure that there are no errors**.

#ReclaimingLives

SOME RIGHTS RESERVED, OHIO JUSTICE & POLICY CENTER
(cc) BY-NC-SA

Reclaiming Lives: Housing

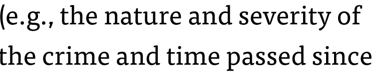
Getting a Safe, Stable Place to Live When You Have a Criminal Record

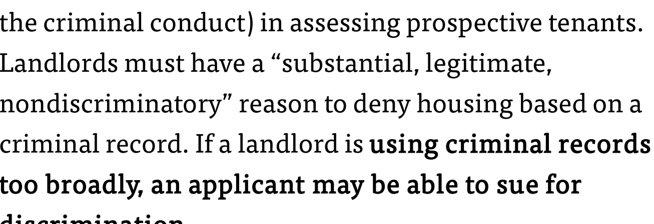
100 million Americans – or nearly one out of three – have a criminal record. The United States incarcerates the largest prison population of any country in the world: 2.2 million adults, almost one quarter of the world's prisoners. Over 95% of these people will be released and will need a place to live. But, individuals with criminal records have **tremendous difficulty accessing safe, secure and affordable housing** – which is critical to their successful reentry to society.

WHAT SHOULD LANDLORDS DO?

Using background checks without breaking laws

Private landlords are **not allowed to have blanket bans** on renting to people with criminal records. This is a violation of the Fair Housing Act that can result in penalties for discriminatory conduct. Housing providers should **distinguish between arrests and convictions** and **cannot use an arrest alone to ban** applicants. In the case of applicants with convictions, property owners must prove that the exclusion is justified and **consider certain factors** (e.g., the nature and severity of the crime and time passed since the criminal conduct) in assessing prospective tenants.





Landlords must have a "substantial, legitimate, nondiscriminatory" reason to deny housing based on a criminal record. If a landlord is **using criminal records too broadly, an applicant may be able to sue for discrimination**.

US DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Federal guidance: http://ojpc.co/HUDguide
More federal guidance: http://ojpc.co/HUDguide2

REMOVING BARRIERS

If you are able to **seal or expunge** some records, you should! You may also be able to bring a lawsuit if your rights under the Fair Housing Act were violated. Free legal assistance may be available at OJPC's Clinics.

If you were denied public housing, you are entitled to a hearing. This is a chance for you to prove that you will be a good tenant and not commit future crimes.

PUBLIC HOUSING

Properly using discretion

Federal law requires public housing authorities (PHAs) to **perform criminal background checks** for all adult household members who apply for housing assistance. Federally assisted housing programs **must permanently reject**: (1) applicants convicted of manufacturing methamphetamine on federally assisted property and (2) applicants required to register as sex offenders for life. In most instances, PHAs will also ban applicants who were previously evicted from federally assisted housing for drug-related criminal activity. Other than these mandatory denials, PHAs have **broad discretion** in deciding whether to admit applicants with criminal records. PHAs can consider all criminal activity, including arrests that did not lead to a conviction, but **only if it occurred during a "reasonable time" before the screening**. A PHA can investigate whether there is sufficient evidence that a disqualifying criminal activity occurred, but an **arrest is not, by itself, evidence** on which to base housing denial or eviction.

SHRIVER CENTER ON POVERTY LAW
Housing report: http://ojpc.co/Shriverreport

OHIO JUSTICE & POLICY CENTER
Get free legal assistance
Check out our calendar: http://ojpc.co/2ndChanceClinics

#ReclaimingLives

SOME RIGHTS RESERVED, **OHIO JUSTICE & POLICY CENTER**
(cc) BY-NC-SA