



NEW YORK STATE BAR ASSOCIATION

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**“RE-ENTRY AND REINTEGRATION:  
THE ROAD TO PUBLIC SAFETY”**

**Report and Recommendations of the Special Committee  
on Collateral Consequences of Criminal Proceedings**

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Albany, New York  
May 2006

The Special Committee is solely responsible for the contents of this report. This report is not the official position of the Association unless and until adopted in whole or in part by the House of Delegates of the Association.



## **MISSION STATEMENT**

### **NYSBA Special Committee on Collateral Consequences of Criminal Proceedings**

The legal disabilities and social exclusions resulting from adverse encounters with the criminal justice system often erect formidable societal barriers for criminal defendants, people with criminal records, those returning to their communities after incarceration, and their families. These consequences are far-reaching, often unforeseen, and sometimes counterproductive.

The Special Committee is charged with studying the effects these collateral punishments have on New York residents who have been arrested or charged with a criminal offense, whether convicted or not, and the consequences of these punishments on their families, their communities and our society in general.

The Special Committee shall identify all of the collateral consequences of criminal proceedings; the original purpose and intent of these often hidden sanctions; their usefulness as a societal sanction; and their impact on the ability of formerly incarcerated persons to reintegrate successfully into society. This examination shall include, but not be limited to, consequences involving education, employment, disenfranchisement, immigration status, housing, and family reunification.

The Special Committee also shall analyze the role played by each criminal justice stakeholder – including the prosecution, the defense, the judiciary, the legislature, civil legal services, probation, and parole – in the imposition of these sanctions, as well as the role of each in counseling defendants about the full consequences of criminal proceedings and assisting in the appropriate mitigation of such consequences.

The Special Committee shall prepare a report recommending any appropriate reforms, both by statute and by practice, to the Executive Committee and the House of Delegates.

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## INTRODUCTION

It is estimated that one in three Americans, including New Yorkers, goes through the criminal justice system at some point in their lifetime.<sup>1</sup> Many suffer profound, long-lasting consequences as a result. This report addresses the effects on individuals who have been convicted of a crime and on those who have served a period of incarceration, as well as on those who have merely been charged and never convicted. Their successful re-entry into society from the criminal justice system is an important issue for all. It most immediately affects the persons returning to society and their families. But it is also critical for the rest of society. Whether or not one believes that society has a moral duty to rehabilitate those who have committed a crime, virtually all would agree that rehabilitation promotes public safety by decreasing recidivism and its very tangible costs on society. This report considers one group of factors in connection with increasing successful re-entry and decreasing recidivism: the ancillary, indirect, unanticipated, or hidden effects – often termed “collateral consequences”<sup>2</sup> – of being charged with, convicted of, or incarcerated for a crime.

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<sup>1</sup> As of December 31, 2003, 5.976 million New Yorkers have a criminal history maintained by the NYS Division of Criminal Justice Services. See Bureau of Justice Statistics NCJ 210297, *Survey of State Criminal History Information Systems, 2003*, at 15 (Feb. 2006). The population of New York in 2003 was 19,228,031. See U.S. Census Bureau, *Table 1: Annual Estimates of the Population for Counties of New York: April 1, 2000 to July 1, 2005*. This former number represents an increase of 656,000 people with criminal histories in New York from 2001 to 2003. The BJS report counts individuals with criminal histories in each state as identified by fingerprints, does not double count for multiple arrests, and the New York numbers were compiled from data provided by DCJS. See Bureau of Justice Statistics NCJ 210297, *Survey of State Criminal History Information Systems, 2003* (Feb. 2006). By December 31, 2003, over 71 million individuals had state criminal histories nationwide. *Id.*

<sup>2</sup> We use these terms interchangeably in this report to refer to the myriad consequences that occur as a result of being charged with or convicted of a crime but are not the results specifically contemplated in the sentencing statute. In that way, they are “indirect,” “collateral,” or “ancillary.” The term “hidden” is often appropriate as well because these consequences are not readily apparent from statutes or made clear at sentencing.

Collateral consequences also extend to all parts of jail and prison life that are not government-sanctioned punishments, including assaults from other inmates, staff assaults, and sexual abuse. Collateral consequences include medical and mental health issues that arise during incarceration and can be considered unintended consequences of the sanction imposed. Although the subject of the medical and mental health issues that may arise during incarceration is complex and deserving of a separate and full examination, the appendix to this report presents some of the problems that arise and also presents some suggestions. Discussion of the medical and mental health issues is particularly relevant to the post-release collateral consequences focus of this report because the

**A. MAGNITUDE OF THOSE DIRECTLY AFFECTED**

It is estimated that more than one in three adults in the United States – over 71 million people – have a criminal record. Included in this estimate are 13 million adults convicted of felonies nationwide.<sup>3</sup> If current incarceration rates continue, an estimated 1 in 15 persons born in 2001 will serve time in prison during their lifetimes,<sup>4</sup> and that likelihood rises to 1 in 3 for African-American males.<sup>5</sup> Countless families are affected: over ten million children have parents who were imprisoned at some point in the children's lives.<sup>6</sup> In addition, disparate racial and economic impacts are well-documented.<sup>7</sup> For example, over 80% of those charged with crimes are indigent and unable to afford an attorney.<sup>8</sup> Further, 93% of all people sentenced to prison eventually return to their communities.<sup>9</sup>

A closer look at actual arrest and conviction data undermines many common conceptions about people with criminal records.<sup>10</sup> In 2005 in New York State, almost 70% of adult arrests

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failure to address medical and mental health issues that arise during incarceration often results in significant problems for the formerly incarcerated and for the community post-release.

<sup>3</sup> Brian C. Kalt, *The Exclusion of Felons From Jury Service*, 53 AM. U. L. REV. 65, 67 (2003). The states that equate aggravated misdemeanors to felonies for purposes of restrictions on civil participation (not New York) are treated in the same manner as states that limit their restrictions only to those who have committed felonies.

<sup>4</sup> See Thomas P. Bonczar, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 197976, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, at 7 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>.

<sup>5</sup> *Id.* at 7-8.

<sup>6</sup> Center for Law and Social Policy (CLASP), *Every Door Closed: Facts About Parents with Criminal Records*, at 1 (Fact Sheet No. 1, 2003), available at [www.clasp.org/publications/EDC\\_fact\\_sheets.pdf](http://www.clasp.org/publications/EDC_fact_sheets.pdf).

<sup>7</sup> See, e.g., Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272-73 (2004); The Sentencing Project, Report Summary, *Intended and Unintended Consequences: State Racial Disparities in Imprisonment*, available at <http://www.sentencingproject.org/pdfs/9050summary.pdf> (last visited Mar. 2, 2005).

<sup>8</sup> See Caroline Wolf Harlow, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 179023, *Defense Counsel in Criminal Cases*, at 1 (Nov. 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc>.

<sup>9</sup> Joan Petersilia, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (2003).

<sup>10</sup> McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments As an Advocacy Strategy*, 36 UNIV. OF TOLEDO L. REV. 479, 485 (2005); Anthony C. Thompson,

were for misdemeanors or violations, whereas only 8% were for violent felonies. Only 63.3% of arrests resulted in convictions for any offense at all, and over 87% of all convictions were for misdemeanors or violations in 2004.<sup>11</sup> However, extensive and complicated collateral consequences affect those convicted of any charge, not just the most serious offenses.

Additionally, the great number of people who are arrested but never convicted of any crime are still “punished” – *i.e.*, their reputation is damaged – by the mere fact of having been charged with a crime. Over 36% of all arrests in New York in 2004 did not result in conviction.<sup>12</sup> However, the fact of the arrest is now more readily known than ever before due to the ready access to computer databases. For example, 80% of large corporations perform background checks on job applicants (up from only 51% eight years ago), and 69% of small businesses do.<sup>13</sup> Similarly, it is common for landlords to run background checks now. That is but one example of how, despite never being found guilty of a crime, arrested individuals still face hurdles to leading their lives.

At the same time, recidivism rates are high and the number of people returning from incarceration is greater than ever before. The most comprehensive study ever conducted by the Bureau of Justice Statistics on prisoner recidivism found that 30% of people released from prison were rearrested in the first six months, 44% within the first year, and 67.5% within three years of release from prison.<sup>14</sup> The overall public safety implication that these recidivism rates represent

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*Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 263 (2004) (“television coverage of crime more than doubled from 1992 to 1993, despite the fact that crime rates remained essentially the same.”).

<sup>11</sup> New York State Division of Criminal Justice Services, *Total Arrests, New York State* (Jan. 26, 2006).

<sup>12</sup> *Id.*

<sup>13</sup> See Susan Llewelyn Leach, *Bosses Peek into Job-Seekers’ Pasts*, CHRISTIAN SCI. MONITOR, Oct. 13, 2004, at 15.

<sup>14</sup> Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994* (U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report, Wash., D.C. 2002), available at <http://ojp.usdoj.gov/bjs/pub/ascii/rpr94.txt>.

can be seen by examining national trends and the relationship between “recidivism arrests” and all arrests. According to Jeremy Travis, by 2001, people released from prison during the three preceding years accounted for approximately 30% of all arrests for violent crime, 18% of all arrests for property crime, and 20% of all arrests for drug offenses.<sup>15</sup> With such a high percentage of crime attributable to the re-entry population, it is axiomatic that, if policymakers want to decrease crime and increase public safety, they must find ways to promote reintegration. This is a reality that has not escaped the prosecutorial perspective. The National District Attorneys Association has stated: “It is inevitable with this rate of recidivism that public safety will suffer unless provisions are made to assist those ex-offenders, who desire to become law-abiding and productive parts of their communities, with their transition back into society.”<sup>16</sup>

#### **B. CONSIDERING RE-ENTRY AND RECIDIVISM**

The importance of re-entry and its connection to recidivism are generally accepted. In his 2004 State of the Union address, President George W. Bush introduced a new re-entry initiative for people leaving prison, stating: “This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can’t find work, or a home, or help, they are much more likely to commit more crimes and return to prison.”<sup>17</sup>

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<sup>15</sup> Jeremy Travis, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 98 (2005). Jeremy Travis is the president of John Jay College of Criminal Justice. Prior to his appointment, Mr. Travis served four years as a senior fellow affiliated with the Justice Policy Center at the Urban Institute, where he launched a national research program on prisoner reentry into society. From 1994 to 2000, Mr. Travis was the director of the National Institute of Justice (NIJ). A key figure in the development of new approaches to prisoner reentry, he pioneered the concept of the reentry court, designed the Department of Justice’s reentry partnership initiative, and created the federal reentry program in President Clinton’s FY 2000 budget. Prior to his time at NIJ, Mr. Travis was deputy commissioner of legal matters at the New York City Police Department, chief counsel to the House of Representatives Subcommittee on Criminal Justice, and special advisor to the mayor of New York City.

<sup>16</sup> National District Attorneys Association, *Policy Positions on Prisoner Reentry Issues*, at 2 (Resolution Adopted by the Bd. of Directors, Portland, ME, July 17, 2005), available at [http://www.ndaa-apri.org/pdf/policy\\_position\\_prisoner\\_reentry\\_july\\_17\\_05.pdf](http://www.ndaa-apri.org/pdf/policy_position_prisoner_reentry_july_17_05.pdf).

<sup>17</sup> President George W. Bush, State of the Union Address (Jan. 20, 2004) (transcript available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>).

There is a need to consider existing barriers to re-entry. Due primarily to federal and state initiatives to be tough on crime and step up the war on drugs, there is a plethora of piecemeal legislation and regulations that impose collateral consequences of arrest or conviction separate from any actual sentences handed down.<sup>18</sup> For more than three decades, the Legal Action Center has been a pioneer and leader in overturning unfair statutory and practical barriers to re-entry into society for people with criminal records. The Legal Action Center's exhaustive study, *After Prison: Roadblocks to Reentry: A State-by-State Report Card*, and its subsequent *Advocacy Toolkits* have proven invaluable in reinvigorating both the national dialogue about perpetual punishment, reintegration and public safety, and efforts to improve public policy responses. In 2001, the Legal Action Center further expanded its commitment to removing roadblocks for people with criminal records by creating its National Helping Individuals with criminal records Reenter thorough Employment ("HIRE") Network, whose mission is to increase the number and quality of job opportunities available to people with criminal records by changing public policies, employment practices, and public opinion.

More recently, the focus and effort has expanded. In response to the exponential growth of hidden sanctions, the American Bar Association adopted the "Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons."<sup>19</sup> The 2003 guidelines call for the codification of all collateral consequences in the penal code and for their use in determining an individual's sentence. The ABA's intent is to ensure that all of the stakeholders in the criminal justice system – particularly the judge, prosecutor, defense counsel,

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<sup>18</sup> Joan Petersilia, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 136 (2003) ("What is new is that these invisible punishments and legal restrictions are growing in number and kind, being applied to a larger percentage of the U.S. population and for longer periods of time than at any point in U.S. history.").

<sup>19</sup> ABA Crim. Just. Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Std. 19-1.1(a)-(b) (2003).

and the defendant – are aware of the civil disabilities that often automatically follow from a criminal conviction. The standards also delineate the respective duties of the judge, the prosecution, and the defense counsel in advising a defendant of the hidden sanctions that attend a conviction. With such education of all aspects of the punishment, these stakeholders can better determine the proper sentence to impose.

Similarly, the National Conference of Commissioners on Uniform State Laws has appointed a Drafting Committee on Collateral Sanctions and Disqualifications Act that is charged with drafting “an act addressing the various penalties and disqualifications that individuals face incidental to criminal sentencing, including disqualification from voting, prohibitions from running for office, exclusion from certain types of employment, etc. The act is intended to be narrow in scope, applying only to the procedures surrounding collateral sanctions, not defining what those sanctions are.”<sup>20</sup>

In New York, Chief Judge Judith S. Kaye has been instrumental in increasing awareness of the issue of collateral or hidden consequences. Through the first colloquium of the *Partners in Justice* program, held in May 2005, she brought together representatives of the bench, bar, and clinical law school programs to consider and discuss the collateral consequences of criminal charges.<sup>21</sup> Already there have been tangible results, including the imminent publication of the colloquium proceedings, as well as the creation of a dedicated website that is an online collaborative forum where judges, lawyers and scholars can learn more about collateral consequences.<sup>22</sup>

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<sup>20</sup> The NCCUSL has prepared and circulated a draft report for comment, which can be found at [http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm).

<sup>21</sup> <http://www.courts.state.ny.us/ip/partnersinjustice/index.shtml>.

<sup>22</sup> <http://www2.law.columbia.edu/fourcs>.

Recently, a collaboration of dozens of legal, social services, and policy reform advocates has come together to build a solution-oriented advocate network and an online resource center to serve it. It is called Reentry Net/NY ([www.reentry.net/ny](http://www.reentry.net/ny)) and was launched in November 2005 with an online library of hundreds of practice resources selected by experts, a calendar of events, and additional communications tools. Reentry Net/NY works to network, train, and support organizations and advocates working with the re-entry community, provide information and education directly to the community to link them with available services, and create a more effective bridge between the re-entry community, the services field, and policy reform advocates.

In addition to those significant and important efforts, there is a need for more – a need that the New York State Bar Association is addressing.

### **C. FORMATION OF THE SPECIAL COMMITTEE**

In December 2004, the New York State Bar Association, under the leadership of President Kenneth G. Standard, formed the Special Committee on Collateral Consequences of Criminal Proceedings. The Special Committee's mission statement provides:

The legal disabilities and social exclusions resulting from adverse encounters with the criminal justice system often erect formidable societal barriers for criminal defendants, people with criminal records, those returning to their communities after incarceration, and their families. These consequences are far-reaching, often unforeseen, and sometimes counterproductive.

The Special Committee is charged with studying the effects these collateral punishments have on New York residents who have been arrested or charged with a criminal offense, whether convicted or not, and the consequences of these punishments on their families, their communities and our society in general.

The Special Committee shall identify all of the collateral consequences of criminal proceedings; the original purpose and intent of these often hidden sanctions; their usefulness as a societal sanction; and their impact on the ability of formerly incarcerated persons to reintegrate successfully into society. This examination shall include, but not be limited to, consequences involving education, employment, disenfranchisement, immigration status, housing, and family reunification.

The Special Committee also shall analyze the role played by each criminal justice stakeholder – including the prosecution, the defense, the judiciary, the legislature, civil legal services, probation, and parole – in the imposition of these sanctions, as well as the role of each in counseling defendants about the full consequences of criminal proceedings and assisting in the appropriate mitigation of such consequences.

The Special Committee shall prepare a report recommending any appropriate reforms, both by statute and by practice, to the Executive Committee and the House of Delegates.

In announcing the formation of the Special Committee, President Standard explained that “[t]hese consequences are far-reaching, often unforeseen, frequently counterproductive, and result in an adverse and often disproportionate toll on families, communities and our society as a whole.” Thus, the Committee “will review existing statutes and regulations to determine whether they work effectively to assist those men and women – who have served a prison term appropriate to their offense – with a successful return to society as useful citizens and not to become repeat offenders or welfare recipients.” At the same time, however, the Committee shall remain mindful that “[w]e all have the right to expect that our neighborhoods and communities are made and kept safe from crime and violence, and every society has a duty to honor that expectation.”<sup>23</sup>

The Special Committee is comprised of practitioners in the criminal justice area who provide experience and input from the prospective of both the prosecution and the defense, as well as others who come to these issues with a fresh perspective.

#### **D. WORK OF THE SPECIAL COMMITTEE**

Given the broad scope of its mandate and the issues presented, the Committee divided its work by topic and by nature of analysis. It identified the primary areas of collateral

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<sup>23</sup> [http://www.nysba.org/Content/ContentGroups/State\\_Bar\\_News1/2005\\_issues/January\\_February\\_2005/State\\_bar\\_forms\\_new\\_committee\\_to\\_examine\\_collateral.htm](http://www.nysba.org/Content/ContentGroups/State_Bar_News1/2005_issues/January_February_2005/State_bar_forms_new_committee_to_examine_collateral.htm).



consequences and formed working groups for each of them: benefits, civic participation, education, employment, family, financial penalties, housing, and immigration. The Committee consciously bifurcated its analysis of each of those areas, first researching and compiling information to educate its members fully and only thereafter separately considering the merits of potential recommendations.

These practical imperatives resulted in the structure of the Committee's work product. The first part constitutes the report, in which the Committee presents, for each of the eight general topics, an objective summary of the current law and its effects as well as a neutral description of possible avenues for change that are being suggested and discussed by others looking at various aspects of these issues across the United States. The second part includes the Committee's recommendations, both overarching as well as topic-specific proposals that the Committee unanimously supports.

Through the publication and dissemination of this report, the Committee has already achieved some of its primary goals: to educate a broader group about the critical issues presented by collateral consequences, to create a research tool for the use of others, and to cause increased discussion and debate of these issues.<sup>24</sup> The Committee further hopes that its recommendations will be adopted by the House of Delegates and thereafter implemented by the relevant stake-holders: the legislature, the court system, the administrative agencies, and the legal profession in general. As set out below, there is so much that is so easy to change that will

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<sup>24</sup> Although this report is voluminous, it is not and does not purport to be a comprehensive or all-inclusive analysis of all collateral consequences and their full impact. In fact, this is necessarily so: hidden sanctions associated with criminal charges, convictions, or incarcerations are continually emerging and being created. Also, because we are a committee of attorneys, we have focused primarily on the legal effects, leaving a detailed discussion of the other effects to other professions.

have profound impact in easing re-entry and the disproportionate cumulative effect of collateral consequences, and thus contribute to the reduction of recidivism.

The work of this Committee has been an intellectual and emotional journey. Although many of the Committee members work in this field, each of us learned something new during the process and came to adjust our views on various issues. The dialogue, debate, and information sharing over the past year have been personally rewarding. As a group, we are privileged and grateful to have had the opportunity on behalf of the Association to examine such an important issue so closely. We hope that our effort will enrich the public discussion and debate on this vital topic and result in concrete change and tangible benefits to all New Yorkers.

**E. MEMBERS OF THE SPECIAL COMMITTEE**

Chair

Peter J.W. Sherwin

Secretary

Jennifer E. Burns

Members

Vincent E. Doyle

Barry Kamins (EC liaison)

Dori Lewis

Susan B. Lindenauer

Bryan Lonagan

John C. Maloney, Jr.

Joseph D. McCann

Leonard E. Noisette

Alan Rosenthal

David M. Schraver

J. McGregor Smyth

Staff Liaison

Frank J. Ciervo

Research and Initial Drafting Staff<sup>25</sup>

Jeff Gentes  
Noah Siskind Gitterman  
Cynara Hermes  
Jason Husgen  
Dawn Irizarry  
Jeremy Mittman  
Carrie Mitnick  
Avi Morrell  
David Olenner  
Jeffrey Penn  
Shona Mack-Pollack  
Parisa Salimi  
Jennifer Wagner

Jennifer E. Burns of New York: Jennifer E. Burns is an associate in Proskauer’s Litigation and Dispute Resolution department. Her practice focuses on white collar criminal investigations and investigations by regulatory agencies.

Vincent E. Doyle, III of Buffalo: Vincent E. Doyle III, a partner with Connors & Vilardo, LLP in Buffalo, is a trial and appellate lawyer. His practice includes white-collar criminal investigations and representation of professionals. He is past Chair of the New York State Bar Association’s Criminal Justice Section.

Barry Kamins of Brooklyn: Barry Kamins, a partner in Flamhaft Levy Kamins & Hirsch, is a Vice President of the State Bar Association. He is an adjunct professor at Fordham Law School and Brooklyn Law School where he teaches New York Criminal procedure. He is president-elect of the Association of the Bar of the City of New York.

Dori Lewis of New York: Dori Lewis is a senior supervising attorney at the Prisoners’ Rights Project of the New York City Legal Aid Society. She has spent more than twenty years

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<sup>25</sup> The Committee thanks Proskauer Rose for its generous contribution of the hundreds of attorney hours, and invaluable assistance, provided by its associates and summer associates on the Research and Initial Drafting Staff. The Committee also thanks The Bronx Defenders, the Legal Aid Society, and the Neighborhood Defender Service for the significant assistance of many of their staff attorneys and interns.

involved in complex civil rights class action litigation challenging human rights abuses experienced by persons confined in jail and prisons. Her work has focused, in particular, on the abuses faced by women and young people.

Susan B. Lindenauer of New York: Susan B. Lindenauer is the retired General Counsel of the Legal Aid Society of New York City. She is a Vice President-Elect of the New York State Bar Association and a past chair of the Criminal Justice Section and the Committee on Legal Aid. She currently serves as a member of the NYSBA Special Committees on Standards for Mandated Representation, Youth Outreach and COSAC. She is also a Vice-Chair of the Fellows of the New York Bar Foundation and a member of the Board of Directors of the New York County Lawyers' Association where she co-chairs the Task Force on Judicial Selection.

Bryan Lonagan of New York: Bryan Lonagan is an attorney with the Legal Aid Society's Immigration Law Unit where he represents non-citizens who have been detained by immigration authorities and are facing deportation because of past criminal convictions. He previously worked in the Society's Criminal Defense Division and Criminal Appeals Bureau.

John C. Maloney, Jr. of Morris Plains, N.J.: John C. ("Jay") Maloney, Jr., is a partner in the Litigation Department of Pitney Hardin LLP in Florham Park, New Jersey, and New York, New York. His practice focuses on complex commercial disputes, pharmaceutical litigation, products liability, toxic tort law, and insurance coverage in the New York and New Jersey state and federal courts. He is a former Chair of the New York State Bar Association Committee on Federal Constitution and Legislation as well as the Association's Coordinating Group for Response to Anti-Terrorism Initiatives.

Joseph D. McCann of Rockville Centre: Joseph D. McCann is a partner in the law firm of Murray & McCann, and principal in the monitoring and investigative firm of Murray &

McCann, LLC. After graduating from St. John's University School of Law in 1984, he served as Law Assistant and then Deputy Chief Law Assistant to the New York Court of Appeals. In 1986, Mr. McCann was appointed as an Assistant United States Attorney for the Eastern District of New York and later served as Chief Civil Rico Attorney for that office. He became General Counsel for the Jacob K. Javits Convention Center in 1994 and held that position until the formation of Murray & McCann in 1995. Mr. McCann is a member of the New York Bar and admitted to practice before several federal courts.

Leonard E. Noisette of New York: Leonard E. Noisette is executive director of the Neighborhood Defender Service of Harlem ("NDS"), a community-based public defender office that has been a leader in expanding the work of defenders to include helping clients address the collateral consequences of their involvement in the criminal justice system. Mr. Noisette has substantial indigent defense experience on both the trial and appellate level. He is an active member of a number of bar associations and is currently Chair of the Board of the National Legal Aid & Defender Association.

Alan Rosenthal of Syracuse: Alan Rosenthal is a criminal defense and civil rights attorney with over 30 years of experience. A graduate of Syracuse University College of Law he is currently the Director of Justice Strategies, the research, training and policy initiative of the Center for Community Alternatives. He is a frequent presenter at CLE programs for the New York State Association of Criminal Defense Lawyers, National Legal Aid & Defender Association, National Alliance of Sentencing and Mitigation Specialists, The Association of the Bar of the City of New York, New York State Judicial Institute, New York County Defender Services, New York State Division of Probation and Correctional Alternatives, and New York

State Defenders Association on sentencing, sentencing advocacy, mitigation, the collateral consequences of criminal convictions, and ethics.

David M. Schraver of Rochester: David M. Schraver is the managing partner of Nixon Peabody LLP's Rochester office, and his practice involves business litigation with an emphasis on complex contracts, public utilities, and Indian land claims and related matters. He served in the United States Navy Judge Advocate General's Corps as Legal Officer of the United States Naval Disciplinary Command, Portsmouth, New Hampshire. Mr. Schraver is a member-at-large of the NYSBA Executive Committee and Finance Committee (among others) and is a past-president of the Monroe County Bar Association, which he represents in the ABA House of Delegates. He is a graduate of Harvard College and the University of Michigan Law School where he was a Note and Comment Editor of the Michigan Law Review.

Peter J.W. Sherwin of New York: Peter Sherwin is a litigation partner in the New York office of Proskauer Rose LLP, and his practice focuses on complex financial disputes, primarily in the international context. He is the past Chair of this Association's Civil Rights Committee and is a member-elect of its Executive Committee. He also chairs the Council on Judicial Administration of the New York City Bar and is a member of Mayor Bloomberg's Advisory Committee on the Judiciary.

J. McGregor Smyth of the Bronx: McGregor Smyth is the Project Director and Supervising Attorney of the Civil Action Project at The Bronx Defenders, and the Director of Reentry Net. McGregor established the Civil Action Project in 2000 and has extensive practical experience helping clients cope with the consequences of criminal proceedings. He represents clients at every jurisdictional level and trains advocates and judges nationally on these hidden sanctions, with a focus on facilitating civil-defender collaborations. In addition, in partnership

with Pro Bono Net, McGregor is leading the development of Reentry Net at [www.reentry.net](http://www.reentry.net), a collaborative network and online resource center that connects, trains, and supports advocates in New York State who provide services to people struggling to get jobs, access benefits, maintain their housing, and keep their families intact after an arrest or conviction.





## **EXECUTIVE SUMMARY**

This executive summary is presented solely to give the reader an overview of the Committee’s report and a listing of its recommendations. It is not, does not purport to be, and cannot be a substitute for the report and recommendations themselves. To understand properly the Committee’s findings and its specific recommendations, it is critical that one take the time to read the Committee’s actual report and recommendations – a possibly daunting, but hopefully rewarding, task.

### **A. REPORT**

The following are highlights from each of the eight subject-matters addressed in the report. This executive summary does not contain supporting footnotes for ease of the reader, but all source references are set out below in the report itself.

#### **1. Employment**

In New York, the unemployment rate is substantial for formerly incarcerated individuals. Up to 60% of people formerly incarcerated are unemployed one year after release, and 83% of people who violate the terms of their probation are unemployed at the time of the violation. Without employment, these individuals cannot meet their own or their families’ basic needs. Without guidance or other resources, many revert to their former criminal behavior. As New York City’s probation commissioner described: “Either they work or they go back to jail.”<sup>26</sup> Research from both academics and practitioners suggest that the chief factor that influences the reduction of recidivism is an individual’s ability to gain quality employment.

The most common issue many people face is filling out the job application itself. Preliminary questions such as “Have you ever been convicted of a crime?” or “Have you ever

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<sup>26</sup> Raul Russi (quoted in Walter Shapiro, *Prison Nation Turns Its Back On Released Convicts*, USA TODAY, May 30, 2001, at 10a).

been arrested?” pose a major obstacle to gaining employment. The decision whether to answer honestly can determine whether the previously arrested or incarcerated individual even gets a chance to interview for a job, much less be hired. Under New York Human Rights Law § 296, it is an “unlawful discriminatory practice ... to make any inquiry about ... or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual.” Although it is permissible under Corrections Law § 752 to inquire into criminal convictions, an employer may not refuse to hire an applicant based on the prior conviction, absent a “direct relationship” between the offense and the employment, or unless employment would involve an “unreasonable risk” to property or safety. If an individual who has been convicted of a crime lies when asked whether he has ever been convicted to avoid the social stigma associated with a conviction, his or her employment may be legally terminated for lying on an employment application.

Formerly incarcerated individuals face several other obstacles in their quest to gain employment. Over 100 occupations in New York State require some type of license, registration, or certification by a state agency. Although only a few statutes automatically bar people from licensure solely based on past convictions, New York created many statutory restrictions based on an individual’s criminal history through general “good moral character” requirements for almost all licenses. For example, an individual with a criminal conviction cannot obtain a license to work as a barber because “a criminal history indicates a lack of good moral character and trustworthiness required for licensure.”<sup>27</sup> Similarly, people often are barred from gaining employment, or often lose employment, with a government employer if ever

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<sup>27</sup> Clyde Haberman, *He Did Time, So He’s Unfit To Do Hair*, N.Y. TIMES, Mar. 4, 2005, at B1.

convicted of a crime. For instance, in New York, people can be terminated from employment with any city, town or village employer if they have engaged in “immoral conduct,” which gives a public employer immense discretion.

Certificates of Relief from Disabilities and Certificates of Good Conduct provide individuals with convictions a limited form of relief from some of the employment barriers they face, such as licensure restrictions. A Certificate of Relief from Disabilities is issued in the discretion of the sentencing court or the New York State Board of Parole and can be tailored to exempt an individual from specific forfeitures or disabilities that are otherwise automatically imposed upon conviction. If not sought and obtained during sentencing from the court, a Certificate of Relief from Disabilities may be obtained upon application to the State Parole Board or the sentencing court, but the applicant must have no more than one felony conviction. A Certificate of Good Conduct is similar to a Certificate of Relief from Disabilities. It may be obtained by a person who has been convicted of more than one felony, but, before an applicant may apply, there is a lengthy waiting period depending on the particular class of felony involved. For example, if the most serious conviction was for a “C” felony, one must wait at least 3 years from the date of the last conviction, payment of fine, or release from prison on to parole supervision. It also takes between six months to a year for a decision on an application for a Certificate of Good Conduct.

## **2. Education**

A complex relationship exists between education, employment, and criminal activity: the higher the level of education attained, the more likely a person will obtain a job and the less likely he or she will engage in future criminal activity. This relationship affects those already imprisoned as well. When released from prison, those convicted of a crime are frequently unable to find jobs because of insufficient education or because they lack necessary work experience.

The stigma attached to incarceration is an obstacle to securing employment after imprisonment that is difficult to counter. However, another obstacle to securing employment – and one that can be remedied – is the fact that, while imprisoned, prisoners do not have the opportunity to develop educational and vocational skills necessary to securing employment once released.

The vast majority of inmates enter prison with low educational attainment. The New York State Department of Correctional Services reported that, as of January 1, 2004, approximately 10% of the prison population had achieved just an eighth grade education, 30% had achieved a tenth grade education, and only 50% had achieved a twelfth grade education. Due to the type and amount of programming available, many inmates do not surpass these levels during their incarceration. The state of prison education is of particular importance to younger inmates – those most likely to re-enter society with a chance for rehabilitation. The Department of Correctional Services reports that of the 3,042 inmates aged 16 to 21 confined in its facilities, or 4.6% of the general prison population, 776 were assessed as reading below the fifth grade level, and 475 have emotional and learning disabilities. It is clear that a very significant portion of the New York State prison population enters the system undereducated. Unless provided with educational and/or vocational programs during their terms of imprisonment, those individuals will exit the system with the same educational disadvantages, unprepared to attain employment.

New York has recognized the need for educational programming. In its 2003 Education Annual Report, the Department of Correctional Services identified socialization as an important objective for the State's educational prison programming so that upon release people return to society with a desire to behave as good citizens and the skills and knowledge necessary to secure employment. To achieve that objective, the Department of Correctional Services has set as its chief education goals ensuring that every person released from incarceration has (a) a high

school diploma or equivalency and (b) the necessary vocational skills to secure a job upon release.

Providing educational and vocational programming in prisons has been recognized as generally beneficial for a myriad of reasons. First, educational and vocational programs help to correct the problem of under-education and prepare people to secure employment upon release from prison. In addition, correctional officers observe that idleness leads to discipline and security problems in prison. Education and vocational programs have been demonstrated to lead to improved behavior.

Studies show that individuals participating in education/vocational programming have a lower recidivism rate compared to their peers. The relationship between education and recidivism has long been recognized. The Department of Correctional Services has proclaimed there is a clear correlation between level of education and employment and between attainment of a high school diploma and reduced recidivism. The Urban Justice Center reported that almost two-thirds of those released from prison are expected to be rearrested for a felony or serious misdemeanor within three years. However, those who participated in prison vocational programs had a recidivism rate 20% lower than non-participants. Educational programs have been found to have a similarly positive effect. For example, among those under age 21 on the date of release, 40% of those who earned their GED while in prison returned to prison within 36 months after release, compared to 54% of those who did not earn a GED while in prison.

Despite these articulated goals and the benefits of education while incarcerated, participation in a vocational programming is available only if the person is located in a facility that offers vocational education and if program space is available. In addition to those limitations, designing programs to teach skills that will assist a person in attaining employment

upon release is a significant challenge. Vocational programs have been faulted as being too general to be of much help. Such programs are not tied to market realities; they are frequently linked to general market needs leaving participants without specific marketable skills. People are often trained for jobs that no longer exist or are trained on outdated equipment. Additionally, many programs prepare people for vocations that require licensure that they cannot obtain due to their convictions. Further, people are generally trained in only one vocation. As a result, those serving long sentences who have completed vocational training have no opportunity to continue to further their skills and are left idle.

In addition to the challenges to developing educational programs, decreases in funding have resulted in further decreases in the quality of programming. Funding for prison education programs has not kept pace with the expansion of the prison population. Educational and vocational programming has declined because of the rapid growth in prisons, the frequent transfers from one facility to another, decreased state and federal funding for higher education programs, and greater interest in short-term substance abuse treatment and anger management programs.

### **3. Benefits**

A significant barrier that people face in their transition to the world outside of prison or jail, as well as while they are incarcerated, is applying for and obtaining public assistance benefits and medical insurance. Single individuals who are released from prison or jail and who need financial help until they get on their feet are likely to apply for Safety Net Assistance, Medicaid, and Food Stamps. Parents with dependent children are likely to apply for Family Assistance instead of Safety Net Assistance. In New York, Family Assistance and Safety Net Assistance are called Public Assistance. This collection of programs is often known colloquially as “welfare.” Individuals with disabilities are also eligible for Supplemental Security Income or

Social Security Disability benefits from the Social Security Administration. Some penalties in the benefits arena are automatically imposed as a consequence of a criminal conviction. Other consequences are more hidden – they are the practical but predictable result of criminal proceedings and create huge barriers to getting and maintaining benefits.

Perhaps the most significant barrier imposed by the federal government upon people with criminal convictions who are re-entering society is a provision that bars anyone convicted of a drug-related felony from receiving during his or her lifetime Temporary Assistance for Needy Families (*i.e.*, traditional federal “welfare” benefits) and Food Stamps. Each state was left with the discretion to decide what type of program it would set up with its Temporary Assistance for Needy Families monies. Though eight states, including New York and the District of Columbia, have opted out of this bar, its existence limits the ability of those with drug-related felony convictions to relocate to other parts of the country and can impact rehabilitated people who have moved out of state without awareness of this sanction.

Additionally, Social Security and Supplemental Security Income benefits are greatly impacted. Supplemental Security Income benefits are cash payments given by the federal Social Security Administration to people over 65, the blind, and people who have other serious mental or physical defects and are poor. Social Security Disability provides help to adults in any of the eligible categories who have worked in the past. The Social Security Administration limits access to benefits during periods of incarceration and places administrative barriers in the way of restoring access to these benefits upon re-entry. Rules affecting receipt of Supplemental Security Income benefits, as applied to current recipients enmeshed in the criminal justice system, depend on the length of the individual’s incarceration. For Social Security benefits such as Social Security Disability, however, where an individual is incarcerated upon conviction of a felony, he

or she is not entitled to benefits for any month or any part thereof during which he or she is incarcerated, regardless of the length of the sentence. The Social Security Administration has procedures enabling its local offices to provide support to jails, prisons, and other corrections facilities to help people submit applications while incarcerated, but only a minority of correctional facilities takes advantage of them.

Criminal charges and proceedings alone often interrupt the continuity of benefits necessary to support low-income recipients. The disruption resulting from a criminal case can lead to termination of benefits or application barriers and delays. Criminal proceedings resulting at least in frequent court appearances, and, in many cases, brief periods of incarceration can also result in suspension or termination of all forms of public assistance and Supplemental Security Income. Advocates report that their clients frequently miss Public Assistance appointments and work assignments due to court appearances and other court-mandated responsibilities. A recent study of people incarcerated on Riker's Island found that 77% of individuals with active cases upon entry had their public assistance enrollment either suspended or terminated.

Single individuals who are released from prison and who need financial help until they get on their feet are likely to apply for Safety Net Assistance and Medicaid. Applicants for Safety Net Assistance have a 45-day waiting period before they can begin to receive that benefit. A 1993 memorandum from the New York State Department of Social Services urged local Social Services Districts to accept public assistance applications from people in prison 45 days before their release date so that benefits can begin on the date of release. Most social services districts, however, still refuse to accept Safety Net Assistance applications from jail or prison, creating a vacuum of support after release. For many people in jail or prison, the absence of



money for rent, transportation, or clean clothes makes their successful transition to the world of work less likely.

A recent review of New York City agency data revealed that more than half of those entering jail with Medicaid have their benefits terminated. Medicaid is a need-based benefit program providing health services for the indigent, elderly, infants, and people receiving Supplemental Security Income benefits. The correctional population is subject to greater public health vulnerabilities than the general population, including higher rates of childhood abuse, homelessness, HIV infection and other infectious or chronic diseases, drug or alcohol abuse, mental illness, and physical or sexual abuse. Compounding the risks associated with these acute medical needs, few people going through correctional facilities have health insurance or can afford necessary medical care.

There is also a separate set of barriers created due to felony warrant and probation/parole violations. Under federal law, a state may not provide Temporary Assistance for Needy Families-funded benefits, Supplemental Security Income, SSDI, public and federally-assisted housing, or Food Stamps to individuals who are: (i) “Fleeing Felons”<sup>28</sup>; or (ii) violating a condition of probation or parole, as found by a judicial or administrative determination. The relevant agencies conduct a national warrant check on all applicants for benefits and a periodic check for current recipients. Courts and administrative judges have attempted to enforce strict definitional standards concerning these bars, but their standards have often been ignored by line-level workers and fought by the agencies. The agencies take the position that one can flee to

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<sup>28</sup> “Fleeing Felon” is a specific legal term used to identify individuals “fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the person flees, for a crime, or an attempt to commit a crime, which is a felony under the laws of the place from which the person flees, or, in jurisdictions that do not define crimes as felonies, is punishable by death or imprisonment for a term exceeding 1 year regardless of the actual sentence imposed.” 42 U.S.C. § 1382 (e)(4).

avoid prosecution without intending to do so or even without knowing there is a prosecution from which to flee. In practice, most benefits offices engage in no inquiry regarding intent to flee prosecution but nonetheless will deny or terminate a person as soon as they receive a warrant hit. Evidence from enforcement of these rules calls into serious question the efficacy of the bars as law enforcement tools. Data from the Social Security Administration reveals that two-thirds of the confirmed matches are from out-of-state warrants. “People living with disabilities who are suspended from SSI for minor offenses allegedly committed in another state face almost insurmountable hurdles in addressing the underlying warrant due to lack of income, lack of representation, and limited ability to travel.”<sup>29</sup> Moreover, in only roughly 11% of all suspensions cases did law enforcement pursue the individual and make an arrest based on the hit.

#### **4. Financial Penalties**

Financial penalties imposed, directly or indirectly, as a result of a criminal conviction, are among the least recognized of the collateral consequences. Driven by a combination of philosophical purposes – punishment, reparation, cost recovery, revenue production and cost shifting – New York and the federal government have developed a vast array of fines, fees, costs, penalties, surcharges, forfeitures, assessments, and restitutions that are levied against people convicted of criminal offenses.

This chapter of the report focuses on the financial consequences that are in the nature of penalties imposed upon the criminal defendant as he or she proceeds through the criminal justice system as a result of a criminal conviction. There are many other financial consequences that are less in the nature of penalties, such as the direct costs of participation fees. More indirect, but no less consequential for individuals and families are access to courts and filing fees, collect phone

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<sup>29</sup> Gerald McIntyre, *Have You Seen a Fleeing Felon? Social Security Administration Targets SSI Recipients with Outstanding Warrants*, CLEARINGHOUSE REV. (2003).

calls, and travel costs for prison visits. Further, there are costs to communities, such as financial losses suffered as a result of the way people in prison are counted in the census.

The use of financial penalties has continued to grow in recent years with new financial penalties seemingly added at each legislative session. Many of these financial penalties have been increased several times over the years and are often viewed by the legislature in isolation from other financial penalties that are imposed. From the perspective of most legislators, each increased financial penalty viewed separately appears to be a good idea for revenue production. When viewed as a whole, the impact of the financial consequences is easily seen as extremely burdensome to the individuals upon whom they are imposed.

The ability of judges and attorneys to review these consequences with defendants is significantly compromised because they are scattered throughout different sections of the law. Yet professional standards require defense counsel not only to be familiar with all of the consequences of the sentence including fines, forfeiture, restitution, and court costs, but also to advise the defendant sufficiently in advance of the plea so that the advantages and disadvantages of the plea can be carefully considered.

The collateral effects of financial penalties and civil sanctions are cyclical and far-reaching. While struggling to find employment, and explain poor credit histories, civil judgments, and unpaid debts, many people with a criminal history contend with the fact that the penalties imposed for their crimes will not be discharged in bankruptcy and will remain on their credit reports until they are able to make payment in full. When restitution is ordered as part of a criminal sentence, any payment made by the defendant does not “limit, preclude or impair” the defendant’s civil liability for damages for an amount in excess of such payment.

The Penal Law, Criminal Procedure Law, Vehicle and Traffic Law, and the Executive Law all provide for the collection of many of the financial penalties attendant to a criminal conviction. New York law provides for the collection of these penalties even while the person is in prison from the “inmate’s funds” consisting of any money earned while in prison or sent to a person in prison by family members. For many people, this means that they are penniless at the time they are released from prison.

The procedures for reducing all of the above financial penalties to judgment are set forth in N.Y. CRIM. PROC. LAW. § 420.10(6). The entered order is deemed to constitute a judgment-roll, and immediately after entry of the order the county clerk must docket the entered order as a money judgment pursuant to N.Y. CIV. PROC. LAW R. § 5018. Not only is such judgment subject to all civil collection remedies, but it will also be reported on any credit report.

The civil judgment that arises as a result of the application of N.Y. CRIM. PROC. LAW. § 420.10(6) and § 420.40(4) may well have the most long-lasting effect of any part of the sentence because it will appear on a credit report. This will affect the person against whom the judgment is filed in two ways: undermining creditworthiness and prospects for employment. Increasingly employers are checking the credit histories of prospective employees, and a bad credit report caused by the judgments arising from these financial penalties can cost the applicant a job. This is a sobering thought in light of the fact that a year after being released 60% of people formerly incarcerated have not found legitimate employment.

It often goes unnoticed that people on parole and probation are required to pay a monthly supervision fee. The Division of Parole is authorized to charge a monthly supervision fee of \$30 for each person on parole, conditional release, presumptive release, and post-release supervision. Likewise, state law authorizes the enactment of local laws to require a monthly \$30 probation fee

in those instances when the probation supervision is for a DWI-related conviction. In a quest for revenues, many counties have pushed the boundaries beyond what is authorized to be charged to probationers.

## **5. Housing**

Access to housing is widely recognized as central to the stability of individuals and their communities. Although New York provides emergency shelter for its residents, the state faces a severe and permanent affordable-housing shortage. Across New York State, the amount of regulated or subsidized housing has decreased, the number of New Yorkers looking for housing has risen, and average wages have declined.

As the result of the relaxation of rent regulation, between 1994 and 2003 at least 118,113 New York City units became destabilized, and the rate of deregulation has been increasing over time. In 2005, over 128,000 families were on the waiting list for Section 8 housing vouchers in New York City alone. Similar waiting lists exist for conventional public housing, which are no longer being constructed, and Mitchell-Lama middle-income units, which are turning over to market-rate housing.

Due to the scarcity of affordable housing and the extremely high demand for it, individuals charged with crimes and their families often encounter great difficulty in securing and maintaining stable housing in the private market. Private landlords and non-profit housing developers often inquire into an individual's background, deny housing to those with criminal records, and evict those with new criminal cases. Landlords have easy access to such information, which can also be rife with bureaucratic errors. These multiple bars to securing and maintaining private housing are compounded by the recently released person's difficulty paying security deposits and broker's fees, lack of personal and employment references, and a poor credit history.

The situation with public housing is similarly difficult. Federal public housing regulations require local Public Housing Authorities to screen and evict persons based on a broad definition of criminal activity, which can include simply being arrested. Local Public Housing Authorities develop admissions guidelines that deny admission to persons years after they have completed a criminal sentence, even for minor criminal activity, such as violations and DWI infractions. Despite the clear concern about public safety and the motivations behind these policies, no studies exist showing any causal link between the exclusion of people with criminal records and reduced crime in or near public housing. These rules cast a wide net that excludes many people leaving prisons who may well make good tenants.

The consequences of these barriers to housing are significant. Incarceration almost invariably leads to loss of stable housing. In New York City, over 30% of single adults in the shelter system were recently released from local jails (substantially more if prisons are included), and many cycle between shelters and incarceration.

Lack of stable housing is also directly linked to re-incarceration of people who have served jail or prison sentences. Homeless individuals on parole have been shown to be seven times more likely to abscond after the first month of release than those located in more permanent housing. Access to affordable housing has also been linked to decreased crime rates in low-income communities where people with criminal records often reside. Quantitative research can be supplemented with strong experiential evidence that stable housing is a key factor in successful re-entry after leaving prison.

Laws excluding people with criminal records from accessing housing may also have unintended consequences for the families of those individuals, including children. Reconnection with family members and establishing community connections can help reduce re-incarceration

but legal bars to allowing a family member back into the home or to accessing stable housing after a conviction often make this impossible. Similarly, a family in private or public housing may be faced with eviction even if just one member of the household engages in criminal activity; an individual engaging in proscribed activity merely has to be under the tenant's control for the PHA or landlord to have the authority to evict.

## **6. Family**

Entire families are affected by the involvement of one of their members in the criminal justice system. The direct and indirect consequences of such involvement are particularly significant when minor children are involved. Pretrial detention alone can lead to the loss of housing, the removal of children from the home, and financial distress for the family unit. When parents are incarcerated, their families face a host of obstacles to maintaining the ties with the incarcerated family member that could foster an easier transition and reunification after a prison sentence ends. Incarceration also increases the likelihood of parents losing custody of their children or of the termination of their parental rights. After release from prison, reuniting with one's children is often impeded by laws limiting access to a range of benefits and assistance and by child support policies that burden parents with insurmountable debt that makes them unable to participate productively in the care of their children.

The United States Department of Justice's Bureau of Justice Statistics reported in 2000 that the majority of incarcerated individuals in the United States are parents of minor children. Among federal prisoners, 55% of fathers and 84% of mothers lived with their children prior to incarceration; among state prisoners, almost half of the fathers and two-thirds of the mothers resided with their children before being imprisoned. Approximately 80% of the mothers who lived with their children prior to incarceration were single parents. The average age of children with an incarcerated parent was eight years old; almost 60% were less than ten years old. The

impact of incarceration has fallen disproportionately on children of color. For African-American children nationwide, 7% had at least one parent in prison in 1999. In New York State, approximately 81% of the prisoners are African-American or Latino.

Although most incarcerated parents want to remain close with their children and families, and expect to live with their children after their release, imprisonment places burdens on the family unit that make those goals difficult to realize. A significant obstacle to incarcerated parents and their children maintaining relationships is that prisons tend to be built in remote rural locations far from the urban centers in which many incarcerated individuals previously lived with their families. In New York State, according to a 2002 report, 72% of the individuals under the custody of the state Department of Correctional Services came from New York City and the surrounding suburban counties. Of these approximately 49,000 individuals, however, only 10,000 of them were incarcerated in the cluster of prisons closest to New York City, and approximately 24,000, by contrast, were imprisoned in the far northern and western sections of the State. The impediments these distances pose to families' efforts to maintain contact with their incarcerated loved ones are borne out by studies that reveal that fewer than half of incarcerated parents ever see their children in person.

The extent to which parents and children are able to visit during the parent's incarceration is also affected by the type of facility in which the parent is being held and the nature of both the visitation facilities and the type of visitation programs in place at the prison. For instance, although maximum-security prisons have visiting hours seven days a week, in medium security prisons visitors are often restricted to weekends only. In addition, some visiting rooms are inadequate in size, resulting in visits being cut short because of limited space. The Department of Correctional Services has developed a number of programs designed to support family



contact. For example, a model program for extended visitation exists at Bedford Hills Correctional Facility, where children are with their mother all day, for a weekend, or for a week during the summer. The Family Reunion Program, currently available in some maximum security and a few medium security prisons, allows inmates to have overnight visits with families in trailers that are within the prison grounds but outside the cellblock area. Resources for these programs are limited, however, and as such they are available to only a small number of prisoners and their families.

In addition, the federal Adoption and Safe Families Act, passed in 1997, which seeks to limit the length of foster care and place a child in an adoptive home as quickly as possible, poses added hurdles to the reunification of incarcerated parents and their children. The ultimate goal of the Adoption and Safe Families Act, as implemented in New York and other states, is to ensure that children do not languish in the foster care system for extended periods of time before being adopted and placed in permanent homes. However, by its terms, this statute can have effects that are counter to that goal. Although under the Adoption and Safe Families Act termination proceedings may begin 15 months after a parent is incarcerated, it can be two years or longer, depending on the age of the child, before an adoption becomes final. The average incarcerated mother who wishes to continue to raise her children would likely complete her prison sentence long before her children would otherwise be adopted, yet she runs the risk of having her parental rights terminated as a consequence of her incarceration.

New York, like other states, has instituted some exceptions to the Adoption and Safe Families Act's filing requirements and has promulgated regulations requiring child welfare agencies to make "diligent efforts" toward reunification even if a parent is incarcerated. These efforts should include arranging visitation with children, informing parents of their children's

progress, and engaging them in future planning and decision-making for their children. If such efforts are not made, the agency should not be able to move forward with the termination petition. However, in many cases these exceptions are not exercised, and the standard for establishing that “diligent efforts” were made is low. Moreover, inadequate resources for legal assistance and the lack of continuous representation make it difficult for parents to protect meaningfully their rights in proceedings leading up to termination.

The Adoption and Safe Families Act has likely had a disproportionate impact on incarcerated parents with children in foster care. A 2002 report noted that, in New York State, 18.1% of imprisoned mothers had a child in foster care. The vast majority of incarcerated parents will serve more than the 15-month limit for foster care placements. Nationally, the average length of time served by incarcerated parents is six and one-half years. For single incarcerated mothers, the average prison sentence for that population is 18 months. Because child welfare agencies do not categorize cases according to whether a child has a parent in prison, there is no precise way to measure the effect the Adoption and Safe Families Act has on the families of incarcerated parents, but one study reported that the number of orders issued under the Adoption and Safe Families Act terminating parental rights of incarcerated inmates rose from 260 to 909 from 1997 to 2002, an increase of approximately 250%.

Another significant barrier that formerly incarcerated parents face in their transition back into their communities and families is the accrual of child support arrears while in prison. Judges who impose child support obligations have significant discretion in determining whether circumstances exist that warrant revision of a child support order, but current policies severely limit an incarcerated parent’s ability to modify his or her support obligations while in prison. New York law currently holds that incarceration is insufficient to justify elimination or reduction

of an existing child support obligation or to suspend the accrual of arrearages during the period of imprisonment. In addition, federal law prohibits retroactive forgiveness of child support arrearages.

These rules result not only in arrears accruing, but also penalties for the arrearages. These penalties often have the effect of further limiting a parent's ability to gain or maintain employment. For example, if employed, a parent can have up to 65% of income become subject to execution to recover the child support arrears. Arrears of more than four months can result in the loss of the parent's driver's license and/or occupational licenses. Also, if a court reduces the amount of the arrears to a money judgment, a parent's bank accounts or other assets will be subject to seizure, further inhibiting reintegration into society.

These policies and circumstances that adversely affect the ability of formerly incarcerated individuals to remain connected to and reunite with their loved ones, and to fulfill their parental responsibility, undercut what in many instances is a critical component to successful community reintegration – a stable family life.

## **7. Civic Participation**

New Yorkers who are convicted of felonies are ineligible to vote while they remain in prison or on parole, and they are barred from serving on juries for life. Obtaining a Certificate of Relief from Disabilities is the only procedure by which such persons may regain the rights which are often taken for granted by those who enjoy them without interruption.

Convictions for felonies and removal from civic participation (or so-called “civic death”) have been linked for centuries. The initial United States' experience with such prohibitions was inherited from the English legal system. In the decades following the Civil War, however, such prohibitions spread throughout the former Confederacy as a means of limiting newly freed African-Americans' rights to participate in government. Indeed, broadening and expanding the

reach of such prohibitions affected minorities at a disproportionate rate. Although the racial effects of such laws are seldom explicitly used today as a justification for maintaining the status quo, the continuing adverse impact on minorities is undeniable.

Today the restrictions are often justified by arguments concerning the worthiness of those convicted of felonies to participate in civic activities – *i.e.*, their mere participation would, or would very likely, harm our civic institutions – and the desire to punish further those who are convicted of felonies with more than just prison time, fines, etc., even if the punishment far outlasts the sentence imposed.

Practical concerns play a role in the debate over civic participation as well. In terms of disenfranchisement, supporters of reform claim that people who were convicted of felonies but who were since released from prison often face more difficulty in attempting to vote than is contemplated under the law – specifically, such persons are often asked to produce non-existent paperwork that proves that they are eligible to vote. Meanwhile, opponents of reform of jury service restrictions assert that voir dire would take considerably more time if jurors who had committed felonies were allowed into jury pools.

Some of these practical effects of the prohibitions on civic participation are compounded by both administrative difficulties and *de facto* expansion of the breadth of the restrictions. Partly because states other than New York with far more punitive disenfranchisement laws have been given a considerable amount of press, New Yorkers who have committed felonies often believe erroneously that they are not eligible to vote once they are out of prison and/or have completed parole. Furthermore, people who are in jail awaiting trial or who are serving time by reason of a misdemeanor conviction are allowed under the law to vote, but as a practical matter seldom can.

Partisanship also plays a role with respect to reform of disenfranchisement laws. Opponents of reform often argue that enfranchising those who have been convicted of felonies would increase the voting strength of one of the national political parties and that the anti-vote dilution arguments of supporters for reform are merely smokescreens for partisan disputes. Whether the public actually supports the proposed reforms is often debated as well. Supporters often brandish favorable poll numbers regarding expansion of the franchise, while opponents in turn criticize the polling techniques. With respect to jury service, supporters of reform claim the public would not view current practice as a restriction on a civic right but as an exemption from what is often an inconvenience for those called to serve – and would therefore support expanding the jury pool – whereas supporters of the status quo assert that the restrictions would be supported by a majority of the public if the rationales behind them were better explained.

## **8. Immigration**

Over the past ten years, the immigration-related consequences of a criminal conviction have increased significantly. Today, non-citizen residents who plead guilty to or are convicted of even a misdemeanor are at grave risk of removal from the United States. In 2003, the United States deported nearly 80,000 people because of their criminal convictions. Further, non-citizens convicted of a crime after 1998 must now be detained without bond until their removal proceedings are resolved, even if they do not present a flight risk or danger to the community. Consequently, the annual population of persons detained by immigration authorities because of their criminal record has soared to 115,000.

For every non-citizen who is detained and removed, there are U.S. citizen spouses, children, parents, and siblings left behind. Every year tens of thousands of children lose parents to removal. When the deportee is the primary bread winner, many families suffer extreme financial hardship, which can lead to the closing of businesses, the inability of children to go to

college, and the inevitable resort to public assistance. Moreover, many deportees are forced to return to their birth countries, where they have not lived since childhood and no longer have family members. If they are not fluent in the language of their birth country, they may find it difficult, if not impossible, to find employment.

Given that a criminal conviction could result in a non-citizen being detained and removed, non-citizen criminal defendants need to be fully aware that their criminal conviction could have dire immigration consequences. New York law does not require that defendants be made aware of the immigration consequences of a plea bargain agreement by either defense counsel or the court. Although New York currently has a court advisory statute, it is not enforceable. Moreover, the warning does not extend to misdemeanors or violations, which may also have serious immigration consequences.

## **B. RECOMMENDATIONS**

The recommendations and the policy and rationales behind them are set out in detail in the Recommendations section below. As an overview, however, the Committee provides the following list of recommendations.

### **1. Overarching**

- Facilitate the process for obtaining Certificates of Relief from Disability and Certificates of Good Conduct.
- Collect or reference all collateral sanctions in one chapter or section of the New York law to improve access to information and awareness of these consequences.
- Provide comprehensive training for defense attorneys, prosecutors, and judges about the civil consequences of criminal convictions and guilty pleas.

- Require judges to inform criminal defendants of all civil consequences prior to accepting a guilty plea and incorporate the collateral consequences of criminal conviction into the sentence or judgment imposed by the court.
- Develop regional attorney referral programs to address the civil consequences of criminal proceedings.
- Create resource guides by county for people with criminal records or returning from prison or jail to supplement comprehensive discharge plans.
- Expand the scope of the current sealing statute, Criminal Procedure Law § 160.55, and create new sealing requirements.
- Expand the protections and strengthen the enforcement tools of the Human Rights Law and the Corrections Law.
- Require the filing of a re-entry impact statement for any new legislation imposing a collateral penalty.
- Ensure that model legislation has four critical features.
- Reduce returns to prison for “technical” parole violations and expand use of alternatives to incarceration and outpatient drug treatment

## **2. Employment**

- Reform record access.
- Create an affirmative defense to negligent hiring claims.
- Create a state bonding program for the hiring of people post-re-entry.

## **3. Education**

- Make educational programming available to all inmates in jail and prison until he or she has obtained a GED, regardless of age.

- Prohibit discrimination by post-secondary educational institutions with respect to prior convictions.

- Increase access to college programming during and after incarceration.

#### **4. Benefits**

- Implement a system whereby people entering jail or prison, currently receiving Medicaid, only have it suspended rather than terminated.

- Provide assistance to people in prison or jail for completion of benefit applications.

- Ensure availability of public assistance for the recently released.
- Expand the medication grant program for people emerging from jail or prison.
- Modify statutory bans on benefits for felony warrants and felony drug offenses.

#### **5. Financial Consequences**

- Consolidate all financial penalties into one fee.
- Amend Criminal Procedure Law § 420.35(2) to allow for waiver of certain financial penalties.

- Impose a moratorium on all new financial penalties and the increase of existing penalties, and consider the filing of a re-entry impact statement for any new legislation imposing financial penalties.

#### **6. Housing**

- Protect people with criminal records from unjust discrimination in housing.
- Reduce barriers to public housing subsidies for people with criminal records and people leaving incarceration.

- Guarantee each person leaving incarceration a place to live and increase the supply of affordable housing available to people with criminal records.



## **7. Family**

- Amend legislation related to the accrual of child support arrears.
- Improve data collection and coordination among the Criminal Justice System and child welfare agencies.
- Change the Adoption and Safe Families Act timelines for incarcerated parents.
- Enhance contact between parents and children during incarceration.

## **8. Civic Participation**

- Permit those on parole to vote.
- Repeal the bar on jury service for those no longer incarcerated.

## **9. Immigration**

- Revise the provisions concerning judicial warnings of the negative immigration consequences of pleading guilty.
- Educate and train judges and counsel on the immigration-related consequences of criminal convictions.



## **REPORT**

### **I. BACKGROUND**

#### **A. OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM**

The criminal justice system in New York State is comprised of a multitude of government agencies and private entities.<sup>30</sup> Indeed, although provisions of state law govern the process by which one is charged with a criminal offense and how those charges are resolved,<sup>31</sup> because most law enforcement takes place at the municipal level, in reality New York State has multiple individual criminal justice “systems” operating within its 62 counties as part of its larger overall state system.

An individual’s contact with the criminal justice system most typically begins with an arrest by a local police department. After an arrest, a person is processed or “booked.”<sup>32</sup> This processing includes the taking of photographs and fingerprints and the transmission of those items to the New York State Division of Criminal Justice Services (“DCJS”), which maintains full criminal history records of all persons arrested in the State.<sup>33</sup> After arrest processing, most individuals are held in custody to await arraignment, their initial appearance before a judge.<sup>34</sup> At

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<sup>30</sup> These include: law enforcement agencies; district attorneys offices; courts; state and local departments of probation and correction; public defender offices, non-profit indigent defense service providers and other court-appointed counsel; and alternative to incarceration programs. Although the percentages vary by county, the majority of individuals accused of a crime in New York State are unable to afford to hire an attorney and are provided representation from court-appointed counsel.

<sup>31</sup> N.Y. PENAL LAW; N.Y. CRIM. PROC. LAW.

<sup>32</sup> For some minor offenses, a person can be provided with a summons instead of being taken into custody. N.Y. CRIM. PROC. LAW ART. 150.

<sup>33</sup> Access to criminal histories through DCJS, as well as the court system and private agencies, has been expanded in recent years. Concerns exist about the accuracy of the records and the reliability of information so widely available to the public. *See infra* Chapter II, Employment.

<sup>34</sup> In limited instances, an individual can, at police discretion, be issued an Appearance Ticket, upon which they are released from the police facility and directed to appear in court on a specified date. N.Y. CRIM. PROC. LAW ART. 150.

arraignment minor cases are frequently resolved. If not resolved, the court must decide whether to release the accused person or set bail or bond.<sup>35</sup>

Local district attorney's offices in the state's lower criminal courts commence formal charges.<sup>36</sup> Although these lower courts have initial jurisdiction over criminal matters, ultimate jurisdiction to resolve a criminal accusation is dependent upon the level of offense charged.

In New York, criminal offenses have three levels of classification: petty offense or violation; misdemeanor; and felony.<sup>37</sup> A petty offense is not a crime and is punishable by a variety of non-jail sentences or by a jail sentence of no more than 15 days. Misdemeanors are classified as either A, B, or unclassified. The maximum jail sentence for a misdemeanor is one year. Lower criminal courts have full jurisdiction over petty offenses and misdemeanors. Felony charges are serious crimes for which a sentence in excess of one year may be imposed. Felony offenses are prosecuted in County or Supreme Court. Felony offenses are classified from the most serious A felony, for which a life sentence may be imposed, to the least serious E felony, for which jail is not required.

The New York Penal Law provides specific periods of imprisonment for various crimes, as well as for a number of non-jail sentences, including fines, discharges requiring avoidance of future criminal conduct or the performance of certain acts such as community service, and probation (supervised release) for a prescribed period of time.<sup>38</sup>

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<sup>35</sup> N.Y. CRIM. PROC. LAW ART. 510.

<sup>36</sup> These courts include Town and Village Justice Courts, City Courts, District Courts, and local Criminal Courts.

<sup>37</sup> See N.Y. PENAL LAW §§ 10.00(6), 55.05, 55.10; N.Y. CRIM. PROC. LAW § 1.20(39).

<sup>38</sup> See N.Y. PENAL LAW Arts. 60, 65 and 70. Probation is imposed in lieu of a sentence of imprisonment or following imprisonment of six months or less. Probation is available for both misdemeanors and felonies. The level of the offense for which the individual was convicted determines the length of the probationary period. N.Y. PENAL LAW § 65.00.

The vast majority of criminal charges filed in New York State in a given year involve misdemeanor or other low level charges.<sup>39</sup> Most individuals accused of a crime serve no time in jail beyond the period spent waiting to see a judge. A large percentage of cases are resolved at the initial court appearance by a plea of guilty and a non-jail sentence. In some instances, individuals will be found guilty and sentenced to “time served” – the number of hours or days spent in custody prior to the initial court appearance.

For those individuals convicted and sentenced to a period of incarceration, the overwhelming majority serve their sentences in local jail facilities. Individuals sentenced for felony convictions to terms of imprisonment in excess of one year serve those sentences in state prison. Upon their release from prison, individuals will typically face a period of supervised release called parole or post-release supervision.<sup>40</sup>

Where cases continue past the initial court appearance, the majority are resolved by a guilty plea or are dismissed. Less than 5% of felony cases statewide are resolved by trial, and only 0.2% of dispositions in New York City Criminal Court were resolved by verdict after trial.<sup>41</sup> Most of these pleas are the result of a negotiation for a reduced charge and sentence, a “plea bargain.”<sup>42</sup> Plea negotiations often involve an individual’s participation in activities designed to

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<sup>39</sup> New York State Div. of Criminal Justice Servs., *Adult Arrests, New York State by County and Region - 2005*, available at <http://criminaljustice.state.ny.us>.

<sup>40</sup> New York has two types of state prison sentences, indeterminate and determinate sentences. Indeterminate sentences have a minimum and maximum term, for example 2-6 years. When an individual is released prior to the end of the maximum sentence, she serves the balance of her sentence on parole supervision. Determinate sentences are of a specific length of time, *e.g.*, 10 years, of which the individual is required to serve 85% of the term of imprisonment. Upon release, the individual is subject to a period of post-release supervision. For all practical purposes, parole and post-release supervision are largely the same.

<sup>41</sup> *Twenty-Seventh Annual Report of the Chief Administrator of the Courts, for Calendar Year 2004*, at 13, 16 (New York State Unified Court System 2005).

<sup>42</sup> The heavy reliance on plea bargains is subject to much criticism from a variety of quarters. Those facing prosecution feel the system, their lawyers included, forces them to plead without allowing sufficient time to examine the case or fully understand the consequences of the plea. Others lament that such bargains result in too lenient

address an identified problem such as substance abuse, mental health issues, educational deficiencies, or anger management. These services are typically provided by a variety of non-profit agencies collectively called alternative to incarceration programs (“ATI”s). Satisfactory completion of the program is often required as a condition of a probationary sentence or the dismissal of charges the prosecution of which has been deferred. Similar program participation is often required of individuals on parole or post-release supervision. Non-compliance with program requirements for these participants can lead to a return to prison.

## **B. CRIMINAL JUSTICE REALITIES**

By definition, collateral consequences attach to criminal justice involvement. A proper examination of them, therefore, must incorporate knowledge of actual practices and realities at every stage of the criminal justice system, from arrest and bail decisions, to sentencing and correctional practices, to post-release supervision and community reintegration.

### **1. The Population**

The size of the community directly affected by the criminal justice system, from arrest to release, is nothing short of astonishing. The statistics are numbing in their variety, but it helps to view the criminal justice system as an hourglass. The entry into the system, the wide mouth of arrest, captures a substantial number of people every year. The vast majority is released without a term of incarceration, but the mark of a criminal history remains. In 2004, there were 519,590 arrests in New York State; 105,429 resulted in some term of incarceration.<sup>43</sup>

The glass narrows to those incarcerated – either in local correctional facilities (jails) or state correctional institutions (prisons). New York prisons, which hold people sentenced to more

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punishment. Much recent attention has been devoted to the failure adequately to advise an accused of the host of potential collateral consequences he might face as a result of the plea, in addition to the sentence offered.

<sup>43</sup> New York State Div. of Criminal Justice Servs.

than a year of incarceration, housed over 63,000 people at year end 2005.<sup>44</sup> Jail populations, by contrast, include people being held in post-sentence incarceration for terms of one year or less and those in pre-trial detention. On any given day the jails of New York State, excluding the five boroughs of New York City, are filled with over 16,000 people.<sup>45</sup> New York City jails themselves in fiscal year 2005 averaged a daily population of 13,576 and admitted 102,772 people.<sup>46</sup> On any given day in New York State the total prison and jail population in 2005 exceeded 93,000.<sup>47</sup>

The hourglass widens again at release from custody.<sup>48</sup> Over 27,000 people were released from New York State prisons in 2004.<sup>49</sup> Based upon the number of state releasees and the number of admissions to local jails, it is conservatively estimated that 200,000 people are released from New York's jails and prisons each year. Many are subject to post-release supervision. By the end of 2004, 54,524 people were on parole in New York, and 122,027 were on probation.<sup>50</sup>

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<sup>44</sup> New York State Comm' of Corrections, *available at* <http://www.scoc.state.ny.us/pop.htm>.

<sup>45</sup> *Id.*

<sup>46</sup> *See* NYC Dep't of Corrections, *available at* <http://www.ci.nyc.ny.us/html/doc/html/gnlstats.html>.

<sup>47</sup> New York State Comm'n of Corrections, *available at* [www.scoc.state.ny.us/pop.htm](http://www.scoc.state.ny.us/pop.htm). Nationwide in 2004, over 1.4 million people were incarcerated in federal and state prisons. *See* Lauren E. Glaze & Seri Palla, BUREAU OF JUSTICE STATISTICS NCJ 210676, PROBATION AND PAROLE IN THE UNITED STATES, 2004 (Nov. 2005). Nearly 7 million people were on probation, in jail or prison, or on parole at year-end 2004. *Id.*

<sup>48</sup> One widely cited statistic is that over 650,000 people will be released from U.S. prisons this year. Paige Harrison & Allen Beck, BUREAU OF JUSTICE STATISTICS BULLETIN NCJ 210677, *Prisoners in 2004* (Wash., DC: U.S. Dep't of Justice 2005). More rarely mentioned is that almost 11 million people are released into the community from the nation's county and local jails. 1 Nat'l Comm'n on Corr. Health Care, *The Health Status of Soon-to-be-Released Inmates* ix (2002), *available at* [http://www.ncchc.org/stbr/Volume1/Health%20Status%20\(vol%201\).pdf](http://www.ncchc.org/stbr/Volume1/Health%20Status%20(vol%201).pdf); *see also* Lauren E. Glaze & Seri Palla, U.S. DEP'T OF JUSTICE, PUBL'N. NO. NCJ 205336, *Probation and Parole in the United States, 2003*, at 3 (2004) (reporting that over 2 million people entered probation), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus03.pdf>.

<sup>49</sup> New York State Dep't of Correctional Servs., *Admissions and Releases 2004*.

<sup>50</sup> Glaze & Palla, *supra* note 47, at 3, 5. In New York State, parole is supervised release from a state prison, while probation is supervised release from a local jail or for a suspended sentence.

The greatest numbers, however, exit the criminal justice system after an arrest, or even a conviction, with no incarceration other than that served directly after the arrest. The end result: nearly 6 million adults in New York State – more than one in three, by some estimates – have a criminal record.<sup>51</sup> Countless families are affected: as of January 2002, people held in New York State prisons reported that they were parents to more than 80,000 children.<sup>52</sup>

## 2. Profile of the Population

A review of collateral sanctions must be viewed through the lens of the prevailing social and economic conditions of the people cycling through the criminal justice system.<sup>53</sup> Over 80% of those charged with crimes are indigent – too poor to afford an attorney.<sup>54</sup> They are primarily African-American and Latino,<sup>55</sup> have serious social and medical problems,<sup>56</sup> are largely uneducated and unskilled,<sup>57</sup> suffer mental illness or substance abuse,<sup>58</sup> have fragile families, and

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<sup>51</sup> This number represents an increase of 656,000 people with criminal histories in New York from 2001 to 2003. See BUREAU OF JUSTICE STATISTICS NCJ 210297, *Survey of State Criminal History Information Systems, 2003*, at 15 (Feb. 2006); U.S. Census Bureau, *Table 1: Annual Estimates of the Population for Counties of New York: April 1, 2000 to July 1, 2005* (finding that population of New York in 2003 was 19,228,031). By December 31, 2003, over 71 million individuals had state criminal histories nationwide.

<sup>52</sup> New York State Dep't of Correctional Servs., *Hub System: Profile of Inmates Under Custody on January 1, 2002*. Nationwide, over ten million children have parents who were imprisoned at some point in the children's lives. Center for Law and Social Policy (CLASP), *Every Door Closed: Facts About Parents with Criminal Records 1* (Fact Sheet Series No. 1, 2003), available at [http://www.clasp.org/publications/EDC\\_fact\\_sheets.pdf](http://www.clasp.org/publications/EDC_fact_sheets.pdf).

<sup>53</sup> See *infra* Chapter V, Financial Consequences.

<sup>54</sup> Caroline Wolf Harlow, Bureau of Justice Statistics, *Defense Counsel in Criminal Cases* (Nov. 2000).

<sup>55</sup> See, e.g., Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272-73 (2004); The Sentencing Project, Report Summary, *Intended and Unintended Consequences: State Racial Disparities in Imprisonment*, available at <http://www.sentencingproject.org/pdfs/9050summary.pdf> (last visited Mar. 2, 2005).

<sup>56</sup> See *infra* Chapter IV, Benefits.

<sup>57</sup> See *infra* Chapter III, Education.

<sup>58</sup> About three-quarters of people re-entering from prison have a history of substance abuse, and approximately 16% suffer from mental illness. Of the re-entering population with substance abuse problems, only 18% received treatment while incarcerated.



have minimal prospects for employment,<sup>59</sup> and now they have the added stigma of a criminal record and the distrust and fear that it inevitably carries with it.

The neighborhoods from which most people on parole come suffer starkly lower household income, high rates of single parent households, and high rates of poverty. Of all people on parole in New York, 49% of them are unemployed.<sup>60</sup> For people who were formerly incarcerated nationwide, the unemployment rate has been placed as high as 60% one year after release.<sup>61</sup> One study found that 60% of employers were unwilling to hire an applicant with a criminal record.<sup>62</sup>

Pure geography creates additional pressures. New York City residents are disproportionately represented in the state prison system and are generally incarcerated hundreds of miles from their homes and families. Whereas only 24% of people incarcerated in New York prisons are from the entire upstate region, over 91% of them are incarcerated there.<sup>63</sup> Two-thirds of the entire state prison population (approximately 44,000) are from New York City.<sup>64</sup> Only 3,000 of these people are in state-run prisons that are actually located in New York City.<sup>65</sup>

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<sup>59</sup> See *infra* Chapter II, Employment.

<sup>60</sup> See New York State Div. of Parole, *Parolee Facts* (Mar. 2004), available at <http://parole.state.ny.us/programstatistics.html>.

<sup>61</sup> Center for Employment Opportunities, *Issue Overview: Crime and Work*, available at [http://www.ceoworks.org/Roundcrime\\_work012802.pdf](http://www.ceoworks.org/Roundcrime_work012802.pdf) (citing Petersilia, *Reentry Roundtable*).

<sup>62</sup> Harry Holzer, *WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS* (Sage 1996).

<sup>63</sup> Peter Wagner, *Importing Constituents: Prisoners and Political Clout in New York* (Prison Policy Institute 2002) available at <http://www.prisonpolicy.org/importing/>.

<sup>64</sup> *Id.* Only 42% of New York State residents live in New York City, yet the city supplies 66% of the state's prisoners. *Id.*

<sup>65</sup> *Id.* As part of research on where the state spends its criminal justice resources, Eric Cadora used judicial records to map the homes of people sent to prison from Kings County in 2003. He found 35 blocks where more than \$1 million in state funds were spent to incarcerate its residents. Jennifer Gonnerman, *Million-Dollar Blocks: The neighborhood costs of America's prison boom*, THE VILLAGE VOICE (Nov. 16, 2004) available at <http://www.villagevoice.com/news/0446,gonnerman,58490,1.html>.

### 3. Offense Characteristics

A closer look at actual arrest and conviction data undermines many common conceptions about people with criminal records.<sup>66</sup> In 2005 in New York state, almost 70% of adult arrests were for misdemeanors or violations, whereas only 8% were for violent felonies.<sup>67</sup> Only 63.3% of arrests resulted in convictions for any offense at all, and over 87% of all convictions were for misdemeanors or violations in 2004.<sup>68</sup> National trends are similar: almost 75% of those who were convicted of felonies, sentenced to more than a year of incarceration, and released from state prisons were convicted of non-violent offenses.<sup>69</sup>

### 4. Structural Deficiencies in Services

Any discussion of hidden sanctions should also reference the disjunction between the severe consequences of criminal proceedings and the dearth of services available to mitigate them.<sup>70</sup> In the face of dire need for effective services for the hundreds of thousands of people involved with the criminal justice system, there is an enormous gap in support and assistance. This gap primarily manifests itself in three ways:

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<sup>66</sup> McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments As an Advocacy Strategy*, 36 UNIV. OF TOLEDO L. REV. 479, 485 (2005); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 263 (2004) (“television coverage of crime more than doubled from 1992 to 1993, despite the fact that crime rates remained essentially the same.”).

<sup>67</sup> New York State Division of Criminal Justice Services, *Adult Arrests, New York State by County and Region - 2005*, available at <http://criminaljustice.state.ny.us>. Numbers were similar for New York City: more than two-thirds of adult arrests were for misdemeanors and only 9% were for violent felonies. *Id.*

<sup>68</sup> New York State Div. of Criminal Justice Servs., *Total Arrests, New York State* (Jan. 26, 2006).

<sup>69</sup> Matthew R. Durose & Christopher J. Mumola, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 207081, *Profile of Nonviolent Offenders Exiting State Prisons*, at 1 (Oct. 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pnoesp.pdf>. Moreover, even the label “felony” may have little relation to the severity of the offense. For example, a person who buys any amount of marijuana in Florida is guilty of a felony. *See* FLA. STAT. tit. 46, § 893.13(2)(a)2 (2004).

<sup>70</sup> *See* Comments of The Bronx Defenders and Reentry Net to the National Conference of Commissioners on Uniform State Laws on the Uniform Collateral Sanctions and Disqualifications Act, Nov. 3, 2005, at 10-11, available at <http://www.reentry.net>.

1. Many people simply cannot obtain necessary services, particularly legal services, to cope with hidden civil consequences;<sup>71</sup>
2. The existing services are fragmented and marked by a lack of coordination and communication;<sup>72</sup> and
3. When people are able to access services, the providers are often uninformed about the wide-ranging consequences of criminal proceedings, particularly those outside the provider's narrow practice areas.<sup>73</sup>

In the current system, structural barriers make it incredibly difficult for people to get the services that they need to return successfully from prison or jail and re-establish themselves in a supportive community. Isolated policymaking in various sectors and overspecialization within social service systems has led to a general fragmentation in public systems.<sup>74</sup> Many law enforcement and criminal justice policies adopted in the last two decades – such as sentencing policies, order-maintenance policing, and the narrowing of corrections missions to “custody and control” – were implemented with little consideration of externalities and costs in other social

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<sup>71</sup> A recent study by the Legal Services Corporation found that, each year, four out of five low-income Americans needing legal help are unable to obtain it, leaving at least 16 million legal problems unaddressed. *See Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Legal Servs. Corp., Sept. 2005), available at <http://www.lsc.gov/pressr/releases/101705pr.htm>. While there is one attorney per 525 people in the general population, there is only one legal aid attorney for every 6,861 low-income people. Another study found that no more than 14% of the legal needs of New York's poor were being met. *See* Evan A. Davis, Otto L. Walter Lecture at New York Law School, *A Lawyer Has an Obligation: Pro Bono and the Legal Profession* (Apr. 10, 2001), available at [http://www.abcny.org/currentarticle/otto\\_walter\\_lecture.html](http://www.abcny.org/currentarticle/otto_walter_lecture.html). In New York, one of the largest legal services providers is forced to turn away at least six eligible clients for every client that it can help. *See* Michael Barbosa, *Lawyering at the Margins*, 11 AM. U. J. GENDER SOC. POL'Y & L. 135, 137 (2003).

<sup>72</sup> McGregor Smyth, *The Bronx Defenders, Reentry.net: Report on the Planning Process 9-10* (Apr. 2004) (on file with author).

<sup>73</sup> *See id.*; Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 254 (2002).

<sup>74</sup> *See, e.g.*, Richard Cho, *Putting the Pieces Back Together: Overcoming Fragmentation to Prevent Post-Incarceration Homelessness*, Columbia University Center for Urban Research and Policy Symposium on Housing &

services systems.<sup>75</sup> In addition, “the various public sectors and agencies that govern social services and health have long been plagued by over-specialization and fragmentation into categories that decreasingly bear a relationship with the realities of social needs.”<sup>76</sup> These systems are often duplicative and uncoordinated. Indeed, the effects of involvement with the criminal justice system cut across traditional divisions of labor among social services agencies, civil legal aid, criminal defense, the courts, and prosecution. Mitigating these effects requires the participation of each of these stakeholders.

How does this play out for individuals in the criminal justice system? A person charged with endangering the welfare of a child could easily have a criminal defense attorney handling his criminal case, a family court lawyer handling a related civil action on abuse, neglect, or termination of parental rights, a civil legal services attorney handling his eviction case, and a social services agency providing treatment services.

Another example: a person re-entering the community after incarceration could have housing and family law needs that a civil legal services attorney should address, but also extensive treatment needs – such as substance abuse or family counseling – that social services providers should meet.

The breadth of hidden consequences demonstrates that individuals leaving jail and prison need coordinated advocacy, not segregated services. Conventional divisions of labor

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Criminal Justice Policy in New York City (Mar. 22, 2004) (<http://documents.csh.org/documents/ke/Re-entryAndHomelessnessPaperOct2004.pdf>).

<sup>75</sup> *Id.* at 6 (“If the recent flurry of interest in prisoner re-entry is any indication, criminal justice and corrections officials are now beginning to realize that incarcerating individuals at a high and rapid rate places strains on the states’ capacity to build and operate prisons, and that the return of high numbers of prisoners who lack the benefit of planned and assisted re-entry to the community presents a public safety risk that threatens the general public’s trust presently enjoyed by the criminal justice system.”).

<sup>76</sup> *Id.* at 8.

continually fail to address this need. An effective response to these problems must cut across sectors and must be holistic.<sup>77</sup>

## 5. Breaking the Cycle

If current incarceration rates remain unchanged, an estimated 1 in 15 persons born in 2001 will serve time in a prison during their lifetime. The chance rises to 1 in 3 for African-American males.<sup>78</sup> Moreover, two-thirds of those released from state prisons will be rearrested within three years. One-half will be convicted of a new crime.<sup>79</sup> The direct costs alone of this cycle of incarceration are staggering. For example, it costs about \$32,400 to maintain a person in custody in a New York State prison for a year.<sup>80</sup> New York City's Correction Department spent an average of nearly \$59,000 per inmate in the 2003 fiscal year. "But when all city expenses are factored in – insurance and pension benefits for correction staff, for instance, as well as more than \$150 million for jail medical care – the yearly per-inmate cost is closer to \$100,000, according to the city's Independent Budget Office."<sup>81</sup> This report attempts in part to document the additional downstream social and economic costs of the criminal justice system and suggest ways to break this cycle.

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<sup>77</sup> Addressing the tremendous need in this area, the Legal Action Center has worked for over 30 years to educate advocates and change policy around the consequences of criminal justice involvement. In addition, a new collaboration of dozens of legal, social services, and policy reform advocates has come together to build an advocate network and an online resource center to serve it called Reentry Net/NY ([www.reentry.net/ny](http://www.reentry.net/ny)). Launched in November 2005 with an online library of hundreds of resources selected by experts, a calendar of events, and additional communications tools, Reentry Net/NY works to network, train, and support organizations and advocates working with the re-entry community; provide information and education directly to the re-entry community to link them with available services; and create a more effective bridge between the re-entry community, the services field, and policy reform advocates.

<sup>78</sup> Thomas P. Bonczar, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 197976, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, at 7 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>.

<sup>79</sup> See Patrick A. Langan & David J. Levin, U.S. DEP'T OF JUSTICE, PUBL'N. NO. NCJ 193427, *Recidivism of Prisoners Released in 1994*, at 1 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>.

<sup>80</sup> Correctional Association (Mar. 2004).

<sup>81</sup> Paul von Zielbauer, *Rikers Houses Low-Level Inmates at High Expense*, N.Y. TIMES, Jan. 16, 2004, at B1.

**C. RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY**

The issues of public safety, recidivism rates, and prisoner re-entry are inextricably entwined. Evidence suggests that fewer and fewer people returning home from prison are succeeding, and ultimately the result is not just more crime and diminished levels of public safety, but also enormous resource expenditure.<sup>82</sup> The impact on public safety is compounded by the reality of today's criminal justice system. The sheer numbers of people returning from prisons are greater than anytime in our history; the needs of people leaving prison are more serious; the correctional systems rehabilitative programs have decreased;<sup>83</sup> and access to criminal histories has increased giving rise to an increased difficulty in reintegration (employment, housing, benefits) as a result of the stigma and legislative bars attendant to a criminal record.

Recidivism studies and data help focus our analysis on the relationship between re-entry and public safety. The most comprehensive study ever conducted by the Bureau of Justice Statistics on recidivism gives us some insight into the magnitude of the problem. The study found that 30% of people released from prison were rearrested in the first six months, 44% within the first year, and 67.5% within three years of release from prison.<sup>84</sup> The overall public safety implication that these recidivism rates represent can be seen by examining national trends and the relationship between "recidivism arrests" and all arrests. According to Jeremy Travis,<sup>85</sup>

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<sup>82</sup> Joan Petersilia, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* vi (2003).

<sup>83</sup> *Id.* at 6, 15.

<sup>84</sup> Patrick Langan & David Levin, *Recidivism of Prisoners Released in 1994* (Washington, D.C.: Bureau of Justice Statistics, 2002).

<sup>85</sup> Jeremy Travis is the president of John Jay College of Criminal Justice. Prior to his appointment, Mr. Travis served four years as a senior fellow affiliated with the Justice Policy Center at the Urban Institute, where he launched a national research program on prisoner reentry into society. From 1994 to 2000, Mr. Travis was the director of the National Institute of Justice (NIJ). A key figure in the development of new approaches to prisoner reentry, he pioneered the concept of the reentry court, designed the Department of Justice's reentry partnership initiative, and created the federal reentry program in President Clinton's FY 2000 budget. Prior to his time at NIJ,

by 2001, people released from prison the three preceding years accounted for approximately 30% of all arrests for violent crime, 18% of all arrests for property crime, and 20% of all arrests for drug offenses.<sup>86</sup> With such a high percentage of crime attributable to the re-entry population, it is axiomatic that if policymakers want to decrease crime and increase public safety, they must find ways to promote reintegration. This is a reality that has not escaped the prosecutorial perspective. The National District Attorneys Association has stated: “It is inevitable with this rate of recidivism that public safety will suffer unless provisions are made to assist those ex-offenders, who desire to become law-abiding and productive parts of their communities, with their transition back into society.”<sup>87</sup>

The fiscal consequences of locking up an ever increasing number of people, and an ever increasing number of people returning to prison, is substantial. Between 1973 and 2000, the number of state prisons nearly doubled – from 592 to 1,023.<sup>88</sup> The federal and state governments now spend \$60 billion a year to house 1.4 million individuals in prison.<sup>89</sup> Other than expenditures on the Medicaid Program, corrections expenditures have been the fastest growing portion of state budgets, approaching the \$74 billion the states spent on higher education in 2000.<sup>90</sup> If society attends to the details of removing the barriers to reintegration and creating

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Mr. Travis was deputy commissioner of legal matters at the New York City Police Department, chief counsel to the House of Representatives Subcommittee on Criminal Justice, and special advisor to the mayor of New York City.

<sup>86</sup> Jeremy Travis, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 98 (2005).

<sup>87</sup> National District Attorneys Association, *Policy Positions on Prisoner Reentry Issues*, at 2 (Resolution Adopted by the Bd. of Directors, Portland, ME, July 17, 2005), available at [http://www.ndaa-apri.org/pdf/policy\\_position\\_prisoner\\_reentry\\_july\\_17\\_05.pdf](http://www.ndaa-apri.org/pdf/policy_position_prisoner_reentry_july_17_05.pdf).

<sup>88</sup> Sarah Lawrence & Jeremy Travis, *The New Landscape of Imprisonment: Mapping America's Prison Expansion* (2004).

<sup>89</sup> Lynn Bauer & Steven D. Owens, *Justice Expenditures and Employment in the United States, 2001*, Bureau of Justice Statistics Bulletin (Bureau of Justice Statistics, Wash., D.C. 2004).

<sup>90</sup> Justice Policy Institute, *Cellblocks or Classrooms? The Funding of Higher Education and Corrections and Its Impact on African American Men* (The Justice Policy Institute Wash., D.C. 2002).

effective programs that promote a smooth transition back into the community, it is highly likely that this investment will generate several dollars worth of benefit for every dollar spent.<sup>91</sup>

Employment, housing, and financial stability are necessary for people returning from prison to refrain from crime and to establish the informal networks critical for long-term survival.<sup>92</sup> According to the United States Department of Justice figures, approximately 650,000 people are released from prison each year.<sup>93</sup> The National District Attorneys Association recognized the impact of re-entry on communities in their policy analysis issued in 2005. “They enter communities in need of housing, medical and mental health treatment, employment, counseling and a variety of other services. Communities are often overwhelmed by these increased demands and, due to budget constraints, unable to provide minimum services to formerly incarcerated persons. As a result, the safety of our communities and citizens is jeopardized when releasees, who are unable to acquire employment, housing and needed services, revert to a life of crime.”<sup>94</sup>

Jeremy Travis suggests that a discussion of the nexus between public safety and re-entry should be conducted at two levels.<sup>95</sup> On one level, society must objectively look at what programs and policies will improve the chances of reintegration. On another level, the public’s concern about the safety risks posed by people returning home from prison has validity and importance. The challenge, as generally described by Travis, is to engage in a public debate that begins by acknowledging the re-entry reality – they all come back – and then move forward,

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<sup>91</sup> Joan Petersilia, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 17 (2003).

<sup>92</sup> *Id.* at 20.

<sup>93</sup> Bruce Western, *Lawful Reentry, The American Prospect*, at 54 (Dec. 2003) (“About 650,000 inmates were released from prison in 2002, up from around 150,000 in 1977.”).

<sup>94</sup> National District Attorneys Association, *Policy Positions on Prisoner Reentry Issues*, *supra* note 87, at 2.

<sup>95</sup> Travis, *supra* note 86, at 87.



adopting policies that demonstrably reduce the level of criminal behavior within the population of people returning from prison.<sup>96</sup> One way to reduce the levels of criminal behavior is to remove the hurdles on the road to re-entry, thereby increasing the levels of reintegration and consequently reducing the rates of new crime and recidivism. Clearly those persons who establish a stake in the welfare of their communities are less likely to engage in illegal activities that will bring harm to others.<sup>97</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> Petersilia, *supra* note 91, at 20.



## II. EMPLOYMENT

In New York, the unemployment rate is substantial for formerly incarcerated individuals; up to 60% of people formerly incarcerated are unemployed one year after release.<sup>98</sup> In New York State, 83% of people who violate the terms of their probation are unemployed at the time of the violation.<sup>99</sup> Without employment, these individuals cannot meet their own or their families' basic needs. Without guidance or other resources, many revert to their former criminal behavior. As New York City's probation commissioner described, "Either they work or they go back to jail."<sup>100</sup> Research from both academics and practitioners suggest that the chief factor which influences the reduction of recidivism is an individual's ability to gain "quality employment."<sup>101</sup>

The most common issue many people face is filling out the job application itself. Preliminary questions such as "Have you ever been convicted of a crime?" or "Have you ever been arrested?" pose a major obstacle in gaining employment. The decision whether to answer honestly or not can determine whether the previously arrested or incarcerated individual even gets a chance to interview for a job, much less get hired. Under the New York Human Rights Law, it is an "unlawful discriminatory practice . . . to make any inquiry about . . . or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or

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<sup>98</sup> Center For Employment Opportunities, Issue Overview: *Crime and Work*, available at [http://www.ceoworks.org/Roundcrime\\_work012802.pdf](http://www.ceoworks.org/Roundcrime_work012802.pdf).

<sup>99</sup> *Id.*

<sup>100</sup> Raul Russi (quoted in Shapiro, Walter, *Prison Nation Turns Its Back On Released Convicts*, USA TODAY, May 30, 2001, at 10a).

<sup>101</sup> *See, e.g.*, MEASURING RECIDIVISM: CRIMINAL HISTORY COMPUTATION THE FEDERAL SENTENCING GUIDELINES, A COMPONENT OF THE FIFTEEN YEAR REPORT ON THE U.S. SENTENCING COMMISSION'S LEGISLATIVE MANDATE, at 12 (May 2004), available at [http://www.ussc.gov/publicat/Recidivism\\_General.pdf](http://www.ussc.gov/publicat/Recidivism_General.pdf) (noting a lower recidivism rate for those who are employed versus those who are unemployed at the time they commit a crime).

proceeding in favor of such individual.”<sup>102</sup> Although it is permissible to inquire into criminal convictions, an employer may not refuse to hire an applicant based on the prior conviction, absent a “direct relationship” between the offense and the employment, or unless employment would involve an “unreasonable risk” to property or safety.<sup>103</sup> If an individual who has been convicted of a crime lies when asked whether he has ever been convicted to avoid the social stigma associated with a conviction, he or she may be legally terminated for lying on an employment application.<sup>104</sup>

Formerly incarcerated individuals face several other obstacles in their quest to gain employment. Over 100 occupations in New York State require some type of license, registration, or certification by a state agency.<sup>105</sup> Although only a few statutes automatically bar people from licensure solely based on past convictions, New York places many statutory restrictions based on an individual’s criminal history through general “good moral character” requirements for almost all licenses. For example, an individual with a criminal conviction

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<sup>102</sup> N.Y. EXEC. LAW § 296.

<sup>103</sup> N.Y. CORRECT. LAW § 752.

<sup>104</sup> *Grant v. State Comm’n for Human Rights*, 54 Misc.2d 775, 777 (Sup. Ct. N.Y. Co. 1967) (inaccuracies and omissions in petitioner’s employment application, alone, constituted “sufficient basis for the exercise of the [employer’s] judgment [not to hire applicant].”).

<sup>105</sup> Not only are vocational licenses elusive in New York State for an individual with criminal convictions, but his or her driver’s license may be revoked as well. In many areas in New York, the ability to drive is essential to commuting to work or can be part of the requirements of the job itself. In 1992 Congress passed a law requiring states to revoke or suspend the drivers’ licenses of people convicted of drug felonies, or suffer the loss of 10% of the state’s federal highway funds. 23 U.S.C. § 159 (defining “drug offense” as any criminal offense involving the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell, or transfer any substance (the possession of which is prohibited by the Controlled Substances Act) or the operation of a motor vehicle under the influence of such a substance). Under New York Vehicle and Traffic Law, crimes such as driving with impaired ability or driving while intoxicated, as well as a range of drug-related convictions (including youthful offender and juvenile adjudications) result in suspension or revocation of a driver’s license.

cannot obtain a license to work as a barber because “a criminal history indicates a lack of good moral character and trustworthiness required for licensure.”<sup>106</sup>

People often are barred from gaining employment, or often lose employment, with a government employer. For instance, in New York, people can be terminated from employment with any city, town or village employer if they have engaged in “immoral conduct,” which gives a public employer immense discretion.<sup>107</sup>

Certificates of Relief from Disabilities (“CRD”) and Certificates of Good Conduct (“CGC”) provide individuals with criminal convictions with a limited form of relief from some of the employment barriers they often face. CRD’s provide the eligible person with some possible benefit from the discretion afforded to the sentencing court or New York State Board of Parole from most forfeitures or disabilities that are automatically imposed upon conviction, and from which there are no other means to appeal from the Board’s discretion. A person with a criminal record may obtain a CRD from the sentencing court, or if one is not obtained during sentencing, the applicant must apply to the State Parole Board or Court of sentencing and have no more than one felony conviction. A CGC, similar to a CRD, may be obtained for those persons who have been convicted of more than one felony. However, a lengthy waiting period may be involved before an applicant may apply, depending on the particular class of felony involved. For example, if the most serious conviction was for a “C” felony (for example, aggravated sexual abuse in the second degree), one must wait at least 3 years from the date of the last conviction, payment of fine, or release from prison on to parole supervision. Furthermore, it

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<sup>106</sup> Clyde Haberman, *He Did Time, So He’s Unfit To Do Hair*, N.Y TIMES, Mar. 4, 2005, at B1.

<sup>107</sup> The Bronx Defenders, Civil Action Project, *The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records* (Oct. 2004) available at [http://www.nlada.org/DMS/Documents/1110924022.69/document\\_info](http://www.nlada.org/DMS/Documents/1110924022.69/document_info).

can take between six months to a year for a decision on an application for a Certificate of Good Conduct.

**A. THE LAW AND ITS EFFECTS**

**1. Employment Discrimination**

**a. Federal law**

There is no federal statute that specifically protects formerly incarcerated individuals from employment discrimination. Although no explicit statutory prohibition exists, the federal government has not completely ignored the need to protect people with criminal records in the workforce. Policies denying employment on the basis of arrests not followed by conviction, and policies that bar anyone with a criminal record from employment have been ruled illegal as applied to racial minorities under federal civil rights laws.<sup>108</sup> Some courts have found that such policies have a racially discriminatory effect, because minorities tend to be arrested and convicted at a greater rate than whites.<sup>109</sup> Thus, in some cases, a refusal to hire on the basis of a criminal record may qualify as illicit race discrimination under federal law.<sup>110</sup>

Furthermore, the federal government provides re-entry programs that curb the effects of employment discrimination against formerly incarcerated individuals. Overall, these programs focus on actively improving a person's ability to re-enter the labor market, instead of prohibiting barriers to employment like employer discrimination. The Workforce Investment Act of 1998 ("WIA"), which replaced the Job Training Partnership Act, establishes a general workforce

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<sup>108</sup> See, e.g., *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972); see also EEOC Compliance Manual, § 604; EEOC Policy Guidance No. N-915-061 (9/7/90) "Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1982)" ("Since the use of arrest records as an absolute bar to employment has a disparate impact on some protected groups, such records alone cannot be used to routinely exclude persons from employment...").

<sup>109</sup> See EEOC Compliance Manual, § 604.

<sup>110</sup> *Id.*

preparation and employment system in which organizations that offer satisfactory training and job-placement to adults and youth, including formerly incarcerated individuals and dislocated workers, receive federal funding.<sup>111</sup> In particular, Section 171 of the WIA orders the Secretary of Labor to carry out pilot programs tailored to the special employment needs of target populations, and the Act grants funding for these programs.<sup>112</sup> For example, under the Prisoner Re-Entry Initiative, the Department of Labor will be awarding grants to faith-based and community organizations (“FBCOs”) that are located in urban communities characterized by large numbers of formerly incarcerated individuals and offer employment-centered services such as mentoring, job training, and other comprehensive transitional services.<sup>113</sup> Additionally, the U.S. Department of Justice, Office of Justice Programs (“OJP”), runs the Serious and Violent Offender Reentry Initiative, which provides funding to prepare targeted persons with criminal records to successfully return to their communities and enter the workforce after having served a significant period of confinement in a state training school, juvenile or adult correctional facility, or other secure institution.<sup>114</sup> The program includes three phases of education, job training, mentoring, job skills development and monitoring.<sup>115</sup>

Recent anti-terrorism laws have increased the number of individuals subject to background checks and employment barriers. In 2002, for the first time, the FBI performed

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<sup>111</sup> 29 U.S.C. § 2801 (1998).

<sup>112</sup> *Id.* § 2916.

<sup>113</sup> Workforce Investment Act – Demonstration Grants; Solicitation for Grant Applications - Prisoner Re-Entry Initiative, 70 Fed. Reg. 16,853, 16,853 – 16,870 (Apr. 1, 2005).

<sup>114</sup> See U.S. Dep’t of Justice, Office of Justice Programs, Reentry, *available at* <http://www.ojp.usdoj.gov/reentry/learn.html>.

<sup>115</sup> *Id.*

more fingerprint-based background checks for civil purposes than for criminal investigations.<sup>116</sup>

The increasing number of background checks makes it difficult for formerly incarcerated individuals to gain employment. In response to this new environment, section 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004 [Pub. L. 108-458] mandates the Attorney General make “recommendations to Congress for improving, standardizing, and consolidating the existing statutory authorization, programs, and procedures for the conduct of criminal history record checks for non-criminal justice purposes.” To comply with the congressional mandate, the Attorney General requested suggested improvements from the National Employment Law Project (“NELP”).<sup>117</sup>

The suggestions proffered by NELP stress the need to narrowly tailor federal regulations. The current licensing and employment restrictions were conceived piecemeal. As a consequence there are no federal benchmarks to evaluate the comparative risks and benefits of subjecting new categories of workers to background checks. According to NELP, the Attorney General’s recommendations should include a new set of guidelines. Additionally, these guidelines are only effective when criminal records are complete. Therefore, NELP suggested that the Attorney General address deficiencies in the federal database used for background checks. Currently, the database is unable to access all available state records, which leads to delays in reporting dropped charges and other dispositions to the FBI. In NELP’s Letter to the Deputy Assistant Attorney General, the organization offered a series of suggestions aimed at improving the

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<sup>116</sup> Steve Fischer, FBI, Criminal Justice Information Services Division, Office of Multimedia, Response to Information Request from Maurice Emsellem, National Employment Law Project (July 22, 2005). From 2002-2004, the number of fingerprint-based criminal records requests increased sharply, thus they again exceeded the number of civil requests in 2004 (9.6 million criminal requests, compared with 9.1 million civil requests).

<sup>117</sup> See Letter from the National Employment Law Project to Richard A. Hertling, Deputy Assistant Attorney General (Aug. 5, 2005), available at <http://www.nelp.org/docUploads/AGCommentsNELP%2Epdf>.



employability of previously incarcerated individuals.<sup>118</sup> These improvements, if instituted, will probably lessen the negative employment effects (*i.e.*, employer discrimination upon discovery of a criminal record, even if such a record is unrelated to the job requirements) resulting from the recent surge in background checks.

**b. New York State law**

Under New York Human Rights Law § 296(16),<sup>119</sup> it is an “unlawful discriminatory practice . . . to make any inquiry about . . . or to act upon adversely to the individual involved, any *arrest or criminal accusation* of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such

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<sup>118</sup> NELP made the following suggestions to the Attorney General’s office: employee protections to compensate for the expanded reliance on criminal records; substantive worker protections defining the scope of employment prohibitions based on criminal records; establish threshold federal standards regulating when to apply new screening requirements and employment prohibitions based on a criminal record, taking into account public safety and security, individual and civil rights; absent special circumstances, new employment prohibitions based on an individual’s criminal records should only apply prospectively, not to current workers; disqualifying offenses should be time limited, and lifetime disqualifications should be eliminated except in special circumstances; all workers with disqualifying offenses should be provided an opportunity to establish that they have been rehabilitated and do not pose a safety of security threat; disqualifying offenses imposed by federal law should “directly relate” to the responsibilities of the occupation and be more closely scrutinized to limit broad categories of offenses and less serious crimes; procedural protections should ensure more complete criminal records and privacy rights; create safeguards protecting against adverse employment decisions and discrimination based on incomplete criminal records, including a one-year limit on arrests with no dispositions; federal procedural protections should be significantly strengthened by making the FBI’s information available to all those who produce a criminal records while also clarifying that the opportunity to correct the individual’s record should be available *before* an adverse employment determination is made by any authorized agency or employer; expand the availability of FBI information to all those individuals who produce a criminal record; ensure that the use-and-challenge protections apply to all employers and agency officials; consistent with current practice, fingerprints collected for employment and licensing purposes should be destroyed and not retained by the FBI; strictly limit the scope of private employer access to federal criminal record information; expanding the authority of private employers to request and review FBI criminal records creates a significant potential for error and abuse by employers which will unfairly penalize the nation’s workers; employers, not workers, should absorb the fees required for the criminal records search; federal and state agencies should strengthen their infrastructures to produce reliable criminal history information, not rely on commercial providers of criminal history data and screening services; commercially-available databases should not be used to supplement the FBI criminal history information because of serious questions related to their accuracy and the industry’s lack of compliance with privacy protections; the demands to comply with new employment screening mandates requires a strategic investment in the federal and state infrastructure, not new federal authority to outsource sensitive screening functions. *See* Letter from the National Employment Law Project, to Richard A. Hertling, Deputy Assistant Attorney General (Aug. 5, 2005).

<sup>119</sup> It must be noted that the protections afforded by § 296(16) only applies to job applicants and not current employees. Therefore, if an employee were to be arrested during employment, there is no law against firing that employee based upon those circumstances alone.

individual.”<sup>120</sup> In a letter accompanying approval of these provisions, then-Governor Carey wrote that these provisions were part of a comprehensive scheme “designed to protect the rights of individuals against whom criminal charges [had] been brought, but which did not ultimately result in a conviction.”<sup>121</sup> Governor Carey further wrote that “[t]his legislation [was] consistent with the presumption of innocence, which simply means that no individual should suffer adverse consequences merely on the basis of an accusation, unless the charges were ultimately sustained in a court of law.”<sup>122</sup> In accordance with § 296(16), employers may not ask job applicants to disclose prior arrests that did not result in conviction and may not obtain an arrest record from other sources. Unlawful inquiries may expose an employer to liability if an employee is discharged or not hired.<sup>123</sup> Damages can include compensation for lost pay and psychological suffering.<sup>124</sup> Note that the language of § 296(16) limits its protection to job applicants and does not include current employees.

Although inquiry into and consideration of an *arrest* is prohibited by § 296(16), it is permissible to consider the underlying *conduct* leading to the criminal charges.<sup>125</sup> Furthermore, if an employer learns of an arrest through legitimate means, the employer *may inquire* into the

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<sup>120</sup> N.Y. EXEC. LAW § 296(16). (emphasis added); *see also* CRIM. PROC. LAW § 160.50(2) (describing the circumstances in which a criminal action or proceeding against a person shall be considered terminated in favor of such person). These circumstances include an order dismissing the accusatory instrument, a verdict of acquittal, an order setting aside a verdict, an order vacating a judgment, an order of discharge, and where all charges against a person have been dismissed or the prosecutor or arresting agency has elected not to prosecute. CRIM. PROC. LAW § 160.50(2).

<sup>121</sup> N.Y. EXEC. LAW § 296(16).

<sup>122</sup> *Id.*

<sup>123</sup> N.Y. EXEC. LAW § 296(16); *see Lebensbaum v. Adelphi Univ.*, 111 A.D.2d 393 (2d Dep’t 1985) (holding that the burden is on the plaintiff to prove the refusal to hire was substantially influenced by an unlawful inquiry into the applicant’s arrest record).

<sup>124</sup> *See Boodram v. Brooklyn Dev. Ctr*, 2 Misc. 3d 574 (N.Y. Civ. Ct. 2003) (upholding variety of compensatory damages to plaintiff for violation under New York State Human Rights Act).

<sup>125</sup> N.Y. EXEC. LAW § 296(16).

underlying facts and disposition of the arrest.<sup>126</sup> For example, in *Perkins v. Merrill Lynch*,<sup>127</sup> an employee sued her employer on the grounds that it had discriminated against her because of her race. The employee stated in her complaint that she was terminated after failing to respond to her employer's inquiries about her recent arrest. The court granted the employer's motion to dismiss for failure to state a claim because the employee had admitted that she had failed to answer her employer's legitimate inquiries into her arrest. Falsification of an application or misstatements of fact given at an interview are legitimate nondiscriminatory reasons to reject a job applicant.<sup>128</sup> Thus, if a job applicant lies about a criminal conviction record, such falsification may be a legitimate basis for refusing to hire or subsequently firing the applicant.<sup>129</sup>

New York Human Rights Law § 296(16) contains two explicit exceptions to the bar on employer inquiries into arrest records. First, inquiries into prior arrests are permissible "in relation to an application for employment as a police officer or peace officer."<sup>130</sup> Second, inquiries are permissible when such inquiries are "specifically required or permitted by

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<sup>126</sup> N.Y. EXEC. LAW § 296(16). *Accord Op.* Att'y. Gen. F90-3 (May 16, 1990) (although inquiry into and consideration of the mere fact of an arrest is impermissible under Executive Law § 296(16), the Department of Health, after learning of the arrest through legitimate means, may consider "evidence adduced during the criminal investigation and trial other than records sealed under section 160.50. A licensing authority is not barred from interviewing and considering the testimony of witnesses to the criminal proceeding or of the applicant who was the subject of criminal charges, as to the underlying incidents and events").

<sup>127</sup> 309 A.D.2d 587 (1st Dep't 2003).

<sup>128</sup> *Grant*, 54 Misc.2d at 777 (inaccuracies and omissions in petitioner's employment application, alone, constituted "sufficient basis for the exercise of the [employer's] judgment [not to hire applicant]").

<sup>129</sup> N.Y. EXEC. LAW § 296(16).

<sup>130</sup> *Id.*

statute.”<sup>131</sup> The Attorney General has indicated that, in light of the legislative history of § 296(16) this exception should be read narrowly.<sup>132</sup>

New York Human Rights Law permits a private right of action for someone denied employment because of an arrest that led to a favorable termination, *e.g.*, dismissal, acquittal, etc.<sup>133</sup> It should be noted that the New York City Human Rights Laws (NYC Admin. Code § 8-107(10)) offers similar protections from employment discrimination as the State Human Rights Laws and Article 23-A of the Correction Law. However, the NYC Human Rights Law provides a private right of action against private employers.<sup>134</sup> It also only allows an Article 78 proceeding against a public employer.

Although it is permissible under Human Rights Law § 296(16) for employers to lawfully inquire about an applicants’ past criminal convictions, Article 23-A of the Correction Law (§§ 750-55) prohibits an employer from refusing to hire an applicant based on the prior conviction, absent a “direct relationship” between the offense and the employment, or unless employment would involve an “unreasonable risk” to property or safety.<sup>135</sup> Employers must individually consider each person who applies for a job and make a decision about hiring that

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<sup>131</sup> *Id.* In 2003, the Legislature provided for background checks, including, inter alia, finger printing and criminal history review in connection with financial services institutions, facilities for children and disabled adults, campus security guards, and certain public employment. *See* Laws of 2003, Ch. 302, 100, 597, 621, and 643.

<sup>132</sup> Op. Atty. Gen. F77-26 (May 3, 1977) (stating: “[i]n order to allow the request of arrest information, a statute must specifically require or specifically permit such a request. The adverb ‘specifically’ must be applied to both words in order to fully implement the legislative objective. It appears that the choice of the two words ‘require’ and ‘permit’ was only intended to cover two types of statutes, those which are mandatory and those which are discretionary.”)

<sup>133</sup> N.Y. EXEC. LAW §§ 296(16); 297.

<sup>134</sup> NYC Admin Code §§ 8-107(10) & (11); 8-502(d).

<sup>135</sup> N.Y. CORRECT. LAW § 750.

individual based on his qualifications and other factors, including conviction history.<sup>136</sup> This law applies to all New York State occupational licensing authorities, public employers (except for positions involving members of law enforcement agencies), and private employers of more than 10 employees.<sup>137</sup>

“Direct relationship” is defined in § 750(3) as one in which the nature of the criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license of employment sought. In making the determination as to whether there is a direct relationship between the offense and the employment sought or whether there is an unreasonable risk to property or safety, an employer is required to engage in a balancing test and weigh the following factors:

1. the state’s public policy of encouraging employment of persons previously convicted of a crime;
2. the specific duties and responsibilities related to the employment sought;
3. the bearing, if any, the past criminal offense will have on the individual’s fitness;
4. the time that has passed since the occurrence of the criminal offense;
5. the age of the person at the time the crime was committed;
6. the seriousness of the offense;
7. any information produced by the person regarding rehabilitation and good conduct; and
8. the employer’s interests in protecting property, and the safety and welfare of specific individuals or the general public.<sup>138</sup>

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<sup>136</sup> Legal Action Center, *Employment Discrimination and What to Do About It*, available at [http://www.hirenetwork.org/pdfs/Employment%20discrimination%20\(NY\).pdf](http://www.hirenetwork.org/pdfs/Employment%20discrimination%20(NY).pdf).

<sup>137</sup> *Id.* at 5-6.

<sup>138</sup> N.Y. CORRECT. LAW § 753.

Whether a particular individual's conviction(s) is, or is not, "job related" as to justify a denial of employment or licensure must be determined on a case-by-case basis.<sup>139</sup> Section 754 provides that a person previously convicted of one or more criminal offenses who has been denied employment may request a written statement from an employer setting forth the reasons for such denial, which must be provided by the employer within thirty days of the request.

Pursuant to § 755, the provisions of Article 23-A are enforceable by a proceeding brought pursuant to Article 78 of the civil practice law and rules.<sup>140</sup> In addition, with respect to actions by private employers, the provisions of this article are enforceable by the division of human rights pursuant to the powers and procedures set forth in Article 15 of the Executive Law, and, concurrently, by the New York City commission on human rights.<sup>141</sup>

**c. New York compared to other states**

Compared to other states, New York offers greater anti-discrimination protection to individuals who have been incarcerated, and other states seek to model their laws after New York. For instance, the New Jersey Institute for Social Justice, in its Briefing Paper "Legal Barriers to Prisoner Reentry in New Jersey," explicitly recommends that New Jersey adopt the New York statutory anti-discrimination scheme which "balances valid public safety concerns with the goal of not unreasonably blocking opportunities for successful reentry."<sup>142</sup> Few states offer both protection against inquiries into criminal records and against criminal-record discrimination in general like New York. Some states forbid employers from *discrimination* in

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<sup>139</sup> Legal Action Center, *Employment Discrimination and What to Do About It*, available at [http://www.hirenetwork.org/pdfs/Employment%20discrimination%20\(NY\).pdf](http://www.hirenetwork.org/pdfs/Employment%20discrimination%20(NY).pdf).

<sup>140</sup> N.Y. CORRECT. LAW § 755 (1).

<sup>141</sup> N.Y. CORRECT. LAW § 755(2).

<sup>142</sup> Nancy Fishman, Briefing Paper: *Legal Barriers to Prison Reentry in New Jersey*, New Jersey Institute for Social Justice (2003), available at [http://www.njisj.org/reports/barriers\\_report.html](http://www.njisj.org/reports/barriers_report.html).

general on the basis of a worker's arrest record.<sup>143</sup> Five states prohibit only *public* employers from engaging in criminal-record discrimination.<sup>144</sup> A greater number of states have laws that prohibit employers from *asking* an applicant about his or her criminal record but do not expressly prohibit discrimination in the event an employer learns of the record.<sup>145</sup> Meanwhile, the majority of states do not have *any* statute that protects applicants with arrest records from employment discrimination. They consequently rely on federal anti-discrimination statutes. Two federal statutes, Title VII of the Civil Rights Act of 1964, and to a lesser extent the Americans with Disabilities Act, serve this capacity. Nevertheless, workers would be best protected by a combination of prohibiting inquiries into criminal records and discrimination generally.

In addition to New York, Hawaii and Wisconsin have the broadest anti-discrimination protections for persons with a criminal record, generally banning all employers from using arrest or conviction records in making employment decisions. Wisconsin is one of the leading jurisdictions in the fight against general employment discrimination.<sup>146</sup> The state legislature enacted the Wisconsin Fair Employment Act ("WFEA") to "encourage and foster to the fullest extent practicable" the employment of all properly qualified individuals, including workers with an arrest or conviction record.<sup>147</sup> The statute states that no employer, labor organization,

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<sup>143</sup> See, e.g., HAW. REV. STAT. §§ 378-1 to -9 (2002); N.Y. CORRECT. LAW §§ 750-55 (McKinney 2002); N.Y. EXEC. LAW §§ 296(15), 296(16) (McKinney 2002); WIS. STAT. ANN. § 111.31 (West 2001).

<sup>144</sup> See, e.g., CONN. GEN. STAT. ANN. §§ 46a-79 to -81 (West 2002); FLA. STAT. ANN. § 112.011 (West 2002); MINN. STAT. ANN. § 364.01-.10 (West 2002); N.J. REV. STAT. ANN. 11A:4-11 (West 2002); WASH. REV. CODE §§ 9.96A.010-.50.

<sup>145</sup> See, e.g., 775 ILL. COMP. STAT. ANN. § 5/2-103 (West 2003); other such states are Colorado, Kansas, Maryland, Missouri, and Montana.

<sup>146</sup> James R. Todd, "It's Not My Problem": *How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts*, 36 ARIZ. ST. L.J. 725, 731 (2004).

<sup>147</sup> WIS. STAT. ANN. § 111.31 (2004). See Act approved Oct. 31, 1977, ch. 125, 1977 Wis. Laws 619 (amending the WFEA to make discrimination in employment based upon arrest or conviction record unlawful with an important class of exceptions); see also Todd, *supra* note 146, at 731-32.

employment agency, licensing agency or other person may engage in any act of employment discrimination, which includes but is not limited to refusal to hire, employ, admit or license an individual, discharge, or inquiry in connection with prospective employment, on the basis of an arrest or conviction record.<sup>148</sup> Because Wisconsin’s prohibition against criminal-record discrimination exists as part of its general anti-discrimination statute, and not the state’s corrections law like New York, the range of discriminatory actions proscribed may be broader.<sup>149</sup> The WFEA covers all employees, including prospective and de facto employees.<sup>150</sup> It also broadly defines “arrest record” and “conviction record” to include, but not be limited to, information indicating that an individual has been questioned, apprehended, taken into custody or detention, placed on probation, fined, imprisoned, or held for investigation, arrested, charged with, indicted, tried for or convicted of any felony, misdemeanor or other offense.<sup>151</sup> Overall, the WFEA broadly protects those with criminal histories from employment discrimination, especially in comparison to other states.

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<sup>148</sup> WIS. STAT. ANN. §§ 111.321-322 (2004).

<sup>149</sup> Jeffrey D. Myers, Note, *County of Milwaukee v. LIRC: Levels of Abstraction and Employment Discrimination Because of Arrest or Conviction Record*, 1988 WIS. L. REV. 891, 896 (1988).

<sup>150</sup> 67 Op. Atty. Gen. Wis. No. 169.

<sup>151</sup> WIS. STAT. ANN. 111.32 (2004). Despite the broad statutory definition, the courts have limited the scope of the term “arrest record” until recently. See *Buller v. Univ. of Wisconsin-Madison*, No. 80-PC-ER-49 (Personnel Comm’n Oct. 14, 1982) (termination for arrest at work initiated by employer lawful); *Kozlowicz v. Augie’s Pizzeria*, No. ERD-8256201 (DILHR Equal Rights Div. Oct. 31, 1983), *aff’d*, No. ERD-8256201 (LIRC Dec. 7, 1983) (termination because of employee’s arrest while working lawful because temporary loss of employee hampered employer’s ability to conduct business); *Holliday v. Trane Co.*, No. ERD-8103982 (LIRC Apr. 21, 1983) (termination resulting from employer’s internal investigation lawful where no law enforcement agency involved); *City of Onalaska v. LIRC*, 120 Wis. 2d 363 (Ct. App. 1984) (termination resulting from internal investigation by employer police department lawful). But see *Hart v. Wausau Ins. Cos.*, No. ERD-8401264 (LIRC Apr. 10, 1987) (termination because of pending charge unlawful, even if complainant told employer a conviction occurred); *Wetzel v. Clark County*, No. ERD-8300021 (LIRC June 5, 1987); *Shipley v. Towne & Country Rest.*, No. ERD-8502472 (LIRC July 14, 1987).



However, the Wisconsin statute also provides exceptions to its general ban on criminal-record discrimination.<sup>152</sup> First, the statute allows an employer to request information regarding any arrest record of a *pending* charge.<sup>153</sup> Secondly, if employment depends on the bondability of the individual and the individual may not be bondable due to an arrest record, then the employer may also request information regarding his or her arrest record;<sup>154</sup> if the same problem applies to an individual because of his or her *conviction* record, then the employer may even refuse to employ, or terminate that individual.<sup>155</sup>

Finally, the WFEA sets forth an employer defense similar to the “direct relationship” defense in New York,<sup>156</sup> and allows the employer to discriminate on the basis of a criminal record when the charge or offense has a “substantial relationship” to the job. On the basis of an arrest record an employer may refuse to employ or suspend from employment an individual who is subject to a *pending* criminal charge if the circumstances of the charge “substantially relate” to the requirements of the particular job.<sup>157</sup> Similarly, on the basis of a past conviction, an employer may refuse to employ or even terminate, not just suspend, an individual if the circumstances of the offense “substantially relate” to the job requirements.<sup>158</sup> Unlike the New

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<sup>152</sup> See *id.* § 111.335; Op. Atty. Gen. Wis. No. 15-90 (1990).

<sup>153</sup> *Id.* § 111.335(1)(a).

<sup>154</sup> *Id.* § 111.335(1)(c)2.

<sup>155</sup> *Id.*

<sup>156</sup> See *supra* note 113 and accompanying text.

<sup>157</sup> *Id.* § 111.335(1)(b).

<sup>158</sup> *Id.* § 111.335(1)(c)1. See, e.g., *Jackson v. Labor & Indus. Review Comm'n*, 276 Wis. 2d 308 (Wis. Ct. App. 2004) (trucking company could refuse to hire an applicant with robbery and theft convictions, which substantially related to the job in that the applicant could not work in Canada or be trusted to haul valuable freight that could easily be sold on the street); *Knight v. LIRC*, 220 Wis. 2d 137 (Wis. Ct. App. 1998) (implications of a job applicant’s conviction for his involvement in a drug deal could be construed as substantially related to the circumstances of a position as a district agent because an agent has a significant amount of unsupervised time in making calls and would also be handling sums of money). But see *Wal-Mart Stores v. LIRC*, 220 Wis. 2d 716 (Wis.

York law however, the Wisconsin statute does not give a detailed list of factors to be considered in determining whether a prior offense justifies employment discrimination.<sup>159</sup> New York's list of factors demonstrates that a simple consideration of the job title and the name attached to the crime is not a sufficient inquiry for a licensing or employment decision.<sup>160</sup> In contrast, some critics argue that the lack of statutory factors has allowed Wisconsin state courts to interpret the substantial relationship exception in a way that swallows the rule.<sup>161</sup>

Hawaii is the last of the three states alongside New York and Wisconsin that provides encompassing protection against employers using arrest or conviction records to make employment decisions. Hawaii's statute declares that it is an unlawful discriminatory practice for any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment on the basis of "arrest or court record."<sup>162</sup> The Hawaiian statute like that in Wisconsin but not New York is codified as part of a general employment discrimination

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Ct. App. 1998) (where an employee who had drug charges pending was hired as a stock clerk after passing a drug test and the employer never asked the employee about pending criminal charges, employer could not subsequently terminate the employee after she pled guilty to misdemeanor drug offenses because the charges were not substantially related to her job). *See also Collins v. LIRC*, 173 Wis. 2d 305 (Wis. Ct. App. 1992) (holding that while post-conviction behavior may be relevant to one's ability to perform the job, it is not relevant to the substantial-relationship test).

<sup>159</sup> Cf. *supra* note 113 and accompanying text.

<sup>160</sup> Jeffrey D. Myers, *County of Milwaukee v. LIRC: Levels of Abstraction and Employment Discrimination Because of Arrest or Conviction Record*, 1988 WIS. L. REV. 891, 891-92 (1988); N.Y. CORRECT. LAW § 753 (McKinney 1987). New York's approach is similar to that of the Model Sentencing and Corrections Act, but contains more specific provisions regarding the factors. Compare N.Y. CORRECT. LAW § 753 with MODEL SENTENCING AND CORRECTIONS ACT § 4-1005(c), 10 U.L.A. Sp. Pamph. 210 (1985).

<sup>161</sup> See Myers, *supra* note 160, at 891-92 (arguing that the Wisconsin Supreme Court's decision in *County of Milwaukee v. LIRC*, which permitted the discharge of a crisis intervention specialist because of his multiple patient neglect convictions during prior employment, has "eviscerated" the WFEA's prohibition of discrimination based upon criminal record by laying aside the factor-weighting test developed by the LIRC). Myers contends that the court sent a message to Wisconsin employers that it is acceptable to discriminate in all but the most egregious cases because it held that an employer is not required in all cases to perform a detailed inquiry into the facts of the offense and the job. *Id.*

<sup>162</sup> HAW. REV. STAT. § 378-2 (2004).

act, and consequently prohibits a broad range of discriminatory acts on the basis of criminal records. It also broadly defines “arrest and court record” to include any information about an individual having been questioned, apprehended, taken into custody or detention, held for investigation, charged with an offense, served a summons, arrested with or without a warrant, tried, or convicted.<sup>163</sup>

Similar to New York and Wisconsin, the Hawaiian statute also contains a “substantial relationship” exception to the general prohibition of criminal-record discrimination. Specifically, the statute permits employers to require “bona fide occupational qualifications reasonably necessary to the normal operation of a particular business or enterprise, and that have a *substantial relationship* to the functions and responsibilities of prospective or continued employment.”<sup>164</sup> Although the exception is partially masked as a bona fide occupational qualification (“BFOQ”), it operates the same as the New York direct relationship defense and the Wisconsin substantial relationship defense.<sup>165</sup> Furthermore, the Hawaiian statute has another section that allows an employer to inquire about an applicant’s conviction record if the record bears a “rational relationship” to the position.<sup>166</sup> Yet, the employer may only inquire provided that the conviction is less than ten years old, and only after the prospective employee has received a conditional offer of employment.<sup>167</sup> The conditional offer may be withdrawn if the prospective employee has a conviction record that bears a rational relationship to the job.<sup>168</sup> Like

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<sup>163</sup> *Id.* § 378-1.

<sup>164</sup> *Id.* § 378-3.

<sup>165</sup> Myers, *supra* note 160, at 896.

<sup>166</sup> HAW. REV. STAT. § 378-2.5.

<sup>167</sup> *Id.* § 378-2.5. Certain employers are not held to these two requirements before making such an inquiry. *See id.* § 378-2.5(d).

<sup>168</sup> *Id.* § 378-2.5.

the Wisconsin but not the New York statute, the Hawaiian statute does not give a detailed list of factors that must be considered in determining either a rational or substantial relationship.

However, the Hawaiian legislature has delineated certain situations where the exception must apply. For example, schools may consider criminal convictions in evaluating applicants' suitability to work near children, and financial institutions may discharge or refuse to hire a person convicted of a crime involving dishonesty.<sup>169</sup> Ultimately, Hawaii, New York and Wisconsin provide the most protection against discrimination on the basis of criminal records. Behind the laws of these states above others is a policy of trying to enable those with criminal records to become employed.<sup>170</sup>

Moreover, a growing number of states have attempted to find a middle ground between the expansive anti-discrimination statutes of Hawaii, New York and Wisconsin and those states that offer no statutory protection for those with a criminal history.<sup>171</sup> Connecticut, Florida, Minnesota, New Jersey and Washington have broadly prohibited *public* employers from engaging in criminal-record discrimination.<sup>172</sup> In Connecticut for example, a person may not be denied employment by the State of Connecticut or any of its agencies solely because of prior

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<sup>169</sup> *Id.* § 378-3[8]-[9].

<sup>170</sup> See Todd, *supra* note 146, at 758 (encouraging Arizona to adopt New York's "preferred statutory mode"); Homeless Persons Representation Project, *Ex-Offenders And Employment: A Review of Maryland's Public Policy and a Look at Other States* (June 2002) ("Few states have done more than New York in attempting to level the playing field for ex-offenders seeking employment... A look at the details and history of the law show that New York attempted to strike a balance between the twin concerns of public safety and rehabilitation. The objective and subjective evidence suggest that this balance has yet to be achieved."), available at <http://www.altrue.net/altruesite/files/hprp/publications/abell%20final.pdf>.

<sup>171</sup> Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1290 (2002).

<sup>172</sup> See CONN. GEN. STAT. §§ 46a-79 to -81 (1987); FLA. STAT. § 112.011 (1987); MINN. STAT. §§ 364.01-.10 (1986); N.J. REV. STAT. ANN. § 11A:4-11 (West Supp. 1987); WASH. REV. CODE §§ 9.96A.010-.50 (1985).

convictions of a crime.<sup>173</sup> However, the State may deny employment on the basis of prior convictions when it considers (1) the nature of the crime and its relationship to the job, (2) the degree of rehabilitation, and (3) the time elapsed since the conviction, and determines that the applicant is not suitable for the position.<sup>174</sup> The Connecticut statute attempts to codify the “substantial relationship” exception, and, although it certainly does not provide an exhaustive list of factors like the statute in New York, this partial list serves as a guide to state employers.<sup>175</sup>

The Connecticut statute also separately provides protection against applicants with arrest records or an erased record rather than prior convictions. The statute does not permit any employer to require an employee or prospective employee to disclose the existence of any arrest, criminal charge or conviction, the records of which have been erased pursuant to Connecticut law.<sup>176</sup> Even though an employer may obtain information regarding the job applicant’s arrest record, such information may be made available only to members of the personnel department or the person in charge of employment.<sup>177</sup> Furthermore, employers may not deny employment to a job applicant solely because he or she had a prior arrest, criminal charge or conviction when the records have been erased.<sup>178</sup> Connecticut represents the category of states that do not ultimately prohibit all employers from discriminating on the basis of any criminal record, arrest or conviction, but still seek to afford some protection against employment discrimination.

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<sup>173</sup> CONN. GEN. STAT. § 46a-80(a) (2004). The Connecticut statute does not list arrest or conviction record as one of the general, discriminatory bases upon which all employers cannot make employment decisions. *See id.* § 46a-60. Instead, the statute has a separate section prohibiting only public employers from discriminating on the basis of prior convictions.

<sup>174</sup> Leavitt, *supra* note 171, at 1292.

<sup>175</sup> *Id.*

<sup>176</sup> CONN. GEN. STAT. § 31-51i(b).

<sup>177</sup> *Id.* § 31-51i(f).

<sup>178</sup> *Id.* § 31-51i(d).

Among those states providing modest protection, Massachusetts, Michigan and California have developed unusual conditions in their anti-discrimination law that are worth mentioning. Massachusetts for example, has divided its protections and distinguished between types of convictions and offenses. The Massachusetts statute prohibits discrimination by any public or private employer on the basis of arrest record, a first conviction of various specified misdemeanors, or any misdemeanor conviction the penalty for which was served more than five years in the past.<sup>179</sup> Similarly, California delineates protection for specific types of convictions; it has prohibited discrimination on the basis either of an arrest record or a conviction for possession of marijuana.<sup>180</sup> Michigan on the other hand does not provide protection for employees with past convictions, but instead has declared discrimination because of an arrest record unlawful for all employers.<sup>181</sup> These three states struggle to find the middle ground between public safety and antidiscrimination.

The next level of protection comes from the greater number of states that have enacted laws only prohibiting employers from inquiring about an applicant's arrest record.<sup>182</sup> For example, Illinois has made it a civil rights violation for an employer to discriminate on the basis of race, color, religion, national origin, ancestry, age, marital status, sex, physical or mental handicap, unfavorable discharge from military service, or citizenship status, but not on the basis

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<sup>179</sup> See MASS. GEN. LAWS ANN. CH. 151B § 4(a) (West 1976). The statute specifically prohibits the "request" on an employment application for information regarding "an arrest...in which no conviction resulted, a first conviction for a specified list of misdemeanors, or "any conviction of a misdemeanor where the date of such conviction ... occurred five or more years prior to the date of such application for employment." *Id.*

<sup>180</sup> See CAL. LAB. CODE §§ 432.7, 432.8.

<sup>181</sup> See MICH. COMP. LAWS ANN. § 37.2205(a) (West 1985). The constitutionality of that law has been explicitly upheld. See *Seals v. Henry Ford Hosp.*, 123 Mich. App. 329 (1983).

<sup>182</sup> See, e.g., 775 ILL. COMP. STAT. ANN. 5/2-103 (West 2003); other such states are Colorado, Kansas, Maryland, Missouri, and Montana.

of arrest or conviction record.<sup>183</sup> Nonetheless, it is unlawful in Illinois for an employer, private or public, to inquire into or to use the fact of an arrest or criminal history record information ordered expunged, sealed or impounded under the state Criminal Identification Act as a basis of an employment decision.<sup>184</sup> The statute does create specific exceptions that allow local governments, school districts, and private employers providing services to children to utilize relevant conviction information when evaluating employee qualifications. Further, like all of the states mentioned, Illinois provides general exceptions to its protections of individuals with criminal histories, which includes whether having a criminal history affects a bona fide occupational qualification.<sup>185</sup>

Overall with respect to employment, state anti-discrimination law for individuals who have been formerly incarcerated needs to be enhanced and reformed. The majority of states do not protect those with criminal records at all from types of employment discrimination. Of the several states that afford some protection, most do not provide all-encompassing or broad protections. Only New York, Wisconsin and Hawaii seem to have statutes that attempt to overcome the many obstacles to employment that those with a criminal history re-entering the workforce face. Nevertheless, even in those states that provide statutory protection, the reality remains that people with criminal records have much more difficulty obtaining employment than those without.

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<sup>183</sup> *Id.* Like the federal courts, the Illinois state courts have found that arrest record hiring criteria can have an inherently discriminatory impact upon black job applicants. *See, e.g., Bd. of Trustees v. Knight*, 163 Ill. App. 3d 289 (5th Dist. 1987).

<sup>184</sup> 775 ILL. COMP. STAT. ANN. at 5/2-103

<sup>185</sup> *See id.* 5/2-104(A)(1) (stating, “Nothing contained in this Act shall prohibit an employer, ... from ...[h]iring or selecting between persons for bona fide occupational qualifications or any reason except those civil-rights violations specifically identified in this Article.”); *see also DeMyrick v. Guest Quarters Suite Hotels*, 944 F. Supp. 661 (N.D. Ill. 1996) (holding that because an arrest record is not a bona fide occupational qualification for a parking attendant, an employer cannot be held liable for having failed to consider employees’ arrest records when hiring them).

**d. The reality of hiring practices**

Despite the protections afforded by federal and state law, a demonstrated preference for hiring people without criminal records still exists. A research study conducted by Professor Devah Pager demonstrates that often an employer's preference involves racial discrimination. The focus of the study was on the effect of a criminal record on employment opportunities and the comparison of that effect between African-Americans and whites.<sup>186</sup> The study made the following findings:

- 1) 34% of whites without criminal records received callbacks, relative to only 17% of whites with criminal records. This demonstrated that a criminal record reduced the likelihood of a callback by 50%.
- 2) Among African-Americans without criminal records, only 14% received callbacks, relative to 34% of white non-criminals (which was also less than whites *with* criminal records – 17%) and only 5% of African-Americans with criminal records received callbacks.

In sum, black men whose job applications stated that they had spent time in prison were only about one-third as likely as white men with similar applications to receive a positive response.<sup>187</sup> However, white men with prison records receive far more offers for entry-level jobs in New York City than black men with identical records, and are offered jobs just as often, if not more so, than black men who have never been arrested.<sup>188</sup>

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<sup>186</sup> Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 5, 937-75 (Mar. 2003).

<sup>187</sup> Paul von Zielbauer, *Study Shows More Job Offers for Ex-Convicts Who Are White*, N.Y. TIMES, June 17, 2005, at B5.

<sup>188</sup> *Id.*



Overall, surveys have documented the reluctance to hire workers with criminal records.

The Holzer survey (2003) reported:

- 1) Employers were least likely to hire people with criminal records compared with other disadvantaged groups, such as welfare recipients;
- 2) Employers were more likely to hire people with criminal records for construction and manufacturing jobs than those in the retail or service sectors, which required significant contact with customers;
- 3) Employer's attitudes varied depending on the offense committed and whether any relevant work experience had been acquired since release. Employers were most reluctant to hire individuals convicted of violent crimes, and were more willing to hire people convicted of low-level drug offenses; and
- 4) The practice of conducting a criminal background check was far from universal, but is more prevalent now than in the past decade.<sup>189</sup>

There are several reasons why employers may, and sometimes should, consider information from criminal history records in screening potential employees.<sup>190</sup> From a public policy standpoint, employing people with criminal records in certain occupations may be seen as creating a risk to the public safety and welfare. For example, a person convicted of embezzling should be barred from banking or accounting for a certain period of time. For this reason, presumably, jobs that require contact with children, certain health services occupations, and firms that provide security services may be closed to individuals with certain felony

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<sup>189</sup> See Amy L. Solomon, et. al., *From Prison to Work: The Employment Dimensions of Prisoner Reentry*, (Oct. 2004), available at [http://www.urban.org/UploadedPDF/411097\\_From\\_Prison\\_to\\_Work.pdf](http://www.urban.org/UploadedPDF/411097_From_Prison_to_Work.pdf).

convictions.<sup>191</sup> Furthermore, employers may be held liable for the criminal actions of their employees under the theory of negligent hiring.<sup>192</sup> Liability under this theory includes punitive damages in addition to liability for loss, pain, and suffering.<sup>193</sup> Consequently, the liability deters employers from hiring people with criminal records.

In its most recent review of state privacy and security legislation, the U.S. Department of Justice concludes that criminal history record information is becoming increasingly available to non-criminal justice users.<sup>194</sup> States tend to place fewer restrictions on non-criminal justice access to conviction records.<sup>195</sup> As of 2001, 23 states had some form of public access or freedom of information statutes that pertained to some aspect of criminal history record information.<sup>196</sup> Easy access to criminal history or records makes it tempting for employers to rely on such information even where it is unrelated to the job qualifications. However, even if accessibility to criminal history information is limited, employers may infer the likelihood of past criminal activity from such traits as gender, race, or age.<sup>197</sup> Studies have shown that this adversely affects the employment outcomes of individuals with clean histories that belong to demographic groups with high conviction rates – for instance, African-Americans.<sup>198</sup> Although federal law and some

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<sup>190</sup> Harry J. Holzer, *Perceived Criminality, Criminal Background Checks and the Racial Hiring Practices of Employers*, at 3 (June 2002), available at [http://ist-socrates.berkeley.edu/~raphael/perceived\\_criminality.pdf](http://ist-socrates.berkeley.edu/~raphael/perceived_criminality.pdf).

<sup>191</sup> *Id.*

<sup>192</sup> See Chapter II.A.2., *Negligent Hiring*, *infra*.

<sup>193</sup> Holzer, *supra* note 190, at 3.

<sup>194</sup> *Id.* at 5.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 1-2. See *supra* nn. 173-175.

<sup>198</sup> Holzer, *supra* note 190, at 2.

states provide protection against employment discrimination, in reality it has not been enough to consistently help all people with criminal records obtain employment or re-enter the workforce.

## 2. Negligent Hiring

New York State, like most jurisdictions, recognizes negligent hiring as a theory of liability.<sup>199</sup> This theory allows an employer to be held liable for injury done by his employee to some third party.<sup>200</sup> Under this theory, the employer's liability arises from its failure to take reasonable care in making hiring decisions, thereby placing the employee in a position to cause foreseeable harm.<sup>201</sup> Generally, to prevail on a claim of negligent hiring, the plaintiff must prove that: (1) the person causing the injury was the employee of the defendant; (2) the employee was unfit for employment; (3) the employer knew or should have known that the employee was unfit; (4) the plaintiff was injured by the employee;<sup>202</sup> (5) the defendant owed a duty of care to the plaintiff; and (6) the hiring of the employee was the cause of the plaintiff's injuries.<sup>203</sup>

Negligent hiring liability creates incentives for employers to avoid hiring individuals with prior convictions in several ways. First, a conviction on an employee's record may allow a potential plaintiff to show a crucial element of a negligent hiring claim – that the employee was unfit for the job. This element is usually shown by demonstrating that the employee had a

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<sup>199</sup> See, e.g., *T.W. v. City of New York*, 286 A.D.2d 243 (1st Dep't 2001) (holding that a jury could reasonably find the defendant employer liable for damages to an infant plaintiff who was sexually assaulted by an employee, whom the employer had failed to investigate despite actual knowledge that the employee had a past criminal conviction).

<sup>200</sup> Usually, the injured third party is a customer of the business or another employee of the defendant. Lex K. Larson, EMPLOYMENT SCREENING § 10.04[5] (2004).

<sup>201</sup> *Detone v. Bullit Courier Serv., Inc.*, 140 A.D.2d 278 (1st Dep't 1988).

<sup>202</sup> In New York state, the type of harm cognizable under the negligent hiring theory is usually limited to significant physical injury. *Brown v. Bronx Cross County Med. Group*, 834 F. Supp. 105, 109 (S.D.N.Y. 1993).

<sup>203</sup> Larson, *supra* note 200, at § 10.04 (laying out the usual elements of a negligent hiring claim).

history or propensity for the type of behavior that caused the plaintiff's injury.<sup>204</sup> A criminal record may be used as proof of such a history or propensity.<sup>205</sup> This is especially true where the criminal record reflects violent tendencies.<sup>206</sup> On the other hand, where a criminal record reflects only relatively benign convictions, this will not be considered evidence that the employee was unfit for the job. For example, in a recent New York case, a claim of negligent hiring based on a nurse's sexual assault of a mental patient was dismissed because the nurse's only past convictions were for disorderly conduct and unauthorized use of a motor vehicle. According to the judge in that case, such a criminal record does not constitute notice that the nurse had a known proclivity to abuse patients.<sup>207</sup>

An employer may feel pressure to conduct a criminal background check on many or all applicants because of another element of a negligent hiring claim – that the employer knew or should have known that the employee was unfit.<sup>208</sup> In New York, there is no official duty to inquire as to whether an applicant has been convicted of crimes in the past.<sup>209</sup> Therefore, an employer cannot be held liable simply for failing to conduct a criminal background check. However, if the plaintiff can show that the employer knew or should have known facts that

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<sup>204</sup> See *Gallo v. Dugan*, 228 A.D.2d 376 (1st Dep't 1996) (granting motion to set aside a jury verdict and dismissing complaint against the defendant employer where the plaintiff failed to prove by a preponderance of the evidence that the employee, a bartender who assaulted a patron, had a history of, or propensity for, assaultive behavior).

<sup>205</sup> In New York State, around 10% of negligent hiring claims are based on the hiring of people with criminal records. National H.I.R.E. Network, Legal Action Center, *Protecting Yourself When Using Criminal Background Checks* (2004), available at [http://www.hirenetwork.org/crim\\_back\\_check.html](http://www.hirenetwork.org/crim_back_check.html).

<sup>206</sup> See *T.W.*, 286 A.D.2d at 246 (finding that an employee's extensive criminal record, including assault and attempted robbery, rendered the employee unfit for a position at a youth community center because it would be an unreasonable risk to the safety or welfare of the children at the center).

<sup>207</sup> See John Caher, *Judge Finds State Not Liable for Nurse's 'Atrocious Act'*, N.Y.L.J., July 21, 2005, at 1.

<sup>208</sup> See *T.W.*, 286 A.D.2d at 244.

<sup>209</sup> *Yeboah v. Snapple, Inc.*, 286 A.D.2d 204 (1st Dep't 2001).

would have led a reasonably prudent person to further investigate, liability may be found if the employer does not so investigate.<sup>210</sup> The depth of a reasonable investigation will vary in proportion to the responsibilities of the job.<sup>211</sup> Thus, a prudent employer may feel that it is always safer to conduct an in-depth investigation into the applicant's criminal history.

Once an investigation has been conducted, and a prior conviction discovered, the employer is not without guidance in deciding whether to hire the applicant. Article 23-A of the Correction Law (§§ 750-755), as discussed above, provides that an employer may decline an applicant based on a prior conviction if there is a direct relationship between the offense and the employment, or if there is an unreasonable risk to property or safety.<sup>212</sup> However, the statute does *not* provide that if an employer follows the guidelines provided in Article 23-A, he will be immune from liability for his decision to hire a person with a past conviction. Therefore, the threat of liability remains if the employer followed the guidelines of Article 23-A, but did not do so “reasonably,” leaving him open to claims of negligence.<sup>213</sup> This may lead employers to give more weight to perceived job-relatedness or safety concerns when making the hiring decision.

New York courts have recognized that the guidelines of Article 23-A are in tension with the threat of liability posed by the negligent hiring theory. In deference to the public policy

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<sup>210</sup> *T.W.*, 286 A.D.2d at 244-45 (finding that a duty could arise to conduct a background investigation when the defendant employer had actual knowledge that the potential employee had some past criminal record and the job involved working with children).

<sup>211</sup> *Ford v. Gildin*, 200 A.D.2d 224 (1st Dep't 1994).

<sup>212</sup> New York is one of only a few states that offers guidance of this type to employers attempting to navigate between the directives of anti-discrimination laws and the threat of negligent hiring liability. A recent article on negligent hiring and the related theory of negligent retention recommended that other states should look to New York's Article 23-A as a model for legislation providing detailed guidance on factors employers should consider in making hiring decisions when the applicant has a prior conviction. Seth B. Barnett, Note, *Negligent Retention: Does the Imposition of Liability on Employers for Employee Violence Contradict the Public Policy of Providing Ex-felons with Employment Opportunities?*, 37 SUFFOLK U. L. REV. 1067, 1084 (2004).

<sup>213</sup> *See Givens v. New York City Hous. Auth.*, 249 A.D.2d 133 (1st Dep't 1998) (indicating that though Article 23-A prohibits discrimination on the basis of a criminal record, employers with “reason to know” of an applicant's propensity for violence may still be held liable under the traditional theory of negligent hiring).

concerns embodied in Article 23-A, the courts have restrained the reach of negligent hiring by putting limits on the element of proximate causation.<sup>214</sup> In *Ford v. Gildin*,<sup>215</sup> the defendant employers hired a person with a manslaughter conviction as a porter in their residential building. Eighteen years later, it was discovered that the porter was sexually abusing a child who lived in the building. The child's mother was friends with the porter, had named him the child's godfather, and often allowed the child to make unsupervised visits to him. The Appellate Division found that even if the defendants were negligent in hiring a porter with a manslaughter conviction, such negligence could not be the proximate cause of the abuse for liability purposes. The court held,

Such a precedent would effectively compel any employer to deny employment to anyone ever convicted of a violent crime, contrary to the public policy stated in article 23-A of the Correction Law, since the employer would upon such hiring face potentially catastrophic liability for any crime committed by that employee which was even minimally connected to the place of his employment.<sup>216</sup>

### 3. Licensing

New York requires licensing for over 100 occupations.<sup>217</sup> Various factors are considered when determining an individual's eligibility for licensure. These include market factors, qualifications of the individual, and frequently a character component. Individuals who were formerly convicted of a criminal offense may find it difficult or impossible to satisfy the character component.

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<sup>214</sup> Proximate causation looks to the foreseeability of the injury following from the decision to hire the employee. Larson, *supra* note 200, at § 10.04[6].

<sup>215</sup> *Ford*, 200 A.D.2d at 224.

<sup>216</sup> *Id.* at 229.

<sup>217</sup> Legal Action Center, *New York State Occupational Licensing Survey*, 2001, available at [http://www.hirenetwork.org/pdfs/occ\\_lic\\_survey04.pdf](http://www.hirenetwork.org/pdfs/occ_lic_survey04.pdf) (listing New York occupations with licensure requirements).

Licensure laws make it illegal to engage in specific occupations without State approval. The penalties for engaging in an occupation without the necessary license range from fines to criminal prosecution.<sup>218</sup> There are also civil consequences in addition to the criminal penalties; courts frequently do not enforce contractual claims from an unlicensed practitioner and conclude that such claims violate public policy because the individual engaging in the occupation seeks damages stemming from an unlawful activity.<sup>219</sup>

States provide licenses for occupations to either raise revenue or to regulate an industry.<sup>220</sup> Both reasons impact a formerly incarcerated individual's ability to become employed. Generally, revenue raising licenses proffer only minimal barriers because the purpose of these licenses is to raise revenue and does not reflect on the ability of the individual to

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<sup>218</sup> New York imposes criminal sanctions for violating various licensing laws. *See* N.Y. GEN. BUS. LAW § 85: Criminal action for violation of this article shall be prosecuted by the attorney-general, or his deputy, in the name of the people of the state, and in any such prosecution the attorney-general, or his deputy, shall exercise all the powers and perform all duties which the district attorney would otherwise be authorized to exercise or to perform therein.

<sup>219</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 181 (1981) Effect of Failure to Comply with Licensing or Similar Requirement:

If a party is prohibited from doing an act because of his failure to comply with a licensing, registration or similar requirement, a promise in consideration of his doing that act or of his promise to do it is unenforceable on grounds of public policy if

- (a) the requirement has a regulatory purpose, and
- (b) the interest in the enforcement of the promise is clearly outweighed by the public policy behind the requirement.

*See also* Bruce May, *Real World Reflection: The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N. DAK. L. REV. 187, 192-93 (1995) (discussing problems unlicensed individuals face); *Richards Conditioning Corp. v. Oleet*, 21 N.Y.2d 895 (1968) (refusing recovery in contract because installer of air-conditioner was unlicensed and the purpose of licensing is to protect health and safety); *Ellis v. Gold*, 204 A.D.2d 261 (2d Dep't 1994) (refusing to grant recovery because construction contractor was not licensed); *B & L Auto Group, Inc. v. Zelig*, 188 Misc. 2d 851, 859 (N.Y. Civ. Ct. 2001) (denying recovery because used car dealership was unlicensed, even though they had been licensed prior and subsequently thereafter). *But see John E. Rosasco Creameries, Inc. v. Cohen*, 276 N.Y. 274 (1937) (unlicensed seller of milk was allowed to recover on contract because statute is merely *malum prohibitum* and does not endanger health or morals).

<sup>220</sup> May, *supra* note 219, at 189.

perform his or her job.<sup>221</sup> The cost of these licenses may, in some cases, present a hurdle for formerly incarcerated individuals, who often do not possess substantial financial resources.<sup>222</sup>

Regulatory licenses are more invasive, often requiring various character components. Character components can be a significant barrier to employment for previously incarcerated individuals. In New York, licensure laws involving character components cover a broad range of occupations, ranging from highly skilled professionals (attorneys and architects, for example) to unskilled jobs (*e.g.*, barbers and bingo operators).<sup>223</sup>

State licensing laws can be divided into three categories.<sup>224</sup> The first category restricts licensure on the basis of a criminal conviction. The second category restricts licenses by requiring an applicant to have good moral character, or trustworthiness. The final category does not restrict licensing based on prior bad acts, and licenses falling under this category are readily available to formerly incarcerated individuals.<sup>225</sup>

Of the occupations in New York requiring licensure, registration or certification by a state agency, approximately 36 carry some degree of restriction due to criminal convictions.<sup>226</sup> These statutes are the most difficult for individuals with criminal records to overcome. There are

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<sup>221</sup> *Id.* at 189-90.

<sup>222</sup> *Id.*

<sup>223</sup> Legal Action Center, *New York State Occupational Licensing Survey, 2001*, available at [http://www.hirenetwork.org/pdfs/occ\\_lic\\_survey04.pdf](http://www.hirenetwork.org/pdfs/occ_lic_survey04.pdf) (listing New York occupations with licensure requirements).

<sup>224</sup> *See May, supra* note 219, at 195 (dividing into five categories). There are many different character requirements in New York, making it hard to accurately classify them. The categories include: good moral character; good moral character and temperate habits; good character and responsibility; good character and reputation; good character; good character and general fitness; good character and integrity; character and fitness; character and responsibility; character; trustworthy and competent; trustworthy, honest and good character; trustworthiness; public interest. Legal Action Center, *New York State Occupational Licensing Survey, 2001*, available at [http://www.hirenetwork.org/pdfs/occ\\_lic\\_survey04.pdf](http://www.hirenetwork.org/pdfs/occ_lic_survey04.pdf).

<sup>225</sup> *See May, supra* note 219, at 195.

<sup>226</sup> Legal Action Center, *New York State Occupational Licensing Survey, 2001*, available at [http://www.hirenetwork.org/pdfs/occ\\_lic\\_survey04.pdf](http://www.hirenetwork.org/pdfs/occ_lic_survey04.pdf) (listing New York occupations with licensure requirements).



two forms of criminal conviction bars: mandatory and discretionary. Mandatory restrictions prevent individuals with specific convictions from gaining licensure. These occupations include bail bondsmen, emergency medical technicians, alcoholic beverage wholesalers, and others.<sup>227</sup> Of the few statutes (approximately thirteen) that actually bar individuals based on a past conviction, most lift the automatic bar when a person is granted a Certificate of Relief from Disabilities, a Certificate of Good Conduct, or Executive Clemency.<sup>228</sup> It is easier for a formerly incarcerated individual to overcome a discretionary bar.<sup>229</sup> When evaluating these restrictions, licensing boards can consider mitigating factors, such as the number, type and timing of offenses. Additionally, the factors that remove the automatic licensing bar are also examined.

Although formerly incarcerated individuals with Certificates of Relief from Disabilities or Good Conduct are not automatically barred from licensure, some might still be denied based on their conviction record because of good moral character requirements; licensing agencies are required by Article 23-A of New York Correctional Law (§§ 750-55) to make licensing decisions on a case-by-case basis. The law prohibits an agency from denying a license to an individual because of his or her conviction record *unless* the individual's conviction is "directly related" to the specific license sought, or if the issuance of the license would create an "unreasonable risk to

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<sup>227</sup> In addition to the occupations mentioned the following also have mandatory bars: bingo distributor; bus driver (felony bar for certain sexual and vehicular offenses); firefighter, junk dealer (bars applicants convicted of larceny or receiving stolen property); notary public (felony and specific misdemeanors); pier superintendent (same); police officer (permanent felony bar); private investigator (felony and specific misdemeanor bar); public adjustor (bar for felony and specific misdemeanor bar for convictions involving fraudulent or dishonest practices); and real estate broker (felony bar). Legal Action Center, New York State Occupational Licensing Survey, 2001, *available at*: [http://www.hirenetwork.org/pdfs/occ\\_lic\\_survey04.pdf](http://www.hirenetwork.org/pdfs/occ_lic_survey04.pdf) (listing New York occupations with licensure requirements).

<sup>228</sup> See discussion on Certificates, *infra* Chapter II.A.4.

<sup>229</sup> Occupations with discretionary bars include: check cashier, electrician, and sanitation worker. Legal Action Center, *New York State Occupational Licensing Survey, 2001, available at* [http://www.hirenetwork.org/pdfs/occ\\_lic\\_survey04.pdf](http://www.hirenetwork.org/pdfs/occ_lic_survey04.pdf) (listing New York occupations with licensure requirements).

property or to the safety” of people;<sup>230</sup> these are the same factors that an employer must balance when considering whether or not to hire an applicant with a criminal record. When considering a previous conviction, the public agency or private employer should consider several factors which are enumerated in § 753 of the Correctional Law.<sup>231</sup> Although some New York statutes do not automatically prevent individuals with criminal records from licensure, they do require that applicants possess a character criterion. For example, “good moral character” is required to be a chiropractor or a dental hygienist.<sup>232</sup> The meaning of this character requirement may vary depending upon the licensing agency and the occupation involved, and must also be evaluated on

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<sup>230</sup> N.Y. CORRECT. LAW § 752.

<sup>231</sup> Article 23-A of N.Y. CORRECT. LAW § 753. Factors to be considered concerning a previous criminal conviction; presumption:

1. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall consider the following factors:
  - (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
  - (b) The specific duties and responsibilities necessarily related to the license or employment sought.
  - (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
  - (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
  - (e) The age of the person at the time of occurrence of the criminal offense or offenses.
  - (f) The seriousness of the offense or offenses.
  - (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
  - (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.
2. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

*Id.*

<sup>232</sup> N.Y. EDUC. LAW § 6609(7) (dental hygienist) (“Character: be of good moral character as determined by the department”); *see also* N.Y. EDUC. LAW § 6154 (chiropractor).

a case-by-case basis (in accordance with Article 23-A). However, an applicant's criminal history will frequently be considered a reflection of his or her moral record.

The determination that an applicant does not possess the requisite "good moral character" or "honesty and trustworthiness" required by statute oftentimes prevents an individual from practicing his or her trade. A formerly incarcerated individual may be unable to capitalize on the education achieved while serving his or her sentence. In March 2005, *The New York Times* ran an article detailing the plight of a formerly incarcerated individual who, while in prison, rehabilitated himself and learned the trade of barbering.<sup>233</sup> When he applied for a state license to become a barber upon release, he was initially denied a license; this decision was subsequently reversed and the individual with a criminal record worked in a barber shop.<sup>234</sup> However, New York's Secretary of State successfully appealed the granting of the barbering license when an administrative judge ruled that the applicant's criminal history "indicate[d] a lack of good moral character and trustworthiness for licensing."<sup>235</sup> The irony of this situation is that the individual was trusted enough in a maximum security prison to wield sharp barbering instruments, but the existence of his prison record tainted his "moral character" and prevented him from carrying his trade into free society.

Another barrier a person with a criminal record faces is the difficulty of overturning licensing board determinations. After an individual has exhausted his or her administrative remedies, he or she must seek redress in state court. However, a reviewing court will only

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<sup>233</sup> See Clyde Haberman, *He Did the Time, so He's Unfit to Do Hair*, N.Y. TIMES, Mar. 4, 2005, at B1.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

overturn a board's decision when it is arbitrary or capricious.<sup>236</sup> This high standard of review makes it difficult for courts to intervene, and a court will only do so when "there is no rational basis for the [agency's] exercise of discretion . . . ."<sup>237</sup> In addition, many formerly incarcerated individuals are unable to appeal a licensing board's decision. The cost of a lawyer is expensive, leaving many without access to one, forcing them to appeal *pro se*.<sup>238</sup> This may be difficult for previously incarcerated individuals because of the low levels of educational attainment found in our nation's correctional institutions.<sup>239</sup> Practically speaking, many formerly incarcerated individuals must abide by the licensing board's decision without an appeal. The impact on an individual when licensure is erroneously denied can be severe. Even when the decision is eventually overturned, the individual is forced to forgo his chosen occupation during the course of litigation.<sup>240</sup>

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<sup>236</sup> *Roosevelt Taxi v. Comm'r of Public Safety*, 27 A.D.2d 753 (2d Dep't 1967) (declining to overturn board decision because it was not arbitrary and capricious), *aff'd*, 22 N.Y.2d 692 (1968).

<sup>237</sup> *Arrocha v. Bd. of Educ.*, 93 N.Y.2d 361, 363 (1999) (quoting *Matter of Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974) (citation omitted)).

<sup>238</sup> For a formerly incarcerated individual, jobs requiring licenses are inaccessible "unless one has the money to hire an expert who, just maybe, could guide you through a panoply of bureaucratic hoops." Webb Hubbell, *The Mark of Cain*, 16 CRIM. JUST. 33, 34 (2001).

<sup>239</sup> Approximately 41% of inmates in the nation's State and Federal prisons and local jails in 1997 had not completed high school or its equivalent. Caroline Wolf Harlow, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, EDUCATION AND CORRECTIONAL POPULATIONS (Jan. 2003), available at <http://www.ojp.usdoj.gov/bjs/abstract/ecp.htm>. The low level of education found in prison and the poverty they face make getting a lawyer or appealing *pro-se* unlikely. *Id.* (roughly 50% of inmates who had a high school diploma or less, made less than \$1,000 the month before they went to jail); see also *infra* Chapter III., Education.

<sup>240</sup> See *Soto-Lopez v. New York City Civil Serv. Comm'n*, 713 F. Supp. 677 (S.D.N.Y. 1989). In *Soto-Lopez* where the New York Housing Authority denied an applicant a job on the basis of a past criminal conviction, the licensing board's error prevented the applicant from being employed. The court, focusing on the express public policy of New York, found the denial of a job unlawful because there was not a connection between janitorial duties and a manslaughter conviction. However, the court did note that because a drug conviction occurred after the applicant submitted an application for employment, that would have been a sufficient reason to terminate. But this information was unknown when the board denied the application. *Id.*

Agency opinions are further insulated from the reach of courts because they are not subject to the rules of evidence. In *Utica Cheese, Inc. v. Barber*,<sup>241</sup> the New York State Department of Agriculture and Markets denied a milk dealer's license on the basis of poor character. The applicant contended that the decision was arbitrary and capricious because the denial was based "solely on rank hearsay, speculation and evidence remote in time . . ."<sup>242</sup> But, the court in allowing the testimony noted that "the hearing officer was not bound by the technical rules of evidence."<sup>243</sup> The court held the agency was within its discretion to deny a license on the basis of an association between the applicant and a reputed member of organized crime, even when the applicant did not have a prior criminal conviction.<sup>244</sup> A formerly incarcerated individual may find licensure equally difficult because he or she may retain friendships with others they met while serving their sentence. If associating with a person accused of engaging in criminal activities suffices to prevent licensure, anyone who was previously incarcerated likely falls within this purview.

#### 4. Certificates of Rehabilitation

New York State offers two types of certificates of rehabilitation to individuals previously convicted of felonies or misdemeanors. The two types of certificates are Certificates of Relief from Disabilities ("CRD") and Certificates of Good Conduct ("CGC"). Both certificates are designed to remove the civil disabilities automatically imposed upon an individual following a

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<sup>241</sup> 80 A.D.2d 368, 371 (3d Dep't), *appeal denied*, 54 N.Y.2d 606 (1981).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*; see also *Stedronsky v. Sobol*, 175 A.D.2d 373 (3d Dep't), *appeal denied*, 78 N.Y.2d 864 (1991) (allowing statement for use in administrative licensing hearing that would be barred in a criminal proceeding).

<sup>244</sup> Interestingly this decision does not discuss New York Corrections Law §§ 752, 753, which require a relationship between character and the position sought. See also *Kramer v. N.Y. State Racing & Wagering Bd.*, 153 A.D.2d 606, (2d Dep't 1989) (upholding denial of harness racing owner's license, relying in part on an indictment that did not result in a conviction). But see *Burnham v. N.Y. Ins. Dep't*, 63 A.D.2d 627 (1st Dep't 1978) (holding there is no rational connecting between sexual abuse of minors and being an insurance agent).

criminal conviction by reinstating those privileges, such as the right to hold an occupational license, as previously discussed.<sup>245</sup> The certificates are issued to eligible applicants at the discretion of the Sentencing Court or the New York State Board of Parole based on the favorable character or fitness of the individual applicant previously convicted of a crime.<sup>246</sup> Though the purpose and effect of each type of certificate is similar, the major differences between the two types of certificates are who is eligible to apply for each and the application procedures. As discussed in detail below, individuals convicted of no more than one felony are eligible to apply for a Certificate of Relief from Disabilities, while applicants with two or more felony convictions may only apply for a Certificate of Good Conduct. One major exception to this rule is that only a Certificate of Good Conduct can lift a statutory bar to a job considered a “public office,” such as a police officer or firefighter. Thus, an applicant previously convicted of only one felony must apply for a CGC rather than a CRD if seeking this type of position.<sup>247</sup>

**a. Purpose of certificates of rehabilitation**

Certificates of rehabilitation can help when individuals with criminal convictions are looking for work or applying for an occupational license because the employer or licensing agency must consider the certificate as evidence that the applicant is “rehabilitated.”<sup>248</sup> This means that an applicant’s criminal conviction(s) should not result in him or her being rejected for employment or denied an occupational license unless there is other evidence that he or she is not

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<sup>245</sup> See N.Y. CORRECT. LAW § 701.

<sup>246</sup> *Id.*

<sup>247</sup> Legal Action Center, *Certificates of Relief from Disabilities and Certificates of Good Conduct: What You Can Do About Criminal Convictions When Looking for Work*, at 10(2003) , available at [http://www.lac.org/pubs/pubs\\_top.html](http://www.lac.org/pubs/pubs_top.html).

<sup>248</sup> N.Y. CORRECT. LAW § 753(2); *see also Arrocha.*, 93 N.Y.2d at 365 (noting that the statute creates a “presumption of rehabilitation” where an individual has obtained a certificate of relief).

qualified for the position.<sup>249</sup> Having a certificate does not, however, completely protect the individual with a criminal conviction from being refused a job or license because of his or her criminal record, because it is not a pardon and does not erase the conviction.<sup>250</sup> Individuals convicted of a crime are still required to list every conviction on job applications, if asked,<sup>251</sup> and employers can ask about previous convictions.<sup>252</sup> Although the employer must take the Certificate of Rehabilitation into account in deciding whether to hire the person convicted of a crime, the law permits an employer or licensing agency to refuse to hire or license him or her if the convictions are “job-related.”<sup>253</sup> The certificate cannot prevent the administrative or licensing authority from exercising its discretionary powers to suspend, revoke, or refuse to issue or renew any license.<sup>254</sup>

**b. Eligibility: Certificates of Relief from Disabilities**

Certificates of Relief from Disabilities are available to any person who has been convicted of no more than a single felony in his or her lifetime (the number of misdemeanor convictions is irrelevant).<sup>255</sup> A separate CRD must be obtained for each separate misdemeanor

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<sup>249</sup> *Id.* (noting that additional evidence should be considered along with a certificate of relief, pursuant to factors outlined in N.Y. CORRECT. LAW § 753).

<sup>250</sup> N.Y. CORRECT. LAW § 706.

<sup>251</sup> *See Rodgers v. NYC Human Resources Admin.*, 154 A.D.2d 233 (1st Dep’t 1989) (fact issue raised whether employee who provided CRD to employer had given notice of conviction).

<sup>252</sup> N.Y. EXEC. LAW § 296(16) (although employers may ask applicants about previous convictions, they may not ask about or consider arrests that did not lead to convictions).

<sup>253</sup> *See, e.g., Springer v. Whalen*, 92 Misc. 2d 922 (Sup. Ct. N.Y. Co. 1978), *aff’d*, 68 A.D.2d 1001 (3d Dep’t 1978) (fact that plaintiff, the owner and operator of a nursing home, was issued a certificate of relief from disabilities following his felony conviction for grand larceny did not preclude the Commissioner of Health from acting to revoke plaintiff’s operating certificate by reason of his industry-related conviction).

<sup>254</sup> N.Y. CORRECT. LAW §§ 701, 706.

<sup>255</sup> N.Y. CORRECT. LAW § 700(1)(a)(a “person who has been convicted of a crime or of an offense but who has not been convicted more than once of a felony” is an “eligible offender”). Rules of construction in determining what constitutes one conviction are:

conviction (or for the one felony conviction).<sup>256</sup> All felony convictions, including federal or out-of-state charges, must be included in determining eligibility to apply for a CRD, with the exception of cases when the defendant was adjudicated as a youthful offender or juvenile delinquent for a felony. Because a youthful offender adjudication<sup>257</sup> is not deemed a conviction, such an offense is not eligible for a CRD.<sup>258</sup> Individuals who have only misdemeanor convictions but who have no felonies may also apply for this kind of certificate. Note that a CRD only bars automatic forfeitures because of criminal convictions, but does not prevent the termination of an employee.<sup>259</sup>

**c. Application procedures: Certificates of Relief from Disabilities**

A Certificate of Relief from Disabilities, sometimes described as a “badge of rehabilitation,” is granted as long as this relief is consistent with the rehabilitation of the eligible person and the relief to be granted is consistent with public interest.<sup>260</sup> The process for obtaining a CRD is based upon the magnitude of the sentence a person convicted of a crime received. If

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(a) Two or more convictions of felonies charged in separate counts of one indictment or information shall be deemed to be one conviction; (b) Two or more convictions of felonies charged in two or more indictments or informations, filed in the same court prior to entry of judgment under any of them, shall be deemed to be one conviction; and (c) A plea or a verdict of guilty upon which sentence or the execution of sentence has been suspended or upon which a sentence of probation, conditional discharge, or unconditional discharge has been imposed shall be deemed to be a conviction.

N.Y. CORRECT. LAW § 700(2)(a)-(c).

<sup>256</sup> Legal Action Center, *Certificates of Relief from Disabilities and Certificates of Good Conduct: What You Can Do About Criminal Convictions When Looking for Work*, at 4 (2003), available at [http://www.lac.org/pubs/pubs\\_top.html](http://www.lac.org/pubs/pubs_top.html).

<sup>257</sup> N.Y. CRIM. PROC. LAW ART. 720.

<sup>258</sup> Glenn Edward Murray, *A Certificate of What? The Mysterious Certificate of Relief from Disabilities*, Public Defense Backup Center Report, Jan.-Feb. 2002, at 10; see also *People v. Doe*, 52 Misc. 2d 656 (N.Y. Dist. Ct. Nassau Co. 1967).

<sup>259</sup> See *Rifogiato v. Bd. of Educ.*, 86 A.D.2d 757 (4th Dep’t 1982) (receipt of a certificate of relief from disabilities by a high school teacher charged with the sale of a large quantity of pills did not bar a proceeding by the city board of education to have the teacher dismissed since the certificate only bars automatic forfeitures).

<sup>260</sup> *Id.* § 702(4).



sentenced to “felony time,” a sentence of more than one year in a state correctional facility, a CRD must be obtained directly from the New York State Parole Board.<sup>261</sup> If sentenced to a revocable sentence (such as conditional discharge or probation) or “local time,” a sentence of not more than one year, a CRD must be obtained from the applicant’s Sentencing Court.<sup>262</sup> In the case of a revocable sentence, a CRD is deemed temporary until such time as the court’s authority to revoke the sentence expires.<sup>263</sup> A court must advise every eligible defendant during sentencing of such eligibility.<sup>264</sup>

**d. Eligibility: Certificates of Good Conduct**

An individual who has two or more felony convictions is not eligible to apply for a Certificate of Relief from Disability, but can apply for a Certificate of Good Conduct. A CGC is available to an individual with any number of misdemeanors and more than one felony conviction (including the exception for those individuals with only one felony conviction who are applying for a public office).<sup>265</sup> A single CGC will cover all felony and misdemeanor convictions.<sup>266</sup> However, an application for a CGC will be considered only if a sufficient period of time has passed since the applicant’s last conviction. If the most serious conviction in the applicant’s criminal history was for a “C,” “D,” or “E” felony, then he or she must wait at least three years from the date of his or her last conviction, payment of fine, or release from prison to parole supervision before applying for a CGC. If the applicant’s most serious conviction was for

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<sup>261</sup> *Id.* § 703-b.

<sup>262</sup> *Id.* § 702.

<sup>263</sup> *Id.* § 702(4).

<sup>264</sup> N.Y. COURT R. 200.9(b).

<sup>265</sup> Legal Action Center, *Employment Discrimination and What to Do About It: A Guide for New York Counselors of Individuals In Recovery From Alcohol and Drug Dependence and Ex-Offenders* (2001), available at [http://www.hirenetwork.org/pdfs/Employment%20discrimination%20\(NY\).pdf](http://www.hirenetwork.org/pdfs/Employment%20discrimination%20(NY).pdf).

an “A” or “B” felony, he or she will have to wait at least five years from his or her last conviction, payment of fine, or release from prison to parole supervision before applying for a CGC.<sup>267</sup> Therefore, an individual convicted of two or more felonies now serving a sentence would not be eligible to apply for a CGC until at least three years after his or her release from prison to parole, due to this mandatory waiting period.<sup>268</sup>

**e. Application procedures: Certificates of Good Conduct**

At the end of the mandatory waiting period, the individual who has been previously convicted can complete an application for a CGC, which must be notarized and returned with proof of payment of income taxes and W2 forms (if the applicant has worked during the previous three years). The State Parole Board will review the application and assign it to a local parole officer, who will conduct an investigation, including a visit to the applicant’s home. The parole officer will then forward his or her recommendation to the State Parole Board, which will make the final decision and notify the applicant by mail. The entire process can take between six months to a year to complete, though this waiting period can be expedited if the applicant offers a written justification.<sup>269</sup> As one commentator has noted, “[w]hen a job or occupational license is at stake, they make every effort to speed up the application process.”<sup>270</sup>

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<sup>266</sup> *Id.*

<sup>267</sup> Legal Action Center, *Certificates of Relief from Disabilities and Certificates of Good Conduct: What You Can Do About Criminal Convictions When Looking for Work* (2003), available at [http://www.lac.org/pubs/pubs\\_top.html](http://www.lac.org/pubs/pubs_top.html).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

## **B. POSSIBILITIES FOR CHANGE**

### **1. Regarding Employment Discrimination**

Notwithstanding statutory protection from employment discrimination, many formerly incarcerated individuals still need to develop the skills and training requisite to most job opportunities. A program such as that established in the Community Reentry Program Act could help to solve this problem.<sup>271</sup> The Act creates a frontline rehabilitation and reintegration plan by assisting each county in New York to set up community re-entry programs.<sup>272</sup> The programs would provide formerly incarcerated individuals with the necessary resources to re-enter successfully such as substance abuse treatment services, mental health counseling services, housing services, health services, and employment services.<sup>273</sup> Each county can tailor the employment services to its specific needs, however it may be best if the bill set minimum standards or services that the counties had to provide. The Act could require different phases of education, vocational skills training, mentoring, job skills development and monitoring much like the federal OJP's Serious and Violent Offender Reentry Initiative but applicable to all.<sup>274</sup>

Because New York has been a forerunner among the states in trying to protect people with criminal records from employment discrimination, creativity in crafting solutions is valuable. For example, the legislature could provide a budget to allow people to file discrimination claims against employers who refuse to hire applicants based solely upon their criminal record. Many individuals are discouraged by the costs associated with litigation. Furthermore, people with criminal records should be educated about their rights. During

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<sup>271</sup> See The Community Reentry Program Act, Senate Bill 11921-05-5, Section 11, at 5 (introduced in June 2005 and currently in committee in both the New York State Senate and the New York State Assembly)

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* § 905.

meetings with their parole or probation officers they could be informed of their ability to appeal denials of employment. New York has served as a role model for states fighting against the employment discrimination of people with criminal records and should continue to do so. Overall, a combination of laws that prohibit barriers to employment such as employer discrimination and programs that improve the ability to re-enter the labor market provide a strong plan for successful reintegration.

Furthermore, the legislature should add a true private right of action to the Corrections Law Article 23-A, regardless of whether the employer were public or private, as well as a 3 year Statute of Limitations to match the Human Rights Law (Exec. L. 297), and attorneys' fees provisions.

## **2. Regarding Negligent Hiring Liability**

By taking steps to eliminate the tension between the requirements of Article 23-A, which mandate that the employer to engage in a statutory balancing test and the common law of negligent hiring, which may cause employers to give undue weight to the severity of the crime (just one of the factors to be balanced in Article 23-A), New York State could greatly benefit both employers and people previously convicted of a crime. The New York State legislature could follow Florida's lead in creating immunity from negligent hiring liability where an employer follows certain procedures.<sup>275</sup> Specifically, New York could add a provision to Article 23-A, specifying that when an employer properly follows the guidelines laid out in that Article, he will not be found negligent for a decision to hire an applicant with a prior conviction. This would bring Article 23-A and the common law of negligent hiring into sync, such that

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<sup>274</sup> See *supra* Chapter II.A.1.a (summarizing federal law).

<sup>275</sup> FLA. STAT. ANN. § 768.096 (West 1999). If an employer conducts a proper background investigation pursuant to the statute, he will be presumed not negligent in the hiring of that employee.

“negligence” for the purposes of the negligent hiring cause of action would be defined as, “a failure to follow the guidelines of Article 23-A.” By so doing, the legislature would be granting a safe harbor to employers who rightly rely on Article 23-A when making their hiring decisions. At the same time, this legislation would greatly help people with past convictions to find employment and reintegrate into the community successfully. Such a step could be a major stride towards achieving New York’s stated public policy goals.

The New York legislature might also consider implementing a liability limit for negligent hiring claims. Liability for negligent hiring currently includes punitive damages in addition to liability for loss, pain, and suffering.<sup>276</sup> Across the country, jury awards in negligent hiring cases are growing ever larger.<sup>277</sup> A fear of having to pay such an award will likely cause employers to be reluctant to give full weight to the policy considerations in Article 23-A when deciding whether to hire an individual with a prior conviction.<sup>278</sup> To lessen this chilling effect, the legislature should consider capping the total award amount possible for negligent hiring claims, removing punitive damages from the equation, or doing both. Similarly to the recommendation

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<sup>276</sup> Harry J. Holzer et al., Joint Center For Poverty Research, *Perceived Criminality, Criminal Background Checks and the Racial Hiring Practices of Employers*, at 3 (2002) available at [http://www.jcpr.org/wp/wpdownload.cfm?pdflink=wpfiles/holzer\\_raphael\\_stoll\\_perceivedcriminality.pdf](http://www.jcpr.org/wp/wpdownload.cfm?pdflink=wpfiles/holzer_raphael_stoll_perceivedcriminality.pdf).

<sup>277</sup> A California jury in the 2000 case *Dean v. Oppenheim Davidson Enterprises Inc.* awarded \$9.38 million in a negligent hiring case against a carpet-cleaning company whose employee murdered a customer in her home. See *Employment Screening Resources, Carpet Firm Hit With \$9.38M in Murder* (2005), available at <http://www.esrcheck.com/articles/article25.php>. A Massachusetts jury in the 1998 case *Ward v. Trusted Health Resources, Inc.* awarded \$26.5 million in a negligent hiring case against a home health care company whose employee murdered a patient and his grandmother. See *Healthier Home Care*, University of Chicago College Report, June-August 1999, <http://magazine.uchicago.edu/9906/CollegeReport/newsmakers3.htm>. A New Jersey jury in the 2002 case *Gurtin v. Nurse Connection Inc.* awarded \$40.6 million in a negligent hiring case against a nursing agency whose employee burglarized a patient’s home and murdered his wife. See *Stabbing By Aide Brings Suit Of Home Care Agency*, VerdictSearch.com (2004), available at <http://www.verdictsearch.com/news/verdicts/special/top100/nlj100-6.jsp#59>.

<sup>278</sup> See, e.g., *Employment Screening Resources*, supra note 277 (referring to the *Dean v. Oppenheim Davidson Enterprises Inc.* jury award as a “loud wake-up call” to service employers). Even without enormous jury awards, negligent hiring suits can be costly for employers; in 2003, the average negligent hiring suit settled for more than \$1.6 million. Stephanie Armour, *Competitive Job Market Locks Out Former Offenders*, USA TODAY, Nov. 21, 2003, at 1B.

above, this would benefit both employers, who would no longer have to worry about a debilitating negligent hiring award, while making people with prior convictions more attractive candidates for employment.

A third possibility for encouraging the employment of individuals with past convictions through liability protection for employers is to add coverage at the New York State level to the Federal Bonding Program. The Federal Bonding Program provides six months of no-cost fidelity bonding insurance coverage for individuals with criminal histories and other high-risk job applicants who are qualified for employment, but denied regular commercial bonding due to their backgrounds.<sup>279</sup> The bond insurance currently offered through the program covers employer loss for theft, forgery, larceny or embezzlement committed by the employee.<sup>280</sup> New York State could make significant progress in combating employer reluctance to hire persons with past convictions if it offered similar coverage for negligent hiring liability. Offering such a bond, even for a limited time period such as the six months offered under the current bonding system, would remove the specter of liability from the initial hiring decision, thereby allowing employers to give full weight to the public policy considerations in Article 23-A.<sup>281</sup>

A different potential approach to the problem may be seen in the Second Chance legislation proposed by Edward Koch. The Second Chance proposal would allow individuals with non-violent drug offenses on their record, who have met certain requirements such as entering a dependency treatment program, obtaining a GED, remaining arrest and

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<sup>279</sup> Federal Bonding Program, U.S. Dep't of Labor, *Unique Job Placement Tool: Answers to Questions About Fidelity Bonding* (2001), available at <http://www.bonds4jobs.com/Answers.pdf>. In New York, this program is run through and funded by the Department of Labor. More information about the New York State implementation of the program may be found online at <http://www.labor.state.ny.us/businessservices/services/servicesindex.shtml>.

<sup>280</sup> Federal Bonding Program, *supra* note 279.

<sup>281</sup> This step could be taken in conjunction with a cap on negligent hiring awards in order to limit the costs to the state of such a program.

conviction-free for five years, and completing a one-year public service program, to legally answer “no” on a job application question asking whether they have any prior convictions.<sup>282</sup> By enacting this legislation, New York would be closing the door to negligent hiring liability for employers who chose to hire these applicants. The legislation would officially deem such a background equivalent to a background clear of criminal convictions, essentially finding that this class of employees is not unfit for any job. Removing an entire class of persons with prior convictions from the scope of negligent hiring liability should serve to reduce the chilling effects of this type of liability overall.

### 3. Regarding Licensing

One possible recommendation is to develop license-specific guidelines.<sup>283</sup> Guidelines, as opposed to rules, allow licensure boards to retain flexibility and discretion while providing a signal to prospective applicants. This allows an individual with a prior conviction to more accurately evaluate his or her chance of licensure. Currently, an applicant must pay a non-refundable fee without knowing how the board weighs specific criterion. The financial cost may deter applicants who do not view it as *de minimis*. Additionally, guidelines provide transparency for the agency. Politicians can use this transparency to make normative determinations of licensure requirements, which they can subsequently adjust.

The relationship between the individual’s conduct and the desired license can be emphasized through stricter statutory interpretation. New York already requires a “direct relationship between . . . previous criminal offenses and the specific license,” prior to the denial

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<sup>282</sup> See Edward Koch, *A Second Chance For Drug Offenders*, Newsmax.com, Dec. 29, 2004, available at <http://www.newsmax.com/archives/articles/2004/12/28/133841.shtml>.

<sup>283</sup> The Texas Department of Licensing and Regulation currently uses guidelines in licensure determinations. These guidelines are easily accessible on the internet and provide a model for NY. See Texas Dep’t of Licensing and Regulation, *Criminal Conviction Guidelines*, available at <http://www.license.state.tx.us/crimconvict.htm>.

of an application.<sup>284</sup> Because judicial scrutiny of this relationship is not a substantial departure from current practice, it is relatively easy to implement.

Lastly, correctional institutions and licensure boards could communicate more effectively. This will prevent training incarcerated individuals, at taxpayer expense, who are subsequently denied licensure. The current practice wastes the limited resources of correctional institutions and offers a false sense of employability. Once the correctional institution knows who will gain licensure they can allocate their resources accordingly. Additionally, licensure boards can make licensing exceptions for individuals who are trained while incarcerated.

#### **4. Regarding Certificates of Rehabilitation**

Although New York anti-discrimination laws have generally been considered some of the best in the country in balancing the reemployment opportunities of people convicted of crimes with concerns about public safety with the use of Certificates of Rehabilitation,<sup>285</sup> the sheer number of people involved<sup>286</sup> significantly slows down the process. Additionally, statistics indicate that although roughly 25,000 people are annually discharged from state correctional facilities, only about 300 of them complete the process of applying for certificates of

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<sup>284</sup> N.Y. CORRECT. LAW § 752.

<sup>285</sup> New York ranks first in the 50 states for having the fewest unfair and counterproductive barriers to the reentry into society of people with criminal records, based in part on the opportunity provided by New York State laws for people with criminal records to obtain certificates of rehabilitation to aid them in gaining employment. Legal Action Center, *After Prison: Roadblocks to Reentry. A Report on State Legal Barriers Facing People with Criminal Records*, at 21 (2004), available at <http://www.lac.org/roadblocks/reportcardstates.html>; see also *Ex-Offenders and Employment: A Review of Maryland's Public Policy and a Look at Other States* (June 2002), available at <http://www.altrue.net/site/hprp/content.php?type=5&id=1574> (“Few states have done more than New York in attempting to level the playing field for ex-offenders seeking employment . . . . A look at the details and history of the law shows that New York attempted to strike a balance between the twin concerns of public safety and rehabilitation. The objective and subjective evidence suggests that this balance has yet to be achieved.”); see also Todd, *supra* note 146, at 758 (encouraging Arizona to adopt New York’s “preferred statutory mode.”).

<sup>286</sup> Samantha Marshall, *More Ex-Cons Find Bars on the Outside*, at 1, CRAIN’S N.Y. BUS. (Oct. 2004), (“An estimated 20,000 newly released inmates arrive in New York City each year looking for work in a tepid economy. That large number is expected to remain steady in the years to come.”).



rehabilitation from the State Board of Parole.<sup>287</sup> Of these 300 completed applications, approximately 90% are granted.<sup>288</sup> These figures indicate that the option of using a certificate of rehabilitation to assist in obtaining employment is either unknown to many potential applicants or too difficult for an applicant to complete without assistance. One suggestion for expediting the process of granting a Certificate of Relief from Disabilities would be advocating that courts use the discretion authorized by law to grant a CRD relieving all disabilities at the time of sentencing, because without a CRD many employers will not even consider a job applicant who has previously been convicted of a crime.<sup>289</sup> Emphasizing to the judge that a CRD is temporary until the expiration of any conditional sentence<sup>290</sup> may help to overcome a Judge's hesitation in seeking "proof" of rehabilitation.<sup>291</sup> Additionally, an application for the applicable type of certificate of rehabilitation, along with detailed instructions and/or assistance, should be offered at multiple times to an individual convicted of a crime. These time frames should include when the individual is released from incarceration and during follow-up visits with his or her parole officers in addition to the mandatory explanation the individual receives at sentencing. Applications for both types of Certificates of Rehabilitation should also be made available for completion and submission over the internet in addition to upon request by mail. Implementing

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<sup>287</sup> *Ex-Offenders and Employment: A Review of Maryland's Public Policy and a Look at Other States*, at vi (June 2002), available at <http://www.altrue.net/site/hprp/content.php?type=5&id=1574>.

<sup>288</sup> *Id.* (citing telephone interview with Jim Murray, New York State Division of Parole (May 4, 2001). Murray, who handled all inquiries and requests for Certificates from the State Parole Board, stated that roughly 600 applicants begin the process each year, but that half drop out.

<sup>289</sup> The Bronx Defenders, Civil Action Project, *Certificates to Demonstrate Rehabilitation: Why They are So Important and How to Get Them* (Mar. 2005).

<sup>290</sup> *New York State Division of Parole Frequently Asked Questions*, available at <http://www.parole.state.ny.us/FAQs.html>. (A Certificate of Relief from Disabilities issued upon conditional release or parole supervision is a temporary certificate. This certificate becomes permanent when the individual previously convicted of a crime is discharged from supervision. While it is temporary, the certificate may be revoked by action of the Board of Parole.)

<sup>291</sup> Bronx Defenders, *Certificates*, *supra* note 289.

these suggestions may help to increase the number of applicants taking advantage of the employment assistance afforded to them under New York law by obtaining a Certificate of Rehabilitation.

### III. EDUCATION

Inmates who are released from prison are frequently unable to find jobs because of insufficient education or because they lack necessary work experience or both. An Urban Institute Justice Policy Center commented on the “complex” relationship between education, employment and criminal activity: the higher the level of education attained, the more likely a person will obtain a job, and the less likely he or she will engage in future criminal activity. Although “the stigma attached to incarceration” is an obstacle to securing employment after imprisonment, another significant obstacle to securing employment upon release is the fact that, while imprisoned, prisoners do not have the opportunity to develop the educational and vocational skills necessary to securing employment once released.<sup>292</sup>

#### A. THE LAW AND ITS EFFECTS

##### 1. Characteristics of Those Entering the Prison System

Data suggests that prisoners have comparatively low educational attainment.<sup>293</sup> The New York State Department of Correctional Services (“DOCS”) reported that, as of January 1, 2004, approximately 10% of the prison population had achieved just an eighth grade education, 30% had achieved a tenth grade education, and only 50% had achieved a twelfth grade education.<sup>294</sup> This is consistent with the national experience, which is that only about 50% of those imprisoned in federal and all state prisons have a high school diploma.<sup>295</sup> In marked contrast, 75% of non-

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<sup>292</sup> Jeremy Travis, Amy L. Solomon, & Michelle Waul, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry*, at 31-32 (Urban Justice Center, Wash. D.C. 2001), available at [http://www.urban.org/pdfs/from\\_prison\\_to\\_home.pdf](http://www.urban.org/pdfs/from_prison_to_home.pdf).

<sup>293</sup> Sara Lawrence, Daniel P. Mears, Glenn Dubin, & Jeremy Travis, *The Practice and Promise of Prison Programming*, at 2-3 (Urban Institute Justice Policy Center May 2002).

<sup>294</sup> New York State Dep’t of Correctional Servs., *Hub System: Profile of Inmate Population Under Custody on Jan. 1, 2004*, at ii.

<sup>295</sup> *The Practice and Promise of Prison Programming*, *supra* note 293, at 2.

incarcerated persons have a high school diploma.<sup>296</sup> Moreover, 36.1% of the State’s prison population tested at a reading level of eighth grade or below, including 13.5% of the population who tested at a fifth grade reading level or below.<sup>297</sup> Of those incarcerated below the age of 21, approximately 25% read below a fifth grade level.

These numbers are more marked for imprisoned women: 51% of female inmates enter Bedford Hills Correctional Facility without a high school diploma or GED.<sup>298</sup> Moreover 44% of the State’s incarcerated female population read at an eighth grade level or below. Data for Spanish-speaking inmates is also stark. DOCS has labeled 8.2% of the population as “Spanish [language] dominant.” Of the Spanish-language dominant prisoners, just 26.7% of the population had received a verified high school diploma or a degree beyond high school.<sup>299</sup> Of these prisoners, just 11.5% of the State’s Spanish-language dominant prisoners could read in Spanish at a ninth grade level or above.<sup>300</sup>

Prison education is particularly important to younger inmates. DOCS reports there are 3042 inmates aged 16 to 21 confined in its facilities, or 4.6% of the general prison population.<sup>301</sup> Of this group, 776 were assessed as reading below the fifth grade level, and DOCS identified 475 as students with disabilities including 23 designated as having emotional disabilities, 420 as

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<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at ii, 45.

<sup>298</sup> Michelle Fine, et. al, *Changing Minds: The Impact of College in a Maximum-Security Prison*, at 5 (The Graduate Center of the City of New York and the Women in Prison at the Bedford Hills Correctional Facility Sept. 2001).

<sup>299</sup> New York State Dep’t of Correctional Servs., *Hub System: Profile of Inmate Population Under Custody on Jan. 1, 2004*, at 46.

<sup>300</sup> *Id.* at 46, 52.

<sup>301</sup> *Id.* at 4.

learning disabled, 7 as mentally retarded, 18 with multiple disabilities, and 7 with other impairments.<sup>302</sup>

Related to the problem of the low educational attainment of the prison population is the fact that disproportionate numbers of prisoners have poor work history.<sup>303</sup>

The lack of educational attainment and poor work history make it difficult for individuals to secure employment upon release from prison.

## **2. New York State Prisons and the State's Goals**

As described above, a very significant portion of the New York State prison population enters the system undereducated. Unless prisoners are provided with educational and/or vocational programs during their incarceration, they will leave prison with the same educational disadvantages, unprepared to attain employment.

### **a. Educational Programming**

In its 2003 Education Annual Report, DOCS identified inmate socialization as the objective for the state's educational prison programming so that upon their release, inmates return to society with: (a) a desire to behave as good citizens and (b) the skills and knowledge necessary to secure employment.<sup>304</sup> To achieve that goal, DOCS has identified two chief education objectives: (1) to ensure that every released person has a high school diploma or equivalency; and (2) to ensure that every released person has the necessary vocational skills to secure a job upon release.<sup>305</sup>

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<sup>302</sup> New York State Dep't of Correctional Servs., 2003 Education Annual Report, at 18-19.

<sup>303</sup> *The Practice and Promise of Prison Programming*, *supra* note 293, at 3.

<sup>304</sup> DOCS 2003 Education Annual Report, at 5.

<sup>305</sup> *Id.* at 6.

DOCS directs that each inmate be placed in educational programming until he has attained math and reading at a ninth grade level.<sup>306</sup> Moreover, Spanish language dominant inmates whose English reading level is below the fifth grade must attend school.<sup>307</sup> DOCS Directive 4804 also announced that the Department would encourage prisoners to continue in the State's educational programming beyond these levels.<sup>308</sup> The Directive states that inmates age 21 and younger who do not possess a high school diploma must participate in an educational program. Similarly, inmates younger than age 21 who do not have a documented vocational skill must attend the vocational educational program.<sup>309</sup>

**b. Special Education Programming**

To further the educational programming of inmates with learning disabilities, DOCS announced that special educational programming would be provided to all inmates under age 21 whom the Committee on Special Education identifies as having a disability.<sup>310</sup> Toward that end, those inmates classified with an educational disability are to be transferred to facilities which provide special educational programming.<sup>311</sup>

**c. Vocational Programming**

Like its attention to educational programming, DOCS recognized the significance of vocational programming to an inmate's prospects upon release when it asserted the "clear correlations" between a formerly incarcerated person's ability to secure gainful employment

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<sup>306</sup> DOCS Directive 4804, *Academic Education Program Policies*, Apr. 18, 2001, at 1, 3.

<sup>307</sup> *Id.* at 3.

<sup>308</sup> *Id.* at 1, 3.

<sup>309</sup> *Id.* at 4.

<sup>310</sup> DOCS Directive 4805, Sept. 18, 2002, at 2.

<sup>311</sup> *Id.*

upon release and recidivism.<sup>312</sup> Thus, Directive 4806 ordered that any inmate who does not possess a verifiable skill in a trade or occupation must have mastered *entry level skills* in a particular trade or occupation.<sup>313</sup>

To prepare prisoners for release DOCS has worked with the Division of Industries to identify vocational completion standards.

**d. Transitional Services**

Transitional services are not regularly provided to New York City inmates attempting to return to the community. The monitor in *Handberry v. Thompson*<sup>314</sup> found “limited transitional planning and services available in the Rikers schools, due in large part to an insufficient number of personnel to provide transition services.”<sup>315</sup> When provided, such planning was a “one size fits all approach,” with generic plans being formulated such as “student expects to return to his community where he will work hard at integrating positively” or “[will] interact with community in positive manner” or “[will] participate in job training” or “would eventually like to get a GED.”<sup>316</sup> The court found this one-size fits all approach to transitional services “clearly falls short.”<sup>317</sup>

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<sup>312</sup> DOCS Directive 4806, Apr. 14, 2003, at 1.

<sup>313</sup> *Id.* at 1.

<sup>314</sup> *See* discussion *infra* Chapter III.A.3c.i.

<sup>315</sup> Sheri M. Meisel, Final Report of the Court Monitor in *Handberry v. Thompson*, 96 Civ. 6161(CBM), at 39 (Dec. 5, 2001) (“*Handberry* Report”).

<sup>316</sup> *Id.*

<sup>317</sup> *Handberry v. Thompson*, 219 F. Supp. 2d 525, 544 (S.D.N.Y. 2002).

### 3. The Realities of the State's Educational Programs in Prison

In 2003, approximately 20,000 inmates participated in academic classes, while 11,000 attended vocational programs.<sup>318</sup>

#### a. Challenge I: Program Design

Designing programs to teach inmates skills which will assist them in attaining employment upon their release is a significant challenge facing the State's prison system. It has been commented that even when programs are offered in prisons, the programs themselves are often of limited assistance to prisoners. For example, vocational programs have been faulted as being too general to be of much help to inmates. In a 2001 Urban Institute interview, one individual observed that vocational programs are frequently linked to *general* market needs. She suggested that if vocational programs were linked to more *specific* market needs, as a candidate for employment, a graduate of a vocational program would be able to demonstrate to a potential employer added value above that of a candidate with entry level skills and could demand a higher salary.<sup>319</sup> Moreover, the decreases in funding for prison education programs and cuts to existing programs described below have resulted in decreases in the *quality* of programming that is provided in prisons.<sup>320</sup>

A Center for Family Policy and Practice report noted that prisoners are being trained for jobs that no longer exist and are being trained on outdated equipment.<sup>321</sup> The quality of vocational programs is of particular importance because prison life does not otherwise provide

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<sup>318</sup> The Correctional Ass'n of New York, *State of the Prisons 2002-2003: Conditions of Confinement in 14 New York State Correctional Facilities*, at 7 (June 2005) (citing DOCS 2003 Education Annual Report, at 11-12).

<sup>319</sup> *The Practice and Promise of Prison Programming*, *supra* note 293, at 15.

<sup>320</sup> *Id.* at 14.

<sup>321</sup> Marguerite Roulet, *Technical Assistance Series: Incarceration Criminal Legal Records and Employment Barriers* (2004), available at [http://www.cffpp.org/publications/incarceration\\_barriers.html](http://www.cffpp.org/publications/incarceration_barriers.html).



inmates the opportunity to develop skills necessary to secure employment upon release. For example, one study found that 69-81% of inmates reported that they read documents such as directions, instructions, diagrams or bills less than once a week.<sup>322</sup> Reading these types of documents is important preparation for job needs.

Finally, it has been observed that a particular problem with the vocational programming offered in prisons is the fact that the programs prepare inmates for vocations which require licensure that an inmate cannot obtain due to his/her imprisonment.<sup>323</sup>

### **b. Challenge II: Funding Cuts**

Prison educational programming must be implemented in the face of reduced funding available for educational and vocational programming. In fact, funding for prison education programs has not kept pace with the expansion of the prison population.<sup>324</sup> Educational and vocational prison programming has declined because of the rapid growth in prisons, the frequent transfer of prisoners from one facility to another, decreased state and federal funding for higher education programs, and greater interest in short-term substance abuse treatment and anger management programs.<sup>325</sup>

Cuts to educational programming are a national trend. In fact, the New Jersey Department of Corrections reported that only 2% of funds spent per incarcerated person are spent on education. During the 1990s, many states cut existing prison educational programs.<sup>326</sup>

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<sup>322</sup> *Literacy Behind Prison Walls*, at xix, 3 (U.S. Dep't of Educ., Office of Educ. Research & Improvement Oct. 1994).

<sup>323</sup> *Id.* For a more detailed discussion of this subject, please see Employment Law, Chapter II, *supra*.

<sup>324</sup> *From Prison to Home*, *supra* note 292, at 32.

<sup>325</sup> *The Practice and Promise of Prison Programming*, *supra* note 293, at 2.

<sup>326</sup> P. Van Slambrouck, *Push to Expand Book-Learning Behind Bars*, CHRISTIAN SCI. MON., Sept. 15, 2000, at 3.

Similarly, California reduced its teaching staff from 800 teachers for a prison population of 30,000, to 600 teachers for a prison population of 160,000.<sup>327</sup> Nationally, in 1997, approximately 35% of inmates reported receiving educational programming and approximately 27% reported receiving vocational programming. In comparison, in 1991, approximately 43% of inmates reported receiving educational programming and approximately 31% reported receiving vocational programming.<sup>328</sup>

#### **i. Program Cuts**

Although the Directives discussed above outlined the State's goals to educate prisoners, these efforts have been hampered by state budget cuts. According to the Correctional Association of New York, DOCS instituted a hiring freeze in Fiscal Year 2001-2002 of "non-essential" prison employees. Positions unrelated to prison security are generally considered "non-essential." Moreover, it is the Division of Budget, not DOCS, which determines whether a position is essential.<sup>329</sup> As prison teachers have been classified as non-essential prison employees, the budget cuts have particularly affected the prison educational and vocational programming by contributing to a dearth of teachers to educate the State's prison population.

At Arthur Kill, program cuts have resulted in a 70% reduction in the teaching staff in over 15 years. Where the prison used to employ as many as 30 teachers, it employed just 7 teachers in 2003.<sup>330</sup> Similarly, 5 of 12 teaching positions at Great Meadow prison were vacant in 2003.<sup>331</sup> As a result of teacher shortages, an inmate may wait six months to get off a waiting list

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<sup>327</sup> *Id.*

<sup>328</sup> *From Prison to Home, supra* note 292, at 17.

<sup>329</sup> *State of the Prisons 2002-2003, supra* note 318, at 7-8.

<sup>330</sup> *Id.* at 55.

<sup>331</sup> *Id.* at 76.

and into a class.<sup>332</sup> At one prison, approximately 25% of the population was on a waiting list to participate in the prison's academic, vocational or substance abuse treatment programs.<sup>333</sup> The prison administration reported that instructor vacancies were largely responsible for the lengthy waiting lists.<sup>334</sup> Similarly, in January 2003, five of thirteen teaching positions at Sing Sing were not filled and just three of ten scheduled vocational classes were being held.<sup>335</sup> During the same time period, Green Haven had 228 prisoners on a waiting list for GED classes.<sup>336</sup> Fully equipped teaching facilities sit empty as there are no teachers to teach the classes.

## ii. Vocational Programming

The vocational programming available in New York prisons reflects the general problems described above. Vacancies in vocational teaching slots have led to long waiting lists for programs, while classrooms with up-to-date equipment sit unused.<sup>337</sup> As of January 1, 2004, 860 women were on a waiting list to participate in prison vocational programming.<sup>338</sup> Moreover, three female correctional facilities offered just one or two vocational programs. In one instance, the only vocational program offered is horticulture/agriculture.<sup>339</sup>

Inmates are generally trained in only one vocation.<sup>340</sup> As a result, prisoners serving long sentences who have completed vocational training have no opportunity to further their skills and

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<sup>332</sup> *Id.* at 8.

<sup>333</sup> *Id.* at 84.

<sup>334</sup> *Id.* at 8.

<sup>335</sup> *Id.* at 8.

<sup>336</sup> *Id.* at 8.

<sup>337</sup> *Id.* at 9.

<sup>338</sup> Women Prison Ass'n, *Vocational Program Status of Females Under DOCS' Custody on Jan. 1, 2004*.

<sup>339</sup> *Id.*

<sup>340</sup> DOCS Directive, at 2.

are left idle.<sup>341</sup> In addition, participation in a vocational programming is only possible if the facility offers vocational education and program space is available.<sup>342</sup>

### iii. College Programming

As described above, the State has identified inmate attainment of a GED as one of its goals. However, once an incarcerated person has attained her GED, there are even fewer educational opportunities available.

In 1994, inmates were removed from eligibility for federal Pell grants for college, which had enabled many to pursue college degrees from prison.<sup>343</sup> New York State similarly eliminated inmates from those eligible to receive state Tuition Assistance Program monies for college programming. As a result, the 70 post-secondary New York prison programs which existed in April 1994 were reduced to just 4 programs by September 2004.<sup>344</sup> The cut to post-secondary education opportunities in prisons correlates with a substantial reduction in the number of college degrees attained by New York prisoners. In 1991, 1,078 inmates earned college degrees. In comparison, 70 college degrees were awarded to inmates in 1999, and just 44 were awarded in 2003.<sup>345</sup>

Currently college programs exist only at facilities where such programs are privately funded by colleges, foundations, inmates or inmates' families. Privately funded college

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<sup>341</sup> *State of the Prisons 2002-2003*, *supra* note 318, at 9.

<sup>342</sup> DOCS Directive 4806, Apr. 14, 2003, at 2.

<sup>343</sup> *The Practice and Promise of Prison Programming*, *supra* note 293, at 14.

<sup>344</sup> Daniel Karpowit & Max Kenner, *Education as Crime Prevention: The Case for Reinstating Pell Grant Eligibility for the Incarcerated*, at 7 (undated), available at [http://www.bard.edu/bpi/images/crime\\_report.pdf](http://www.bard.edu/bpi/images/crime_report.pdf).

<sup>345</sup> Annette Johnson, *Testimony Concerning the Positive Correlation Between Inmate Education and Reduction of Recidivism* (Dec. 4, 2000), available at <http://www.prisonreader.org/TestimonyEduc.html>.

programs are offered only at Sing Sing, Bedford Hill, Eastern and Wyoming prisons.<sup>346</sup> Out of the 30,000 inmates in New York State prisons who hold a high school diploma or a GED, approximately 670 inmates participated in college programs in 2003.<sup>347</sup>

**c. Challenge III: Educational Opportunities For Young People Under Age 21**

**i. Availability of programming for young people under age 21**

Under New York State law, individuals under age 21 without a high school diploma or its equivalent have a right to an education, regardless of whether they are confined in jail, prison, or a youth detention facility.<sup>348</sup> The protections of the federal Individuals with Disabilities in Education Act (“IDEA”) require that young people with educational disabilities, including those in jail,<sup>349</sup> receive educational services tailored to their individual needs, regardless of their confinement, including transitional services to prepare students for continued education, employment, and community integration.<sup>350</sup>

Despite these requirements, young people involved in the criminal justice system<sup>351</sup> face a myriad of impediments to obtaining educational services, both while incarcerated and upon

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<sup>346</sup> *State of the Prisons 2002-2003*, *supra* note 318, at 9.

<sup>347</sup> *Id.* at 9.

<sup>348</sup> N.Y. EDUC. LAW § 3202(7); 9 NYCRR § 7070.1-2.

<sup>349</sup> The provisions of IDEA apply to young people in jail with a few explicit exceptions, not relevant herein. Exceptions for convicted inmates (not pre-trial detainees) can be found at 20 U.S.C. § 1414(d)(6)(A)-(B). Another exception can be found at 20 U.S.C. § 1412(a)(1)(B)(ii); 34 C.F.R. § 300.122(a)(2), but is not applicable in New York. *See* N.Y. EDUC. LAW § 4401.

<sup>350</sup> 20 U.S.C. § 1400 *et seq.*

<sup>351</sup> This report does not look at the obstacles to education confronting children under age 16 who are involved in the juvenile justice system, although there are longstanding problems. Children in juvenile detention or placement facilities in New York – however brief their stay – often suffer from lost records, failure to receive credit for work done, failure to receive special educational services, warehousing in “transitional” settings, and refusal by their community schools to readmit them after they leave court-ordered settings. *See J.G. et al. v. Mills et al.*, 04-civ-5415 (E.D.N.Y.) (pending class action litigation brought by Legal Aid, Advocates for Children, and Dewey Ballantine LLC).

discharge. In *Handberry v. Thompson*, a class action brought in 1996 by the Legal Aid Society's Prisoners' Right Project, a federal district court judge found that hundreds of young people age 16 to 21 confined in the New York City Department of Correction ("NY DOC") "received absolutely no schooling during many semesters" and that "many class members received no educational services for significant lengths of time."<sup>352</sup> Despite the profound need for special educational services, with estimates of the rate of disability as high as 40%, the court also found a "systematic failure" to provide special education to disabled youth.<sup>353</sup> In ordering the City to submit a plan to ameliorate these problems, the court recognized:

This court cannot overstate the importance of education for youngsters in general but especially for youth whose encounters with the legal system have gained them membership in the plaintiff class. Depriving class members of adequate educational services for the duration of their incarceration not only deprives those individuals of their rights but also poorly serves the larger society to which class members will return, and hopefully remain, upon their release.<sup>354</sup>

Two years later, these violations persisted, with the court concluding that "City defendants continue to fail to meet their obligations under state and federal law."<sup>355</sup>

Uncontroverted reports by the monitor appointed by the court, Dr. Shari Meisel, an expert in correctional and special education, showed that "a substantial number of school age individuals confined at Rikers Island consistently received no services or substandard services" and that disabled youth continued not to receive special education services.<sup>356</sup> The court characterized the City's record of performance in providing education to inmates in special housing units –

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<sup>352</sup> *Handberry v. Thompson*, 92 F. Supp. 2d 244, 248 (S.D.N.Y. 2000).

<sup>353</sup> *Id.* at 246, 249.

<sup>354</sup> *Id.* at 249.

<sup>355</sup> *Handberry v. Thompson*, 219 F. Supp. 2d 525, 530 (S.D.N.Y. 2002), *aff'd in part, vacated in part, remanded in part*, 436 F.3d 52 (2nd Cir. 2006).

<sup>356</sup> *Handberry Report*, *supra* note 315, at 1, 25-42.

where a disproportionate number of special education students are confined – as “pathetic,” “abysmal,” and “a sorry state of affairs.”<sup>357</sup> In ordering improvements to the provision of educational services at Rikers, the court recognized that “inmates who receive schooling while in prison are less likely to return there after release.”<sup>358</sup> The remedial injunction issued by the district court was affirmed in part, vacated in part and remanded in part by the Circuit.<sup>359</sup>

In addition, inmates between the ages of 16 and 21 are confined at more than 50 different prisons, some of which have extremely limited teaching staffs.<sup>360</sup> As discussed above, 25% of these inmates’ reading skills are below a fifth grade level, and 15% have been identified by DOCS as students with disabilities including 23 designated as having emotional disabilities, 420 as learning disabled, 7 as mentally retarded, 18 with multiple disabilities and 7 with other impairments. To teach these young people, DOCS has a total of 29 special education teachers at 14 different prisons.<sup>361</sup>

## **ii. Educational opportunities after release from prison**

Young people discharged from jail also encounter barriers in actually accessing educational services. The court’s monitor in *Handberry* found that:

For some incarcerated youth, returning to the public schools after their discharge from a correctional facility is the most appropriate educational component of a transition plan, but according to a number of transition staff, the [Board Of Education’s] comprehensive and alternative high schools often refuse to enroll

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<sup>357</sup> *Handberry*, 219 F. Supp. 2d at 530, 545.

<sup>358</sup> *Id.* at 530 and n.1 (citations omitted).

<sup>359</sup> *Handberry v. Thompson*, 436 F.3d 52 (2nd Cir. 2006).

<sup>360</sup> *Id.*; see also DOCS 2003 Education Annual Report at App. B.

<sup>361</sup> DOCS 2003 Education Annual Report at 18-19.

Rikers students.... This is an extremely detrimental policy for high-risk youth recently discharged from a correctional facility.<sup>362</sup>

In response to these findings, the City promised that even when community schools refuse to enroll a discharged inmate, that individual can still enroll in programs run by the Alternative Superintendency's office. The court "held" the City to that representation.<sup>363</sup> No assessment has been made since as to whether the City is meeting this mandate.

Regardless, denying access to a young person's community school as a consequence of incarceration can be extremely disruptive to a young person's education: he no longer can attend the school he attended all of his life, with friends and teachers in the community he knows and feels comfortable with; he may have to travel extremely long distances to attend an alternative program; and the program may have a limited curriculum – all as a collateral consequence of his incarceration. Attendance in full-time school is mandatory in New York City for children aged 17 and younger.<sup>364</sup> For many young people involved in the court system, attendance in school is a condition of probation. When their school districts refuse to enroll them and provide legally-required educational services, these children face a loss of their liberty. Additionally, students who have been in court-ordered settings are often already over-age for their grades in school. When these children are denied the right to attend school once they are back in the community, or are subject to months- or semesters-long delays in reenrollment, the risk of dropping out and recidivism increases.

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<sup>362</sup> *Handberry* Report, *supra* note 315, at 39.

<sup>363</sup> *Handberry*, 219 F. Supp. 2d at 544.

<sup>364</sup> N.Y. EDUC. LAW § 3202; New York City Chancellor's Regulation A-101.



### **iii. Benefits attributed to prison programming**

Providing educational and vocational programming in prisons has been recognized as generally beneficial for a myriad of reasons. First, as described above, many prisoners enter the State's prison system undereducated. As recognized by DOCS, educational and vocational programs help to correct this under-education and prepare prisoners to secure employment upon release from prison. In addition, correctional officers observe that inmate idleness leads to discipline and security problems in prison. Education and vocational programs occupy prisoners and have been demonstrated to lead to improved prisoner behavior. Finally, studies show that prisoners participating in educational/vocational programming have a lower recidivism rate compared to their peers.

#### **(a) Relief from Inmate Idleness**

Educational programming has been recognized as generally beneficial. Specifically, participation in prison educational programming has been recognized as improving prisoner behavior *while* incarcerated by “offering relief from the pains of imprisonment and by helping inmates to appreciate and adopt pro-social norms.”<sup>365</sup> A New York Times Magazine article observed that prisoners who participated in prison educational programming were more likely to behave themselves.<sup>366</sup> Such behavior was reinforced by the knowledge that if they did misbehave, they would jeopardize their opportunity to continue to participate in educational programming.

These benefits have been observed in the New York State prison system. The Correctional Association reported that, due to insufficient educational and vocational

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<sup>365</sup> Miles D. Harer, *Prison Education Program Participation and Recidivism: A Test of the Normalization Hypothesis*, at 3 (Federal Bureau of Prisons Office of Research and Evaluation May 1995).

<sup>366</sup> Ian Buruma, *Uncaptive Minds*, N.Y. TIMES MAGAZINE, Feb. 20, 2005.

programming, inmates are generally assigned to “porter patrol” assignments.<sup>367</sup> Porter patrol involves general cleaning and simple maintenance. Porter positions do not provide inmates with training or skill development which would allow them to secure employment upon release. At Woodbourne prison, 40% of prisoners were assigned to porter duties.<sup>368</sup> New York State correctional officers reported that the high number of prisoners assigned to porter duties contributes to management problems, increased flow of contraband and threats to security.<sup>369</sup>

### (b) Education and Its Impact on Recidivism

The relationship between education and recidivism has long been recognized. DOCS proclaimed there are “clear correlations between level of education and employment and between attainment of high school diploma and reduced recidivism . . . .”<sup>370</sup> The Urban Justice Center reports that almost “two-thirds of released prisoners are expected to be rearrested for a felony or serious misdemeanor within three years of release.”<sup>371</sup> In September 2000, the Christian Science Monitor reported that “numerous studies show that education programs are one of the most effective tools in reducing the rate at which former prisoners return to criminal activity.”<sup>372</sup> In fact, the Urban Justice Center has reported that former inmates who had participated in prison vocational programs had a recidivism rate 20% lower than non-participants.<sup>373</sup>

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<sup>367</sup> *State of the Prisons 2002-2003*, *supra* note 318, at 8-9.

<sup>368</sup> *Id.* at 8.

<sup>369</sup> *Id.* at 8.

<sup>370</sup> DOCS Directive 4804, *Academic Education Program Policies*, at 1 (Apr. 18, 2001).

<sup>371</sup> *From Prison to Home*, *supra* note 292, at 1.

<sup>372</sup> *Push to Expand Book-Learning Behind Bars: California Bill to Strengthen Prison Education May Indicate Shift in Focus to Rehabilitation*, CHRISTIAN SCI. MONITOR, Sept. 15, 2000, at 3.

<sup>373</sup> *From Prison to Home*, *supra*, note 292, at 32.

A 2003 study found that, in New York, among inmates under age 21 on the date of release, 40% of inmates who earned their GED while in prison returned to prison within 36 months of their release, compared to 54% of their cohorts who did not earn a GED while in prison.<sup>374</sup> Of those over age 21, 32% of inmates who earned their GED while in prison, returned to prison within 36 months after release. In comparison, 37% of inmates who did not earn a GED while imprisoned returned to prison in the same time period.

Attaining a college education has an even greater impact on recidivism. Of women who participated in a college program at Bedford Hills Correctional Facility, only 7.7% recidivated after 36 months. In comparison, during that same time period, 30% of all female inmates released recidivated.<sup>375</sup> Moreover, one study has estimated that New York could save approximately \$150 million if one-third of the State's prison population participated in college programs.<sup>376</sup>

## **B. POSSIBILITIES FOR CHANGE**

### **1. Successful New York State Prison Programs**

#### **a. Industry program**

Under the Partnership with Department of Motor Vehicles, Arthur Kill prisoners work in the DMV's customer service unit. The program is open to 40 inmates who field calls from DMV customers and answer questions such as how to find a DMV office and how to register a car.<sup>377</sup>

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<sup>374</sup> John Nuttall, Linda Hollmen & E. Michele Staley, *The Effect of Earning a GED on Recidivism Rates*, 54 J. OF CORRECTIONAL EDUCATION 90, 91 (Sept. 2003).

<sup>375</sup> *State of the Prisons 2002-2003*, *supra* note 318, at 10.

<sup>376</sup> Michelle Fine, et al., *Changing Minds: The Impact of College in a Maximum-Security Prison*, at 20 (The Graduate Center of the City of New York and the Women in Prison at the Bedford Hills Correctional Facility Sept. 2001).

<sup>377</sup> *State of the Prisons 2002-2003*, *supra* note 318, at 55.

**b. Use of technology**

Attica's educational department makes extensive use of its computers. The general business class uses Microsoft Office. In addition, prisoners use a Macintosh design center to learn PageMaker. Finally, prisoners use an intranet system to learn to navigate the web and how to design web pages.<sup>378</sup>

**c. Department of labor apprenticeship program**

Some inmates at Sullivan have participated in a Department of Labor apprenticeship program to allow them to receive certification from an outside vocational agency.<sup>379</sup>

**d. Varied vocational training**

At Green Haven prison, vocational programs offer training in welding, carpentry, small engine repair and electrical trades.<sup>380</sup>

**e. Project Greenlight**

Project Greenlight was started by the Vera Institute of Justice in cooperation with government agencies and community-based service organizations. Project Greenlight helps structure systems that prepare those leaving prison for release. In 2002, Project Greenlight began a pilot program with DOCS and the Division of Parole at the Queensboro Correctional Facility in Long Island City. This program provided intensive preparation for release for people in the final months of their sentence, including daily classes focused on job readiness, family reintegration, substance abuse, practical life skills, and establishing connections with support agencies in the community. To supplement these classes, Project Greenlight focused on developing cognitive skills, including critical reasoning and problem solving, social skills, values, and managing

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<sup>378</sup> *Id.* at 60.

<sup>379</sup> *Id.* at 140.

<sup>380</sup> *Id.* at 84.

emotions – skills necessary to make progress in the other areas of the programming. Participants in the program also developed a release plan with a step-by-step approach for life after release. DOCS and the Division of Parole have now taken over the program, and an evaluation of the effectiveness of the original pilot is under way.

**f. Hudson Link**

In 1998, inmates at Sing Sing approached religious and academic volunteers for help with the lack of college programs. These volunteers founded Hudson Link for Higher Education in Prison to restore college degree programs at Sing Sing with private funding. Hudson Link's first classes began in June 2000 with 22 students taught by Nyack College faculty. Eighteen students completed the program and graduated with bachelor degrees in Organizational Management on October 18, 2001. Beginning in June 2001, Hudson Link's program expanded to include thirty-five inmates enrolled in classes offered through Mercy College. Additional students were subsequently admitted to bring the student group to 75 inmates. Twenty men received Mercy College degrees on June 2, 2004.

**g. Greenhope**

Greenhope is a comprehensive residential day treatment and outpatient program for formerly incarcerated women, women referred as an alternative to prison, and women with a history of substance abuse. Greenhope's parole programs serve residents of New York State who have been incarcerated in state or federal prisons. These programs are designed to assist women in their re-acclimation to society and prevent substance abuse, relapse or re-incarceration.

Four different parole programs are offered including: the Community Based Residential Program for parolee women needing substance abuse residential services; the Residential Stabilization Program for women parolees in crisis situations such as domestic violence or lack

of housing; the Relapse Prevention program for parolee women who have violated their parole or have had relapses; and the Day Treatment program for parolee women who have a stable residence and require substance abuse services. Among its programs, Greenhope offers participants substance abuse education and counseling and vocational and educational group programs.

Greenhope has helped over 4,000 women with its programs. It maintains a 75% successful completion rate among parolees, a 65% job placement rate, and a recidivism rate of less than 10%. Because of Greenhope's effectiveness, it was selected by the New York State Division of Parole as the program to receive and rehabilitate all female parolees coming out of prison who were natives of Harlem before their imprisonment.

## **2. Successful Programming from Other States**

States such as Wisconsin and Ohio use vocational advisory boards to monitor the vocational programming to ensure that prisoners meet established industry standards prior to receiving a certificate.<sup>381</sup>

In Indiana, the adult and vocational programs division of the Department of Corrections works with local vocational schools to ensure that prison vocational teachers are using the most up to date techniques.<sup>382</sup>

Project RIO provides job preparation services to inmates while they are still incarcerated in state prisons. The program offers a weeklong job search workshop and one-on-one assistance with job placement.<sup>383</sup>

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<sup>381</sup> *The Practice and Promise of Prison Programming*, *supra* note 293, at 15.

<sup>382</sup> *Id.* at 15.

<sup>383</sup> *Id.* at 17.

Partnerships with non-governmental organizations have proven effective. For example, Habitat for Humanity has worked with correctional programs in some states to help prisoners learn building skills.<sup>384</sup>

In Minnesota and Wisconsin, partnerships have been created with private companies that provide work opportunities for inmates. For example, the Department of Corrections in Minnesota has explored opportunities for working with interested providers to develop computer skills.<sup>385</sup>

### **3. Recommendations**

New York State must determine the need for additional teachers and tutors and provide funding to staff these positions. State resources are wasted when facilities have been built but sit empty because there are no teachers to conduct classes. At Green Haven, one staff member commented on the classroom space, materials and available students, all sitting vacant due to lack of teachers.<sup>386</sup>

DOCS should not transfer prisoners participating in educational/vocational programs mid-semester. It was reported that, in the course of a three year study of Bedford Hills Correctional Facility, 30% of prisoners were transferred to other facilities during their involvement in college programs.<sup>387</sup> The State must ensure parity in types and amounts of programming available for women prisoners.

DOCS should play a role in determining which positions should have a hiring freeze.

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<sup>384</sup> *Id.* at 23.

<sup>385</sup> *Id.* at 23.

<sup>386</sup> *State of the Prisons 2002-2003*, *supra* note 318, at 83.

<sup>387</sup> *Changing Minds*, *supra* note 376, at 37.

The Legislature should pass 2005 Assembly Bill 3925 which requires the State to provide each prisoner with an opportunity to earn a GED.<sup>388</sup>

The State's goals with respect to Spanish language prisoners should be revised to require greater skills than reading at a fifth grade level. The State should articulate English-language skill goals for Spanish-language dominant prisoners.

The State's goals with respect to prisoner competency must be higher than ninth grade competency.

The orientation of the State's goals should be shifted; the goal cannot not just be that every inmate achieve a GED, but there be sufficient funding and staffing to allow prisoners to achieve a GED.

**a. College Programming**

Restore funding or post-secondary education through the Tuition Assistance program for prisoners. In addition, financial aid should be provided to inmates to allow them to participate in self-directed study, such as through the College Level Equivalency Program ("CLEP").

Ensure a steady stream of state funding so that a viable college education program can be sustained. Such funding is particularly important in those communities which cannot rely on the private donations from the local community.

The State should provide grants to colleges and/or prisons interested in partnering to provide educational programming.<sup>389</sup>

**b. Education in New York State Prisons for Persons Under 21**

All young people under age 21 are entitled to a high school education, and this right should also extend to young people under age 21 confined in New York State prisons.<sup>390</sup> Unlike

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<sup>388</sup> Amending Correction Law § 136 (proposed Mar. 8, 2005).



the explicit statutory requirements found in Education Law § 32302(7), requiring the provision of a high school education to young people confined in local correctional facilities, including New York City jails, there is no comparable explicit provision for young people confined in state prisons. This creates a loophole in the law allowing the State to argue that only the more general protections of the law apply to young people under age 21 confined in DOCS facilities, which have not consistently been held to create an enforceable interest in any specific educational program.<sup>391</sup>

**c. Content of programming**

Programming must be evaluated to determine whether skills taught in vocational programming reflect market skills and whether the State’s goal of providing prisoners with entry level skills adequately prepares prisoners to secure employment upon release. DOCS and local jails should join much more with non-governmental partners, including employers and advocates involved in job placement, to ensure that the content of vocational and educational programming is meaningful and useful to these populations. The range of the vocational programming curriculum available should be expanded.

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<sup>389</sup> *Changing Minds*, *supra* note 376, at 38-39.

<sup>390</sup> N.Y. CONS. ART. XI, § 1; N.Y. EDUC. LAW § 3202(1) (all children older than 6 and under 21 are entitled to a public education); *see also Campaign for Fiscal Equity Inc. v. State*, 100 N.Y.2d 893, 902, 908 (2003) (interpreting this Constitutional provision to require that the State “ensure the availability of a ‘sound basic education’ to all its children,” including “the opportunity for a meaningful high school education.”) (citation omitted).

<sup>391</sup> *See* N.Y. CORRECT. LAW § 136 (goals of correctional education are defined as providing these inmates with “a more wholesome attitude toward living, with a desire to conduct themselves as good citizens and with the skill and knowledge which will give them a reasonable chance to maintain themselves and their dependents through honest labor”); 9 NYCRR § 7677 (DOCS shall provide a comprehensive education program that is accessible to all inmates and designed to meet the needs of the inmate population. . . so that inmates may obtain educational skills and credentials that are necessary to function more productively and responsibly both during incarceration and after release.”). *Compare Clarkson v. Coughlin*, 898 F. Supp. 1019, 1041 (S.D.N.Y. 1995) with *Lane v. Reid*, 575 F. Supp. 37 (S.D.N.Y.1983).

All facilities should offer vocational programming. Until all facilities offer vocational programming, prisoners in need of vocational programming should be sent to prisons with such programming.

All facilities should establish industry programs such as Arthur Kill's Department of Motor Vehicles program. Industry programs provide prisoners opportunities to further develop their vocational skills. In particular, for those prisoners serving long prison sentences, industry programs provide engaging work opportunities which also allow prisoners to further develop their skills.

As to education and vocational programming, all facilities should ensure that the following characteristics, which are recognized in the literature as important to the success of these programs, are included:

- There should be a focus on skills applicable to the job market. Employers hire people who meet their particular needs. If prisons train inmates in trades/skills that are outdated, their job prospects are reduced;
- Prisoner's needs should be matched with program offerings. This will ensure that prisoners are exposed to programs that increase their skills, and will increase the likelihood they can find a job upon release;
- Participation in these programs should be timed as close as possible to an inmate's release date. This will ensure that prisoners' skills are up-to-date and reflect market demands;
- Provide programming that last at least several months. Programs cannot address prisoner's needs in an abbreviated time.

- Provide programs that cover each individual's needs and are well-integrated with other prison programs to avoid potential redundancy or conflict across programs;
- Ensure that prison programming is followed by treatment and services upon release from prison. Without continuation of service, efficacy may be diminished. Prisoners face obstacles upon release, including difficulties obtaining house or health services.<sup>392</sup>

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<sup>392</sup> *The Practice and Promise of Prison Programming*, *supra* note 293, at 9-11.



#### IV. BENEFITS

One significant barrier that people face in their transition to the world outside of prison or jail, and while they are incarcerated, is applying for and obtaining public assistance benefits and medical insurance. Single individuals who are released from prison or jail and who need financial help until they get on their feet are likely to apply for Safety Net Assistance (“SNA”), Medicaid, and Food Stamps. Parents with dependent children are likely to apply for Family Assistance (“FA”) instead of SNA. In New York, FA and SNA are called Public Assistance (“PA”).<sup>393</sup> This collection of programs is often known colloquially as “welfare.”

The universe of federal and state public benefits is complicated. Not only is it complicated to spell out for purposes of this report, but it is particularly complicated for criminal defendants and their lawyers. Laws and regulations that have a profound effect on a convicted individual, aside from the criminal sentence imposed, are scattered throughout the law in a wholly unstructured manner. As one scholar has noted:

No one knows, really, what [collateral consequences] are, not legislators when they consider adding new ones, not judges when they impose [a] sentence, not defense counsel when they advise clients charged with a crime, and not defendants when they plead guilty or are convicted of a crime and have no idea how their legal status has changed.<sup>394</sup>

The discussion of benefits below demonstrates the complexity of this substantial issue. Some penalties in the benefits arena are automatically imposed as a consequence of a criminal conviction. Other consequences are even more hidden – they are the practical but predictable result of criminal proceedings and create huge barriers to getting and maintaining benefits.

These consequences touch on a multitude of areas, and they are buried in countless laws and

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<sup>393</sup> 18 N.Y.C.R.R. § 350.1(d).

<sup>394</sup> Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 255, 256 (2002).

regulations. The simple compilation of these civil penalties in a single document is a challenge, given the structure of the law, but for the same reason, ultimately, a service. This chapter will discuss particular benefits in turn, move on to larger issues affecting all such benefits, and lastly discuss possibilities and recommendations for change.

**A. THE LAW AND ITS EFFECTS**

**1. Welfare Benefits**

**a. The Personal Responsibility and Work Opportunity Reconciliation Act**

Perhaps the most significant barrier imposed upon people with criminal convictions who are re-entering society – specifically those convicted of drug-related felonies – by the federal government is a provision of the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”), passed on August 22, 1996, that bars anyone convicted of a drug-related felony from receiving federal cash assistance and Food Stamps during his or her lifetime. Under PRWORA, a “drug-related felony” is defined as any offense that is classified as a felony by the law of the jurisdiction involved and that has as an element the possession, use, or distribution of a controlled substance. The benefits denied to those convicted of such felonies are Temporary Assistance for Needy Families (“TANF”) (*i.e.*, traditional federal “welfare” benefits)<sup>395</sup> and Food Stamps.<sup>396</sup>

Certain benefits are not denied under PRWORA. These include: (1) emergency medical services as defined under Title XIX of the Social Security Act; (2) short-term, non-cash, in-kind emergency disaster relief; (3) public health assistance for immunizations and for testing and

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<sup>395</sup> TANF benefits are provided under 42 U.S.C. § 601 *et seq.*

<sup>396</sup> Food Stamps are provided under 7 U.S.C. § 2011 *et seq.*

treatment of certain communicable diseases; (4) prenatal care; (5) job training programs; and (6) drug treatment programs.<sup>397</sup>

**b. States may “opt out” under PRWORA**

Each state was left with the discretion to decide what type of program it would set up with its TANF monies. PRWORA allows states to “opt out” of the provision concerning benefits denied to those convicted of drug-related felonies. The overall operation of PRWORA shifts the control of certain federal benefits over to the states by providing block grants of federal money to the states to be put toward such benefits. States may choose to continue to provide TANF-funded benefits and Food Stamps to individuals otherwise deprived of such benefits under PRWORA. New York has opted out of the ban on benefits affecting those convicted of drug-related felonies.<sup>398</sup> Accordingly, New Yorkers with drug-related felony convictions remain eligible to receive TANF-funded benefits and Food Stamps under the terms of New York’s PWRORA, the State’s comprehensive response to the federal PWRORA. Nine other states and the District of Columbia have also opted out of the ban.<sup>399</sup>

**2. Social Security and Supplemental Income Benefits**

Supplemental Security Income (“SSI”) benefits are cash payments given by the federal Social Security Administration (“SSA”) to people over 65, the blind, and people that have other serious mental or physical defects and are poor. Social Security Disability (“SSD”) provides help to adults in any of the eligible categories who have worked in the past. Disability must be

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<sup>397</sup> PRWORA imposed major changes to the welfare system in several other ways. The Act eliminated the Aid to Families with Dependent Children (AFDC) program, reduced Food Stamps to most households, and terminated Supplemental Security Income (SSI) to many children, immigrants and substance abusers. The federal funds formerly guaranteed to families under the AFDC program are given to the states in the form of a block grant called Temporary Assistance to Needy Families (TANF).

<sup>398</sup> N.Y. SOC. SERV. LAW § 95 (McKinney 2003).

<sup>399</sup> These nine states are Connecticut, Maine, Michigan, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, and Vermont.

demonstrated by a report from a medical professional demonstrating that a person's condition is severe, and impairs the ability to do "substantial" work, meaning work which earns more than \$800 per month (\$1300 if blind). In some cases, working individuals may continue to receive SSI benefits, although typically subject to a reduction in payments.

Although benefits administered by the SSA are not per se denied to people re-entering society from prison or jail, federal law limits or, in many cases, eliminates access to these benefits during periods of incarceration, and certain procedural rules hinder access to such benefits during incarceration and upon re-entry. Limiting access to benefits administered by the SSA during periods of incarceration and placing barriers in the way of restoring access to these benefits upon re-entry is a consequence wholly distinct from an individual's criminal sentence and, hence, a collateral consequence.

**a. Applicants**

If an individual is incarcerated when he or she applies for benefits administered by the SSA and is otherwise eligible, he or she is not eligible for payment of benefits until the first day of the month following the day of release from incarceration.<sup>400</sup> This ineligibility places a burden, separate and apart from the individual's criminal sentence, that is not placed on eligible applicants who are not incarcerated. It has a particular effect on those in short terms of incarceration in local jails.

The SSA has procedures enabling its local offices to provide support to jails, prisons and other corrections facilities to help people submit applications while incarcerated. These applications can also cover food stamps. SSA will accept and process applications several months before the applicant's anticipated release and make a prospective determination of

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<sup>400</sup> 20 C.F.R. § 416.211 (SSI).



potential eligibility and payment amount, based on anticipated circumstances. A pre-release memorandum of understanding between the local SSA office and the correctional facility can facilitate this process, but such an agreement is not required.<sup>401</sup>

**b. Current recipients**

Rules affecting receipt of SSI benefits, as applied to current recipients enmeshed in the criminal justice system, depend on the length of the individual's incarceration. If an individual is incarcerated for more than 12 months, his or her SSI benefits are terminated following incarceration,<sup>402</sup> and the individual must reapply for SSI upon release. With respect to incarceration for more than a full calendar month but less than a year, SSI benefits are suspended and can be reinstated effective the day of release.<sup>403</sup> SSI benefits are unaffected by incarceration for less than a full calendar month.

For Social Security benefits such as SSD, however, where an individual is incarcerated upon conviction of a *felony*, he or she is not entitled to benefits for any month or any part thereof during which he or she is incarcerated, regardless of the length of the sentence.<sup>404</sup> In addition, during any period of incarceration, an individual is not entitled to Social Security benefits he or she would receive as a dependent.<sup>405</sup> This includes disability benefits and children's benefits

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<sup>401</sup> See SI 00520.900 - Prerelease Procedure for the Institutionalized (provides an overview); SI 00520.910 Prerelease Agreements - Institutionalization (describes responsibilities of correctional facility and the SSA); SI 00520.920 - Processing PreReleases Cases (describes SSA procedures) and SI 00520.930 - Exhibits (includes a model PreRelease Agreement), *available at* <http://policy.ssa.gov/poms>. For an excellent overview, see the Bazelon Center's resource on restoring federal benefits. *Available at* <http://www.bazelon.org/issues/criminalization/publications/gains/restoringfederal.htm>.

<sup>402</sup> 20 C.F.R. § 416.1335.

<sup>403</sup> 20 C.F.R. §§ 416.211; 416.421; 416.1326.

<sup>404</sup> 20 C.F.R. § 404.468(a).

<sup>405</sup> 20 C.F.R. § 404.468(a). This provision applies only to the incarcerated individual. That individual's dependents are not directly affected by this provision in the sense that those entitled to benefits on the basis of the incarcerated individual's income may calculate their entitlement as though the individual were receiving benefits. *Id.*

based on disability.<sup>406</sup> An incarcerated individual may be exempt from such denials if engaged in an approved vocational rehabilitation program, such as an approved job training program.<sup>407</sup> Again, where an individual's benefits are terminated during a period of incarceration, this is a penalty distinct from that individual's criminal sentence. And, where an individual must reapply upon re-entry, that individual is faced with an interruption in benefits unique to his or her status as a formerly-incarcerated individual.

During any period of incarceration, federal regulations impose a duty to report to the Social Security Administration admission and discharge from an incarceration facility.<sup>408</sup> The same rule imposes a duty to report upon individuals fleeing prosecution for a felony or who have violated a condition of parole or probation imposed by state or federal law.<sup>409</sup>

### **3. Military Pensions and Military Service**

Military pensions are an additional federal benefit denied as a result of a criminal conviction. Incarcerated individuals will be denied military pensions after 60 days in custody pursuant to a felony or misdemeanor conviction.<sup>410</sup> Such pensions may, however, be paid to the dependents of a veteran disqualified from receiving the benefits due to incarceration.<sup>411</sup> In addition, people with felony convictions are forever barred from enlisting in the military, unless the office in charge of enlistment authorizes an individual exception on the basis of merit.<sup>412</sup>

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<sup>406</sup> *Id.*

<sup>407</sup> 20 C.F.R. § 404.468(d).

<sup>408</sup> 20 C.F.R. § 416.708(k).

<sup>409</sup> 20 C.F.R. § 416.708(o). *See* discussion, *infra* Chapter IV.A.6.

<sup>410</sup> 39 U.S.C. § 1505.

<sup>411</sup> *Id.*

<sup>412</sup> 10 U.S.C. § 504.

#### 4. Other Benefits

Federal law provides that as part of a criminal sentence for a drug offense, a state or federal judge may deny “any and all” federal benefits. For those convicted of drug possession, a judge may deny such benefits for up to a year after the date of conviction,<sup>413</sup> and for those convicted of drug trafficking potential ineligibility may continue for up to five years.<sup>414</sup> The benefits covered under this discretionary sentencing law include: “the issuance of any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States.”<sup>415</sup> Notably, earned retirement and health benefits are not included. However, the Bureau of Justice Assistance has compiled a list of 750 benefits potentially affected under this law.<sup>416</sup>

This discretionary sentencing law is unusual in that it provides that benefits that would otherwise be deemed collateral to a criminal sentence may in fact be made part of a criminal sentence. In this way, it highlights the underlying legal fiction of the term “collateral consequence.” One of the central issues concerning collateral consequences is that they are typically shielded from the view of criminal defendants, their lawyers, and even government decision-makers. Indeed, this sentencing law illustrates one potential method of reform – to incorporate all sanctions, whether currently defined as “direct” or “collateral” – into the sentencing process.<sup>417</sup>

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<sup>413</sup> 21 U.S.C. § 862(a)(2)(A)(i).

<sup>414</sup> 21 U.S.C. § 862(a)(1)(A).

<sup>415</sup> 21 U.S.C. §§ 862(d)(1)(A)-(B); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5F1.6.

<sup>416</sup> Bureau of Justice Assistance, DENIAL OF FEDERAL BENEFITS PROGRAM AND CLEARINGHOUSE (FACT SHEET) (1997).

<sup>417</sup> *See* ABA Report on Collateral Sanctions.

## **5. Continuity of Benefits**

As mentioned above, criminal proceedings often interrupt the continuity of benefits necessary to support low-income recipients. The disruption resulting from a criminal case can lead to termination of benefits or application barriers and delays.

### **a. Termination of benefits**

Criminal proceedings resulting at least in frequent court appearances, and, in many cases, brief periods of incarceration can result in suspension or termination of all forms of public assistance (SNA, FA, Food Stamps, Medicaid), and SSI.

Failure to recertify for benefits can result in termination from assistance programs. Recertification procedures for receipt of PA benefits involve production of documented evidence of need, interviews with OTDA officials, meeting with financial and employment planners, and two Eligibility Verification Review (“EVR”) appointments. Failure to meet any of these requirements is justification for denial of needed benefits.<sup>418</sup>

Advocates report that their clients frequently miss PA appointments and work assignments due to court appearances and other court-mandated responsibilities.

The state imposes a variety of sanctions for a client’s failure to participate in the FA work requirement. For the first failure or refusal to comply with a work requirement, the cash grant is reduced by the adult’s share until the individual is willing to comply. For the second incident, it is reduced by the adult’s share for a minimum of three months and thereafter until compliance. For a third incident, the grant is reduced by the adult’s share for a period of six months and thereafter until compliance.<sup>419</sup>

Many people who receive public benefits but are subsequently incarcerated find the status of their benefits altered, even after short terms in prison or jail. A recent study of people

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<sup>418</sup> USDA, Food and Nutrition Service, Northeast Region, Food Stamp Program, *New York Program Access Review November-December 1998*, at 15.

<sup>419</sup> NEW YORK STATE DEPARTMENT OF LABOR EMPLOYMENT POLICY MANUAL § 1300, *available at* <http://www.labor.state.ny.us/welfare2work/policy/EmployPolManual/policymanual.shtm>.

incarcerated on Riker’s Island found that 77% of individuals with active cases upon entry had their public assistance enrollment either suspended or terminated. This change in status is often justified on the grounds that the state or municipality where the individual is incarcerated provides for that individual’s public assistance needs during the period of incarceration. This justification does not account for the re-enrollment or reinstatement time necessary for processing of benefits applications upon release or for important factors such as preserving stable housing during short periods of incarceration. More than half of those entering jail with Medicaid have their benefits terminated.<sup>420</sup>

Depending on the nature of the criminal offense, sanctions can present either minor or lifelong obstacles to the receipt of benefits. For example, 21 U.S.C. § 862(a) permanently bars persons with drug-related felony convictions from receiving federal cash assistance and Food Stamps for life. Though 8 states, including New York and the District of Columbia have opted out of this bar, its existence limits the ability of those with drug-related felony convictions to relocate to other parts of the country, and can impact rehabilitated people who have moved out of state unaware of this sanction.

#### **b. Application delays**

Single individuals who are released from prison and who need financial help until they get on their feet are likely to apply for Safety Net Assistance (“SNA”) and Medicaid. Applicants for Safety Net Assistance have a 45-day waiting period after they apply for benefits, before they can begin to receive Safety Net Assistance (although minimal emergency needs must be met in the interim.<sup>421</sup> In 1993, the New York State Department of Social Services, now the Office of

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<sup>420</sup> *Analysis of Public Benefits: Enrollment of Longer-Term Rikers Inmates* (limited to inmates whose stay at Rikers was at least 30 days).

<sup>421</sup> N.Y. SOC. SERV. LAW § 153(8).

Temporary and Disability Assistance (“OTDA”), recognized that this waiting period might be problematic for those released from prison, and issued an Informational Letter stating that local Social Services Districts should accept public assistance applications from people in prison 45 days before their release date so that benefits can begin on the date of release.<sup>422</sup>

With the advent of welfare reform, and the strong preference for county flexibility, OTDA has taken the position that 93 INF-11 is an option, not a requirement. Advocates for people in jail or prison are therefore unable to benefit from OTDA’s recommendation in counties that refuse to let currently incarcerated persons apply for benefits or that process the applications but deny them on the grounds that the applicant is not “needy” because the applicant’s needs are being met in prison.

The refusal of a local social services district to accept an application from a person in prison often results in adverse consequences. If the person has no family or friends to take them in, they will end up in a homeless shelter costing the taxpayers of New York much more money than if the social services district accepted the application. For others, a condition of release is that they have a place to live. If these people are without families or friends to take them in, they will remain in prison past their conditional release date. For other people in jail or prison, the absence of money for rent, transportation, or clean clothes makes their successful transition to the world of work less likely.

### **c. Medicaid**

Medicaid is a need-based benefit program providing health services for the indigent, elderly, infants, and people receiving SSI benefits. There are income caps above which individuals will generally not be eligible to receive Medicaid benefits, although there are

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<sup>422</sup> 93 INF-11, question 4.

exceptions: children up to age 1 and pregnant woman at or below 200% of the national poverty level, and children up to age 19 at 133% of the poverty level retain their eligibility. Medicaid does not make payments to beneficiaries but rather directly pays health-care providers. Although there is a statutory right for eligible persons to receive Medicaid benefits, enrollment is not instantaneous.

Generally, local districts must determine if you are eligible and send a letter notifying you if your application has been accepted or denied within 45 days of the date of your application. If you are pregnant or applying on behalf of children, the local district has 30 days from the date of your application to determine if you are eligible for Medicaid. If you are applying and have a disability which must be evaluated, it can take up to 90 days to determine if you are eligible.”<sup>423</sup>

Access to medical insurance, or Medicaid, is often adversely affected by criminal proceedings. The correctional population (both jails and prisons) faces significant health issues that, in the aggregate, amount to a public health crisis. This group is subject to greater public health vulnerabilities than the general population, including higher rates of childhood abuse, homelessness, HIV infection and other infectious or chronic diseases, drug or alcohol abuse, mental illness, and physical or sexual abuse.<sup>424</sup> Compounding the risks associated with these acute medical needs, few people going through correctional facilities have health insurance or can afford necessary medical care. A recent review of New York City agency data revealed that

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<sup>423</sup> [http://www.health.state.ny.us/health\\_care/medicaid/index.htm](http://www.health.state.ny.us/health_care/medicaid/index.htm).

<sup>424</sup> See, e.g., NAT'L COMM'N ON CORR. HEALTH CARE, THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES (2002), available at [http://www.ncchc.org/pubs/pubs\\_stbr.html](http://www.ncchc.org/pubs/pubs_stbr.html); Doris J. James, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 201932, *Profile of Jail Inmates, 2002* (July 2004, rev. Oct. 12, 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf>; Caroline Wolf Harlow, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 195670, *Education and Correctional Populations* (Jan. 2003, rev. Apr. 15, 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf>; Patrick A. Langan & David J. Levin, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 193427, *Recidivism of Prisoners Released in 1994* (June 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>; Christopher J. Mumola, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 182335, *Incarcerated Parents and Their Children* (Aug. 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>; Doris James Wilson, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 179999, *Drug Use, Testing, and Treatment in Jails* (May 2000, rev. Sept. 29, 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/duttj.pdf>.

of those incarcerated for more than thirty days (either pretrial detention or post-sentencing), only 26% had Medicaid upon admission. Less than 13% had it upon release.

## **6. Felony Warrant and Probation/Parole Violation Barriers**

### **a. Ineligibility and termination of benefits**

Under federal law, a state may not provide TANF-funded benefits, SSI, SSDI, public and federally-assisted housing, or Food Stamps to individuals who are: (i) “Fleeing Felons”<sup>425</sup>, or (ii) violating a condition of probation or parole, as found by a judicial or administrative determination.<sup>426</sup> Notably, a person subject to these restrictions is still eligible for Medicaid.

For public assistance and Food Stamps, these categories are defined by state law under N.Y. Soc. Serv. Law § 131(14); 18 NYCRR § 351.2 (public assistance); 18 NYCRR § 387.1 (Food Stamps); and 97 ADM-23.<sup>427</sup> A “fleeing felon” is any individual who is (a) fleeing to avoid prosecution; (b) fleeing to avoid custody; or (c) fleeing to avoid conviction. The underlying offense must be a felony. Any individual violating a condition of probation or parole imposed under federal or State law could also be ineligible. A person is considered violating only if: (a) the person is currently in violation of probation or parole supervision and a warrant alleging such a violation is outstanding; or (b) the person has been found by judicial determination to have violated probation, or by administrative adjudication to have violated parole. A person can lose his or her eligibility for any violation of probation or parole, no matter how minor and regardless of the seriousness of the underlying offense, even a low-level

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<sup>425</sup> “Fleeing Felon” is a specific legal term used to identify individuals “fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the person flees, for a crime, or an attempt to commit a crime, which is a felony under the laws of the place from which the person flees, or, in jurisdictions that do not define crimes as felonies, is punishable by death or imprisonment for a term exceeding 1 year regardless of the actual sentence imposed”. 42 U.S.C. § 1382 (e)(4).

<sup>426</sup> Compare SSI bar at 42 U.S.C. § 1382(e)(4) with PA bar at 42 U.S.C. § 608(a)(9).

<sup>427</sup> New York has extended the ban to all forms of Public Assistance, including SNA (which is not funded by TANF). 18 NYCRR § 351.2.



misdemeanor. A person is considered violating only until (i) he or she is restored to probation or parole supervision; (ii) he or she is released from custody; or (iii) the expiration of maximum term of imprisonment or supervision.

The federal statutes, 42 U.S.C. §§ 402 (x)(1)(B)(iii) & 1382(e)(4)(B), have recently been amended to include some “good cause” exceptions. A mandatory good cause exception applies where a beneficiary is found not guilty, has the charges dismissed, warrant vacated, is otherwise exonerated by a court order, or was implicated as a result of identity theft or fraud. In reality, this provision is not an “exception,” but rather a clarification of the definition of fleeing felon. The amendment also creates discretionary good cause exceptions based on mitigating circumstances. The Social Security Administration’s Program Operations Manual System has provided two options for granting a discretionary good cause exception. POMS SI 00530.015B2 & GN 02613.025B2. Under Option A, the underlying offense, probation or parole violation must be nonviolent and not drug-related, the individual must not have pled to or been convicted of any subsequent felony and the law enforcement agency must report that it will not act on the warrant which triggered “fugitive felon” suspension. Under Option B, the underlying offense, probation or parole violation must be nonviolent and not drug-related, the individual must not have pled to or been convicted of any subsequent felony, the warrant must be the only existing warrant and must have been issued 10 years prior to the Fugitive Felon Match, and the beneficiary must be legally incompetent or incapable of managing his or her payments.

**b. Problems with enforcement of “fleeing felon” statutes**

The federal SSA and state Department of Social Services (Human Resources Administration in New York City) will run a national warrant check on anyone applying for benefits. Each program also has a periodic warrant check for current recipients. The state “fleeing felon” system operates via a data-matching agreement between OTDA and the state

Division of Criminal Justice Services (“DCJS”).<sup>428</sup> The local fraud/investigative unit usually is the point of contact for DCJS hits. For *recipients* of criminal conviction information, a monthly match report through BICS (Benefit Issuance Control System) is provided. For *applicants*, a weekly report through RICH (Recipient Identification and Client History) is requested. When a match is made, the local Social Services District (“SSD”) must report the person’s address to law enforcement.<sup>429</sup> The SSD will then obtain a “timely follow-up report” from the law enforcement agency within 48 hours. The report should establish whether the individual had been taken into custody or fled, or if the reported match was in error. If the report confirms the “fleeing” status, the SSD must deny the individual’s application or close the case.

In practice, most SSDs and SSA offices engage in no inquiry regarding intent to flee prosecution and will deny or terminate a person as soon as they receive a hit. To be considered a “fleeing felon,” as workers currently implement the law, a person need not have intentionally fled the jurisdiction on a felony case, and might have no knowledge of the warrant or have only unknowingly violated a condition of parole.

Warranting procedures in criminal practice do not require verification that the person warranted actually received the notice, so it is common that individuals have their benefits cut without even knowing that they have warranted. Due process requires the government to provide a pre-termination evidentiary hearing, fair notice, and the opportunity to be heard before terminating certain benefits, including PA, SSI, and SSD.<sup>430</sup> The SSA, however, notifies most individuals less than two weeks prior to the suspension of benefits. Individuals lacking a mailing address may never receive notice. For those who do receive notice of termination, appeal may

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<sup>428</sup> DCJS maintains the state repository of criminal records. N.Y. EXEC. LAW § 837.

<sup>429</sup> 18 NYCRR § 357.3(e)(3).

be made within 10 days of the receipt of notice. Appeals are made to local SSA representatives who may be unfamiliar with the complex procedural filing requirements of the regulations.<sup>431</sup>

Because benefits workers enforce fleeing felon eligibility bars mechanically, the reason for an individual's departure from the warranting jurisdiction is almost irrelevant in practice to the suspension of benefits. Did the client live in the jurisdiction where the arrest took place when arrested? If not, they may have simply returned home following release and been too poor to make the frequent trips back and forth for court appearances. Suspension of benefits for such individuals fails to meet the stated purposes of the SSA in implementing the program, namely protecting "the integrity of the SSI program by stopping payments to fugitive felons" and protecting "the public by providing information to law enforcement that assists in the apprehension of a fugitive fleeing from justice."<sup>432</sup> Clients may have relocated because of job loss, or to flee an abusive spouse, or to receive or give support to or from a family member. Benefits workers too frequently ignore whether the originating jurisdiction intends to extradite the person, and whether the person is financially, physically, or mentally able to return. Essentially, the agencies take the position that one can flee to avoid prosecution without intending to do so or even without knowing there is a prosecution from which to flee.

Courts and administrative judges have attempted to enforce strict definitional standards around these bars, but these standards have often been ignored by line-level workers and fought

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<sup>430</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>431</sup> Kathryn J. Lewis, *INCOME INJUSTICE: THE IMPACT OF WELFARE REFORM'S FLEEING FELON REGULATIONS ON SSI RECIPIENTS* (2002).

<sup>432</sup> *Preventing Benefits to Prisoners, Fugitives, the Deceased and Other Ineligibles: Hearing before the Senate Finance Comm.*, 107th Cong. (2001) (statement of Fritz Streckewald, Acting Assistant Deputy Commissioner for Disability and Income Security Programs).

by the agencies.<sup>433</sup> A number of federal cases have reversed the SSA's decision to terminate benefits for a felony warrant without proof of intent to flee. In *Hull v. Barnhart*, 336 F. Supp. 2d 1113 (D. Or. 2004), the plaintiff moved from Nevada to Oregon in July 1995, three months before charges were filed against her in Nevada. Hull was unaware of the charges until January 2002, when SSA notified her that her benefits would be suspended because she was "fleeing to avoid prosecution" for a felony in Nevada. The court rejected the agency's contention that the mere existence of an active warrant is sufficient to determine that someone is "fleeing." In *Blakely v. Comm'r*, 330 F. Supp. 2d 910 (W.D. Mich. 2004), the court ruled that a man who was physically and financially unable to return to answer felony charges in Montana was not "fleeing to avoid prosecution."<sup>434</sup>

Most recently, in *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir. 2005), the Court of Appeals for the Second Circuit held that the federal statute does not permit the Commissioner to conclude simply from the fact that there is an outstanding warrant for a person's arrest that he is "fleeing to avoid prosecution."<sup>435</sup> In 1996, Schenectady resident Felipe Oteze Fowlkes was approved to receive SSI based on his mental illness involving delusions. Three years later, he was arrested in Virginia for shoplifting. He was released and not charged with a crime, and he returned home in New York. Officials in Virginia later decided to file charges against him for shoplifting. The shoplifting charge was raised to the level of a felony because of prior shoplifting convictions and a Virginia "three strikes" law. Fowlkes was never served with notice that charges were filed against him in Virginia, and no attempt was made by Virginia to extradite him. Having received

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<sup>433</sup> For relevant state fair hearing decisions, see Fair Hearings 3708876N, 3737787Q, 3561826L, 3767336Z, 3745731H, and 4012187K, available at <http://onlineresources.wnylc.net>.

<sup>434</sup> For other cases involving the SSA, see *Garnes v. Barnhart*, 352 F. Supp. 2d 1059 (N.D. Cal. 2004) and *Thomas v. Barnhart*, No. 03-182-B-W, 2004 WL 1529280 (D. Me. June 24, 2004).

<sup>435</sup> 10 U.S.C. § 1382(e)(4)(A).

no notification, Fowlkes had no idea he was being charged. Nevertheless, SSA adjudicated him a “fleeing felon” and terminated his benefits. After a pro se trial and appeal, the Second Circuit appointed counsel and requested briefing on the requisite intent.

The Court of Appeals held that “fleeing” in § 1382(e)(4)(A) means the conscious evasion of arrest or prosecution.<sup>436</sup> Thus, the court held, there must be some evidence that the person knows his apprehension is sought. The court also held that 20 C.F.R. § 416.1339(b)(1) does not permit the agency to make a finding of flight; rather, it demands a court or other appropriate tribunal to have issued a warrant or order based on a finding of flight. Notably, the Second Circuit heard oral argument on November 16, 2005, and issued a full, written decision less than a month later, on December 6.

Evidence from enforcement of these rules calls into serious question the efficacy of the bars as law enforcement tools. Data from the Social Security Administration reveals that two-thirds of the confirmed matches are from out-of-state warrants, creating greater difficulties in implementing the sanctions in a principled way. “People living with disabilities who are suspended from SSI for minor offenses allegedly committed in another state face almost insurmountable hurdles in addressing the underlying warrant due to lack of income, lack of representation, and limited ability to travel.”<sup>437</sup> Moreover, in only roughly 11% of all suspensions cases did law enforcement pursue the individual and make an arrest based on the hit.<sup>438</sup> Those persons who have committed the more serious offenses are more rigorously pursued by out-of-state law enforcement agencies, charged and sentenced, retaining their rights

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<sup>436</sup> The court cited BLACK’S LAW DICTIONARY 670 (8th ed. 2004), defining “flight” as “[t]he act or an instance of fleeing, esp. to evade arrest or prosecution”.

<sup>437</sup> *Id.*

<sup>438</sup> Gerald McIntyre, *Have You Seen a Fleeing Felon? Social Security Administration Targets SSI Recipients with Outstanding Warrants*, CLEARINGHOUSE REVIEW (2003).

to benefits upon release, while people charged with more minor offenses lose their public assistance when they are most vulnerable. For a regulatory scheme designed to punish flight and facilitate the apprehension of fugitives, such a low percentage of pursued and completed arrests puts in question the effectiveness of the “fleeing felon” regulations.

In addition, because of the wide variability of state criminal recordkeeping policies,<sup>439</sup> some errors in these hits are fairly common, including misidentification and non-felony hits. In this worst-case scenario, an individual’s SSI or PA benefits are suddenly suspended without even having been brought up on charges in the first place. The FBI’s National Crime Information Center (“NCIC”) is the predominant repository of warrant information used by SSA in evaluating eligibility. Only about 30% of outstanding warrants are actually reported to the NCIC because reporting by the states is “voluntary and selective.” Eleven states report all of their felony warrants to NCIC.<sup>440</sup> Additionally, SSA has sought matching agreements for the sharing of additional warrant information with Alaska, California, Colorado, Kentucky, Nebraska, Massachusetts, New Jersey, New York, Rhode Island, South Carolina, Tennessee, and Washington, to fill in the missing gaps. Outstanding warrants reported to SSA from these states lack comprehensiveness and are also difficult to access because of different formats of data, privacy considerations, and the lack of local and state level warrant information repositories.

## **B. POSSIBILITIES FOR CHANGE AND RECOMMENDATIONS**

This section outlines both broad and specific recommendations for different policy approaches to the disbursement of benefits to individuals interacting with the criminal justice system. Access to benefits should generally be seen as a public good because public benefits

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<sup>439</sup> SEARCH, The National Consortium for Justice Information and Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (Dec. 2005).

prevent homelessness, poverty, drug use, and health conditions from becoming chronic and exacting greater costs on the public. The prevailing trend, however, is to view these benefits as a privilege for qualifying individuals, to be suspended as an added punishment for criminal conduct, notwithstanding any period of incarceration, probation, or parole that is meted out by judicial order. In addition, the threat of suspension of benefits in theory could provide an incentive for lawful conduct; this idea was part of the inspiration for the “Fleeing Felon” legislation and Welfare Reform. The stated purpose of the Welfare Reform Act was in part to “end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage.”<sup>441</sup> Some policymakers justify collateral consequences, however extreme, to the extent that they encourage these goals.

Evidence suggests, however, that suspension or termination of benefits tends to exact harsh penalties that contribute to recidivism and hamper individuals from turning their lives around. Perhaps more alarming is the extent to which these hidden consequences impact the innocent families of people charged with crimes. It is also questionable the extent to which people respond to these types of disincentives. Also, the marginal disincentives provided by withholding of a government benefit are likely outweighed by the cost – such policies are ultimately self-defeating because they contribute to a cycle of crime and spiraling costs in law enforcement, corrections, and health care.

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<sup>440</sup> *Id.* The states are Connecticut, Maine, New Hampshire, Alabama, Florida, Georgia, North Carolina, Arkansas, New Mexico, Kansas, and Missouri.

<sup>441</sup> H.R. 3734, Sec. 401(a)(2), Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

## 1. Maintaining Continuity of Care

### a. Provide proper and immediate access to Medicaid to reduce recidivism and health-care costs

The National Institute of Justice has tracked the relationship between criminal conduct and the chronic health problems, drug abuse, and homelessness of the female inmate population.<sup>442</sup> Providing health care to incarcerated people, as well as those re-entering their communities, serves the dual function of discouraging antisocial and unhealthy behaviors and cutting costs associated with prosecuting drug offenses and fighting the spread of communicable diseases like HIV and hepatitis. The inadequacy of health care in the state and local correctional systems<sup>443</sup> only increases the need for continuity of care upon release. A recent study of women leaving New York City jails showed that women who enrolled in Medicaid in the year after release were less likely to be rearrested and less likely to report illegal activities than women without Medicaid coverage. The study also found that women with Medicaid coverage were more likely to have a regular source of health care, more likely to participate in residential drug treatment and less likely to report having gone without needed medical care in the last year than women without coverage.<sup>444</sup> Other studies indicate that Medicaid enrollment can reduce long-term health costs.<sup>445</sup>

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<sup>442</sup> Catherine Conly, *THE WOMEN'S PRISON ASSOCIATION: SUPPORTING WOMEN OFFENDERS AND THEIR FAMILIES*, NATIONAL INSTITUTE OF JUSTICE (1998).

<sup>443</sup> See Appendix on Mental and Medical Health, *infra*.

<sup>444</sup> Joshua Lee, David Vlahov & Nicholas Freudenberg, *Primary care and health insurance among women released from New York City*, J. OF HEALTH CARE FOR THE POOR AND UNDERSERVED 200, 207, 213 (2006), available at <http://www.reentry.net>); Nicholas Freudenberg, DrPH, Jessie Daniels, PhD, Martha Crum, MS, Tiffany Perkins, PhD, & Beth E. Richie, PhD, *Coming Home From Jail: The Social and Health Consequences of Community Reentry for Women, Male Adolescents, and Their Families and Communities*, AM. J. OF PUB. HEALTH 1725, 1732 (Vol. 95, No. 10 Oct. 2005) (finding similar results for men and women) (available at [www.reentry.net](http://www.reentry.net)).

<sup>445</sup> United Hospital Fund, *Estimating the Cost of Enrolling New York City's Eligible but Uninsured Adults in Medicaid* (2004).



**b. Implement a system whereby people entering jail or prison, currently receiving Medicaid, only have it suspended rather than terminated**

The United States Department of Health and Human Services and the New York City Commissioners of Health and Mental Hygiene, Corrections, Probation, Homeless Services, and the Human Resources Administration have strongly recommended that Medicaid eligibility be suspended rather than terminated upon incarceration to combat the risk of homelessness and establish a continuum of care. The Re-Entry Policy Council has advised that individuals eligible for Medicaid because of their enrollment in SSI only have their Medicaid terminated when their SSI eligibility has lapsed (upon 12 months of consecutive SSI suspension).<sup>446</sup> The Center for Medicaid and State Operations Disabled and Elderly Health Programs Group (“DEHPG”) has echoed this sentiment, stating that “Persons released from institutions are at risk of homelessness; thus, access to mainstream services upon release is important in establishing a continuum of care and ongoing support that may reduce the demand for costly and inappropriate services later.”<sup>447</sup> This simple suggestion is permitted by current federal and state law.

On the other hand, there is a concern that relaxing termination of benefits for incarcerated individuals will result in fraud and waste, as individuals will retain non-terminated Medicaid cards while in prison, where their vital health needs are ostensibly being met by the facility. The concern is that ineligible individuals in the community could use the Medicaid cards for their own health care needs. Suspension is a solution to these potential problems because it prevents reimbursement for services under a suspended Medicaid case, while permitting timely and efficient reinstatement upon release. The only impediment to suspending Medicaid cases is

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<sup>446</sup> See Letter of Glenn Stanton to State Medicaid Directors, Center for Medicaid and State Operations Disabled and Elderly Health Programs Group (May 25, 2004).

<sup>447</sup> *Id.*

the state's database, the Welfare Management System ("WMS"), which does not provide that eligibility option. On a more practical level, implementation of a new system of benefit suspension will require a recoding of the state agency database, and possibly retraining of agency personnel.

**c. Provide assistance to people in prison or jail for completion of benefit applications**

The State could actively facilitate Medicaid applications for all eligible people leaving jail or prison, either through Medicaid-only applications or attached to SNA. Local social services districts could regularly visit correctional facilities to process these applications, or pursue similar methods with the help of local social services providers. The State could actively facilitate these applications and change its policies that create practical and legal barriers for people in jail or prison. An example of this approach is the Pennsylvania Department of Public Welfare ("DPW")'s COMPASS (Commonwealth of Pennsylvania Access to Social Services) website, which allows individuals and community based organizations to screen for, apply for, and renew enrollment in a variety of social programs including Medicaid, Food Stamp Benefits, Cash Assistance, Long Term Care, and Low-Income Home Energy Assistance Program ("HEAP"). The DPW works in conjunction with Pennsylvania's Department of Corrections to allow people in prison access to the COMPASS portal and is also currently training corrections personnel to screen incarcerated persons for eligibility and to assist with applications.

Ultimately, increased access to SNA and Medicaid can reduce recidivism and long-term costs. One view is that SNA and Medicaid provide security for an underprivileged, economically disadvantaged population that represents the most cost-effective means of addressing vital social needs. The alternatives to consistent public benefits for this population are prolonged hospital stays by uninsured individuals at public expense, incarceration at a cost to

New York taxpayers of around \$32,000 per year per inmate for state prisons, \$54,000 per year per inmate for New York City jails,<sup>448</sup> and an overall degradation of public health.

There are problems with reform in this area. Incarcerated people lack access to the Internet, because Department of Corrections policy disallows it (although there is no statutory bar) and because of a lack of computer savvy and literacy among the incarcerated population.<sup>449</sup> Resources would need to be allocated for providing Internet portals and training incarcerated people to use a public benefits database created in the Pennsylvania model. Advocates for the rights of incarcerated persons would need to argue persuasively for access to public benefits sites, especially to counter the real public ambivalence about the necessity of welfare. The NPR/Kaiser/Kennedy School survey on Poverty in America found that 44% of those surveyed felt that welfare recipients could get by without federal assistance. 78% felt that there were jobs available for people on welfare who really want to work. 46% of those surveyed felt that poor people have it easier than non-poor people because they are able to receive benefits without doing anything, as opposed to 43% who felt that poor people still have hard lives because the government benefits do not go far enough to help them live decently.<sup>450</sup> Combined with understandable public animus for criminality, generating public support for investment in incarcerated individual's access to public benefits will be a difficult task. However, a recent

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<sup>448</sup> Women in Prison Project, *Women in Prison and Substance Abuse Fact Sheet*, at 2.

<sup>449</sup> See Public Employees Federation, *available at* [http://www.pef.org/fact\\_sheets/old2001/peffactsheet.htm#docs](http://www.pef.org/fact_sheets/old2001/peffactsheet.htm#docs) (“Almost 14,000 inmates are functionally illiterate and another 18,000 read below the eight-grade level. Over 35,000 inmates have not completed high school.”).

<sup>450</sup> NPR/Kaiser/Kennedy School Poll, *Poverty in America*, *available at* <http://www.npr.org/programs/specials/poll/poverty/staticresults.html>.

study conducted by the Sentencing Project has indicated that public condemnation of people convicted or accused of crime is not only changing but also is frequently overstated.<sup>451</sup>

Such programs are not without a cost, but a variety of options exist. The local social services district could visit correctional facilities at regular intervals or could establish a satellite office with WMS access to process applications directly. Local social and legal services offices could assist incarcerated individuals with applications and facilitate enrollment. To improve the debate, more extensive cost assessments should be completed to establish a link between access to public benefits and recidivism and track cost savings across government agencies. These assessments should also include forecasts of economic benefits of reduced recidivism, if any, in affected communities.

**d. Ensure availability of public assistance for the recently released**

The waiting periods for processing and approving benefits are a significant barrier in providing continuity of care and basic support during the critical period after release from jail or prison. Access to benefits increases stability, facilitates access to health care and numerous social services, decreases homelessness, and consequently can reduce recidivism. In 1993, the New York State Department of Social Services (now the Office of Temporary and Disability Assistance (“OTDA”)) recognized that the waiting period for processing and approval of benefits might be problematic for those released from prison, and issued an Informational Letter stating that local Social Services Districts should accept public assistance applications from people in prison 45 days before their release date so that benefits can begin on the date of release.<sup>452</sup> Currently, counties have discretion to accept or deny the applications. 93 INF-11 should be

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<sup>451</sup> The Sentencing Project, *Crime, Punishment and Public Opinion: A Summary of Recent Studies and Their Implications for Sentencing Policy*.

mandatory, regardless of the desire to give counties flexibility in administering public assistance programs, or at least, a public hearing should be held to air arguments opposing the letter's recommendation. Alternatively, N.Y. SOC. SERV. LAW § 153(8), which provides for an exception to the 45 day waiting period for disbursement of funds for "emergency circumstances" should be construed as including the tenuous circumstance of those newly released from prison. The advantages of continuity of care make a persuasive argument for a consistent state policy requiring the acceptance of public assistance applications from people in jail or prison 45 days before their release date, and allowing that time to count toward the 45 day waiting period, or that this matter be resolved by amendment to the Social Services Law.

**e. Expand the medication grant program for people emerging from jail or prison**

Acknowledging the lag time for restoration of benefits to recently released people, it is at the very least incumbent upon the state to provide a supply of medication for the relevant waiting period to individuals emerging from incarceration who have serious medical conditions. The Reentry Policy Council recommendation is for people leaving incarceration to be given a supply lasting at least from their last appointment within the facility to their first scheduled appointment upon return to the community. The Health Services Division of the Georgia State Department of Corrections provides people in prison with a minimum of two weeks worth of medication upon release, in addition to providing institutional nurses to assist with the scheduling of future appointments and reestablishment of Medicare benefits.

In New York, beginning in 1995, the Medication Grant Program ("MGP") has helped connect eligible individuals with mental illnesses to federal benefits upon release from prison, as well as providing MGP cards that contain prescription information and allow the eligible to

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<sup>452</sup> 93 INF-11, question 4.

receive medication from pharmacists in their area. To be deemed eligible for MGP, an individual must have a serious mental illness, be currently taking prescribed psychiatric medications, and appear to be eligible for Medicaid after release (though ultimate Medicaid eligibility can only be decided by the local department of social services).<sup>453</sup> In addition, the MGP is grant-funded and counties can opt out of participation.<sup>454</sup> Nevertheless, since the program's inception, almost 10,000 individuals have been enrolled and been able to receive medications upon release. A similar program, not tied to mental incapacity and available to all incarcerated persons with serious medical conditions, would significantly improve emerging individuals' chances for successful re-entry, by bridging the gap between release and resumption of benefits.

## 2. Community Reintegration

Another recommendation under consideration is expanding temporary absence protection from suspension of benefits. Temporary absence is a status that allows people absent from the home to continue to receive FA and other sources of public assistance funds. 18 NYCRR § 349.4. Frequently, individuals whose households receive family assistance are out of the household for periods of time, either due to incarceration, in-patient substance treatment programs, or because of flight from an abusive spouse. This temporary absence provision should

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<sup>453</sup> Reentry Policy Council, *Ensuring Timely Access to Medicaid and SSI/SSDI for People with Mental Illness Released from Prison*, available at [http://www.reentrypolicy.org/documents/State\\_NY\\_001.pdf](http://www.reentrypolicy.org/documents/State_NY_001.pdf).

<sup>454</sup> MGP is a grant program, established by Kendra's Law and administered by OMH (effective April 1, 2000), that provides funding to localities for medications to treat mental illness, and the services necessary to prescribe and administer such medications, during the period that an individual's eligibility for medical assistance is being determined. Grants may be used to provide medications and such related services to individuals for whom the process of applying for medical assistance has commenced within one week after discharge or release. The grants available under the legislation are subject to the approval of the State Commissioner of Mental Health based on a plan by the locality. The program also provides the ability to file Medicaid applications for inmates with mental illness prior to release from prison to the community. Releasees are given a Medication Grant Program (MGP) card that is valid for use at over 3,700 pharmacies statewide to access their psychiatric medications. Services to obtain psychiatric medications are also covered.

be expanded and better defined by statute to provide a mechanism for people whose benefits are suspended to appeal the SSA's ruling on suspension or termination of benefits. Provisions could explicitly allow temporary absence determinations to preserve shelter allowances, direct payment to landlords, and to preserve housing during short terms of incarceration. Relevant provisions to be amended include 18 NYCRR § 351.22 (sanctions for failure to appear in interviews, or determination of ineligibility), 18 NYCRR § 415.2 (eligibility for child care services), and 42 C.F.R. 431.221 (federal right to request for a fair hearing regarding benefits.)

Clarifying temporary absence requirements might allow more individuals to perpetrate fraud by claiming to have been absent due to exigent circumstances when they were merely negligent in attending to their responsibilities. Whether this fraud would actually occur, efforts to expand the protection of temporary absence would be vulnerable to such criticisms, but could be solved with proper documentation requirements and agency data sharing. These modifications promote the important goal of preserving stable housing and preventing homelessness during short periods of incarceration – especially important with rent regulated and subsidized housing.<sup>455</sup>

### **3. Modification of Statutory Bans on Benefits for Felony Warrants and Felony Drug Offenses**

OTDA could issue clearer guidance about the intent necessary to prove a claimant is “fleeing.” The SSA and OTDA should issue a clearer regulation or policy statement adopting the Second Circuit’s definition of intent as explained in *Fowlkes*. Individuals who are not present in the warranting jurisdiction may be absent for several reasons, aside from the presumed reason that they are actively evading prosecution. If the jurisdiction issuing a warrant states that they do not wish to extradite, then the claimant should not be considered “fleeing.” Fleeing an

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<sup>455</sup> See Chapter VI., Housing, *infra*.

abusive spouse should not be considered in flight from prosecution, because penalizing someone for removing oneself from an oppressive, and potentially deadly relationship will encourage battered spouses to remain in harm's way. To operate on the presumption that an individual is a willful fugitive, and subsequently to suspend public assistance which is a vital lifeline may be counterproductive in many cases. A 2002 General Accounting Office report on the "Fleeing Felon" regime found that 45,000 individuals had been identified and had their benefits suspended as a result, even though only 5,000 people were actually arrested. It is troubling that the GAO viewed these numbers as positive. The individuals who have their public benefits suspended are even more likely to return to prison in some capacity without this needed assistance. For the government to have knowledge of the location of supposedly dangerous fugitives, suspend their benefits, and do nothing further to apprehend or rehabilitate them is hard to defend.

The "Fleeing Felon" program truly produces some perverse outcomes, as where the benefits of two clients of a legal services office in Georgia were suspended because they had relocated to nursing homes and could not be found by the authorities. 90% of the 10% of "fleeing felons" who were actually arrested as a result of the program's reporting were charged only with nonviolent offenses or probation or parole violation. This means that only 1% of all outstanding warrants actually resulted in the arrest of violent offenders.<sup>456</sup> At a cost to the Office of the Inspector General of \$45,110,400 from August 2001 to June 2002, or \$9,000 per arrest, perhaps the effectiveness of the fleeing felon Regulations needs to be reassessed.

The SSA and OTDA should issue clearer standards for line-level benefits workers. At a minimum, if the originating jurisdiction of the warrant declines to extradite or enforce the warrant, then the agency should find no intent to flee. In addition, the agency should find no

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<sup>456</sup> McIntyre, *supra* note 438, at 476 n.12; Steve Berry, *Criticism of U.S. Felon Program Grows*, L.A. TIMES, Sept. 6, 2002, at B1.



intent to flee if the person is financially, physically, or mentally unable to return. The agencies should implement more intensive training and supervision concerning these standards and relevant fair hearing and court decisions.



## **V. FINANCIAL CONSEQUENCES**

### **A. THE LAW AND ITS EFFECTS**

#### **1. Overview**

The financial penalties imposed, directly or indirectly, as a result of a criminal conviction, are among the least recognized of the collateral consequences. Driven by a combination of philosophical purposes – punishment, reparation, cost recovery, revenue production and cost shifting – New York and the federal government have developed a vast array of fines, fees, costs, penalties, surcharges, forfeitures, assessments, and restitutions that are levied against people convicted of criminal offenses.

For the purpose of this report, we will focus on the financial consequences that are in the nature of penalties – imposed upon the criminal defendant as he or she proceeds through the criminal justice system as a result of a criminal conviction. Clearly there are many other financial consequences that are faced not only by defendants, but also their families, and even their communities. These “other” financial consequences, which are less in the nature of penalties, are no less compelling or consequential. Some will be noted in this report, however, their effects will not be analyzed and remedial action will not be proposed, as it would take us well beyond the scope of our immediate task.

The use of financial penalties has continued to grow in recent years. New financial penalties are seemingly added at each legislative session. Many of these financial penalties have been increased several times over the years, and are often viewed by the legislature in isolation from the other financial penalties that are also imposed.

Most directly connected to the punishment for the offense are the financial consequences of fines that are imposed as part of the sentence. In New York State, the provisions for fines are found in Penal Law Article 80 and Vehicle and Traffic Law Article 45. Under New York’s

Enterprise Corruption Act, Penal Law § 460.30(5), fines can be imposed upon a criminal defendant convicted under the statute for amounts not exceeding three times the gross value of the benefit gained, or three times the gross value of the loss caused, by the defendant’s criminal activity. Among the federal statutes which authorize fines the basic statute is 18 U.S.C. § 3571. A fine is a sentence to pay a fixed amount, and may be imposed in addition to a revocable sentence or a sentence of imprisonment. If a sentence of imprisonment is mandated, or if imprisonment is not mandatory but the felony is one defined in Article 220 (drugs), then a fine may only be imposed in addition to the sentence of imprisonment. Otherwise, it may be the sole sanction.<sup>457</sup>

**a. Mandatory surcharges**

All convictions in the State of New York carry with them a mandatory surcharge. Provision for these surcharges is made by Penal Law § 60.35 and Vehicle and Traffic Law § 1809. It is a fee that is imposed upon a defendant when he or she has been convicted of an offense. It is separate and distinct from any fine which the court may have imposed. The current surcharges, amounts, and statutory authority are listed below:

AMOUNT	APPLIES TO	STATUTE
\$250	VTL § 1192 DWI felony	VTL § 1809(1)(b)(I)
\$140	VTL § 1192 DWI misdemeanor	VTL § 1809 (1)(b)(ii)
\$25	VTL Article 9 infraction	VTL § 1809(1)(a)
\$45	Selected VTL offenses	VTL § 1809(1)(c)
\$25	Surcharge for any conviction VTL § 1192	VTL § 1809-c
\$250	Felony surcharge	Penal Law § 60.35(1)(a)
\$140	Misdemeanor surcharge	Penal Law § 60.35(1)(b)
\$75	Violation surcharge	Penal Law § 60.35(1)(c)

<sup>457</sup> See N.Y. PENAL LAW §§ 60.01(3)(b), 60.05(7).

AMOUNT	APPLIES TO	STATUTE
\$5	Proceeding in town or village	VTL § 1809(9)
5%-10% of total restitution	Designated surcharge paid to agency collecting restitution for collection and administration	Penal Law § 60.27(8)

**b. Fees**

In New York, there is a wide range of fees that are authorized by statute including the crime victims’ assistance fee, DNA Bank Fee, Sex Offender Registration Fee, termination of license revocation fee, termination of suspension fee, parole supervision fee, probation supervision fee for DWI offenses, supplemental sex offender victim fee, and incarceration fee. These fees are separate from any fines imposed by the court. These fees, amounts, and statutory authority are listed below:

AMOUNT	APPLIES TO	STATUTE
\$20	Felony offense Crime Victim Assistance Fee (CVAF)	Penal Law § 60.35(1)(a)
\$20	Misdemeanor offense CVAF	Penal Law § 60.35(1)(b)
\$20	Violation CVAF	Penal Law § 60.35(1)(c)
\$20	For VTL § 1192 felony offense CVAF	VTL § 1809(1)(b)
\$20	For VTL § 1192 misdemeanor offense CVAF	VTL § 809(1)(b)
\$5	For VTL Art 9 traffic infraction CVAF	VTL § 809(1)(a)
\$5	VTL offenses covered by 1809(1)(c) CVAF	VTL § 1809(1)(c)
\$50	DNA Databank fee: a person convicted of a designated offense as defined in Executive Law § 995(7) shall, in addition to a mandatory surcharge and crime victim assistance fee, pay a DNA databank fee	Penal Law § 60.35(1)(e)

AMOUNT	APPLIES TO	STATUTE
\$50	Sex offender registration fee (SORA): a person convicted of a sex offense as defined in Correction Law § 168-a(2) or a sexually violent offense as defined in Correction Law § 168-a(3)	Penal Law § 60.35(1)(d)
\$10	SORA change of address fee	Correctional Law § 168-b(8)
\$50	Termination of license revocation fee. If driver's license is revoked – application for re-issuance	VTL § 503(2)(h)
\$100	Termination of license revocation fee. If driver's license is revoked for an alcohol-related offense and driver is under 21	VTL § 503(2)(h)
\$25	Termination of license suspension fee	VTL § 503(2)(j)
\$100	Termination of license suspension fee – Zero Tolerance. If driver is under 21, license is suspended for an alcohol-related offense	VTL § 503(2)(j)
\$35	Termination of license suspension fee where suspension is for failure to appear, pay fine, penalty, or mandatory surcharge	VTL § 503(2)(j-1)(I)
\$30/month	Fee for parole supervision	Executive Law § 259-a(9)(a)
\$30/month	Fee for probation supervision (DWI - related)	Executive Law § 257-c
\$1/week	Incarceration Fee: The commissioner may collect from the compensation paid to a prisoner for work performed while housed in a general confinement facility an incarceration fee.	Correction Law § 189(2)
\$1,000	Supplemental Sex Offender Victim & Fee	Penal Law § 60.35(1)(b)

One of the fees noted above is the probation supervision fee authorized by Executive Law § 257-c. These types of fees are also known as correctional user fees. Correctional user fees are payments that a person convicted of an offense is compelled to make that generate revenue for

correctional purposes or that recover all or a portion of the costs of services provided. There are two types of correctional user fees: program fees and service fees.<sup>458</sup> By this statute the New York State legislature authorized every county and the City of New York to adopt a local law requiring individuals sentenced to a period of probation upon conviction of any crime under Article 31 of the Vehicle and Traffic Law (DWI) to pay to the local probation department an administrative fee of \$30.00 per month. These fees are not required to be turned over to New York State and can be kept by the local probation department. Needless to say many counties passed such local legislation in the early 1990's.

By the mid-1990's revenue from these administrative fees for supervising probationers was seen as revenue enhancement. Not wanting to be limited to supervision fees for DWI probationers only, a number of counties enacted local legislation authorizing the collection of administrative fees for supervising all probationers, and additional fees for such "services" as drug testing, preparation of pre-sentence reports, electronic monitoring and victim impact panels. For counties that were aggressive with the collection of these fees the money was rolling in, at a considerable burden to individuals on probation.

Across New York State concerns were raised as to the legality of these fees being collected pursuant to local laws. The question was presented to the New York State Attorney General by the County Attorney for the County of Essex. In an opinion issued on April 7, 2003, Opinion No. 2003-4, the Attorney General's Office concluded that by enacting Executive Law § 257-c the State had preempted the area of provision of probation services, and a county may not enact local legislation permitting fees for probation services except as specifically authorized by

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<sup>458</sup> John Howard Society of Alberta, *Correctional User Fees* (2001), available at <http://www.johnhoward.ab.ca/docs/userfees/cover.html>.

statute. Despite this opinion, some counties have maintained the practice of collecting probation fees that are not authorized by state law.

By recent legislation, Penal Law § 60.35(10), effective February 16, 2005, makes all of the surcharges and fees provided for in Penal Law § 60.35 applicable to “sentences imposed upon a youthful offender finding.” The same change was made in Vehicle and Traffic Law § 1809(10) to make defendant’s found to be youthful offenders subject to the surcharges and fees required by Vehicle and Traffic Law § 1809.

Effective November 18, 2004, New York was introduced to a new financial penalty. It is known as the Driver Responsibility Assessment. The Vehicle and Traffic Law has been amended to add a new section, § 1199. This section makes any person convicted of a violation of any subdivision of § 1192 (DWI or DWAI) of the Vehicle and Traffic Law or any person found to have refused a chemical test in accordance with § 1194 of the Vehicle and Traffic Law not arising out of the same incident as a conviction for a violation of any of the provisions of § 1192, liable for payment of a Driving Responsibility Assessment in the amount of \$250.00 per year for each of three years.

Vehicle and Traffic Law § 503(4) was added to also provide for an additional Driver Responsibility Assessment for any person who accumulates 6 or more points on his or her driving record for acts committed within any 18 month period. The amount of the assessment is \$100.00 per year for each of 3 years for the first 6 points on a driver’s record and an additional \$25.00 per year for each additional point on such driver’s record. The Driver Responsibility Assessment is imposed by the Commissioner of the Department of Motor Vehicles.

**c. Civil penalties**

For people convicted of certain alcohol or automobile insurance related offenses the Vehicle and Traffic Law provides for Civil Penalties, as set forth below:



AMOUNT	APPLIES TO	STATUTE
\$125	Zero Tolerance Law: For offenders under age 21 for alcohol-related offense	VTL § 1194-a(2)
\$750	Operating with no insurance or underinsured	VTL § 319(5)
\$300	Chemical test refused	VTL § 1194(2)(d)(2)
\$750	Second Chemical test refusal with alcohol within 5 years	VTL § 1194(2)(d)(2)
\$750	Chemical test refusal w/prior VTL § 1192 convictions w/in 5 years	VTL § 1194(2)(d)(2)

The creation and increase of fees, surcharges, or other financial penalties are legislated in a vacuum. They are seldom, if ever, seen by the legislature in the context of the sum of all penalties. Each increased financial penalty viewed in isolation appears to be a good idea for revenue production.

When viewed as a whole, the impact of the financial consequences are easily seen. For example, John, age 20, after refusing a chemical test, was convicted of Driving While Intoxicated, a class E Felony; and operating a motor vehicle with no insurance, a misdemeanor. He was sentenced to 5 years probation. The financial consequences of his conviction included:

Mandatory fine of no less than	\$1,000.00
Mandatory Surcharge	\$250.00
Crime Victim Assistance Fee	\$20.00
Probation Supervision Fee (\$30.00/Month)	\$1,800.00
Civil Penalty (Zero Tolerance DWI)	\$125.00
Fee for termination of license revocation	\$100.00
Surcharge for VTL § 1192 conviction	\$25.00
Civil Penalty for No Insurance	\$750.00
Civil Penalty for chemical test refusal with prior VTL § 1192 conviction within 5 years	\$750.00
Driver Responsibility Assessment	\$750.00
Court Ordered installation of ignition interlock devise (VTL § 1193 (1-a)(c)(I))	<u>\$2,175.00</u>
	\$7,745.00

The sum of the financial penalties for this Felony DWI conviction totaled \$7,745.00.

Another of the problems that arises with so many financial penalties scattered throughout different sections of the law is that it is difficult for either a Judge or defense counsel to locate and identify them all so that they can review them with the defendant. Yet, professional standards require that defense counsel be familiar with all of the collateral consequences of the sentence including fines, forfeiture, restitution, and court costs.<sup>459</sup> Defense counsel should also advise the defendant, sufficiently in advance of the plea, as to the possible collateral consequences.<sup>460</sup> Most defense counsel can barely keep track of the most common fees and surcharges. A pioneering effort to consolidate these financial penalties in one place as a useful tool for defense counsel was undertaken by the Center for Community Alternatives in 2004.<sup>461</sup>

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<sup>459</sup> See National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation, Guideline 8.2 (3d printing, 2001).

<sup>460</sup> See American Bar Association Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 14-3.2 (3d ed. 1993).

<sup>461</sup> See Center for Community Alternatives, *Sentencing for Dollars: Policy Considerations*, available at [http://www.communityalternatives.org/articles/policy\\_consider.html](http://www.communityalternatives.org/articles/policy_consider.html).

## 2. Restitution

Restitution is the financial consequence most directly related to the offense. Drawing upon one of the concepts of restorative justice, restitution and reparation in New York State are authorized by Penal Law § 60.27 as part of the sentence in addition to any of the dispositions authorized. Whenever the court requires restitution or reparation to be made, the court must make a finding as to the dollar amount of the fruits of the offense and the actual out-of-pocket loss to the victim caused by the offense. If restitution is made, the defendant is not required to pay the mandatory surcharge or crime victim assistance fee.<sup>462</sup> The restitution must be made prior to the time sentence is imposed, otherwise a court may impose both an order for restitution and an order for payment of the mandatory surcharge and crime victim assistance fee.<sup>463</sup> The Court of Appeals in *Quinones* was also of the opinion that Penal Law § 60.35 (4) provided a mechanism whereby a person could seek a refund of the mandatory surcharge and the crime victim assistance fee after payment of the restitution had been made.

In all cases where restitution or reparation is imposed directly, as part of the disposition, the court must also impose a designated surcharge of 5% of the entire amount of the restitution or reparation payment payable to the official or organization designated pursuant to Criminal Procedure Law § 420.10(8).<sup>464</sup> This designated surcharge shall not exceed 5% of the amount actually collected. Provision is also made in Penal Law § 60.27(8) for an additional surcharge of up to 5% upon application by the official or organization designated as the restitution agent satisfying the statutory criteria.

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<sup>462</sup> N.Y. PENAL LAW § 60.35(6); N.Y. VEH. & TRAF. LAW § 1809(6).

<sup>463</sup> *People v. Quinones*, 95 N.Y.2d 349 (2000).

<sup>464</sup> N.Y. PENAL LAW § 60.27(8).

All of the collection remedies provided for in C.P.L. §§ 420.10, 420.20, and 420.30 apply to the collection of restitution and reparation.<sup>465</sup>

### 3. Bankruptcy

The collateral effects of the financial penalties and civil sanctions of mandatory surcharges, fines, fees, and penalties are cyclical and far-reaching. While struggling to find employment, explain poor credit histories, civil judgments and unpaid debts, many people with a criminal history contend with the fact that the penalties imposed for their crimes will not be discharged and will remain on their credit reports until they are able to make payment in full. Under federal bankruptcy law, certain debts are not dischargeable in either Chapter 7 or Chapter 13 bankruptcies.<sup>466</sup> These include debts incurred through fraud, back child support and alimony, and for death or personal injury in DWI-related accidents.<sup>467</sup> Also non-dischargeable are debts for fines, penalties or forfeiture payable to and for the benefit of a governmental unit, and judgments of restitution.<sup>468</sup>

There are a number of debts under Chapter 7 that may be determined non-dischargeable, which means they could possibly be challenged by a creditor, but would be dischargeable under Chapter 13 (*i.e.*, debts incurred through fraud,<sup>469</sup> intentional torts and debts for willful and malicious injury by the debtor).<sup>470</sup> Back taxes and back child support must be paid in full in a

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<sup>465</sup> N.Y. PENAL LAW § 60.27(3).

<sup>466</sup> <http://www.newyorkbankruptcylaw.com/nondischarge.htm>.

<sup>467</sup> 11 U.S.C. §§ 523(a)(9), 523(a)(6).

<sup>468</sup> 11 U.S.C. §§ 523(a)(7), 523(a)(13).

<sup>469</sup> 11 U.S.C. §§ 523(a)(2), 523(a)(4) and 523(a)(6).

<sup>470</sup> 11 U.S.C. § 523(a)(6).

Chapter 13 payment plan. However, if there has only been a Chapter 7 bankruptcy filing, the individual will still be responsible for repaying these debts after discharge.

When restitution is ordered as part of a criminal sentence, any payment made by the defendant does not “limit, preclude or impair” the defendant’s civil liability for damages.<sup>471</sup>

#### **4. Collection**

The Penal Law, Criminal Procedure Law, Vehicle and Traffic Law, and the Executive Law all provide for the collection of many of the financial penalties attendant to a criminal conviction.

Pursuant to Penal Law § 60.35(5), when a person who has been convicted of a crime or a violation and has been sentenced to a term of imprisonment, has failed to pay the mandatory surcharge, sex offender registration fee, DNA bank fee, crime victim assistance fee or supplemental sex offender fee, the clerk of the court that rendered the conviction must notify the superintendent or the municipal official of the facility where the person is confined. The superintendent or municipal official must then collect the money owing from the “inmate’s funds” or such money as may be earned by the person in a work release program. Vehicle and Traffic Law § 1809(5) makes the same procedure applicable for unpaid Vehicle and Traffic cases where the mandatory surcharge or crime victim assistance fee is unpaid. Inmates’ funds “means the funds in possession of the inmate at the time of his admission into the institution, funds earned by him as provided in section one hundred eighty-seven of this chapter and any other funds received by him or on his behalf and deposited with such warden or superintendent in accordance with the rules and regulations of the commissioner.”<sup>472</sup>

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<sup>471</sup> See Gary Muldoon, *The Collateral Effects of a Criminal Conviction*, 70-Aug N.Y. ST. B.J. 26, 29 (July/Aug. 1998); N.Y. PENAL LAW § 60.27(6); see *Farber v. Stockton*, 131 Misc. 2d 470 (App. Term 1986).

<sup>472</sup> See N.Y. CORRECT. LAW §§ 116, 500-c.

In any case where cash bail has been posted by the defendant as the principal and is not forfeited or assigned, the court may order that the bail be applied towards payment of any order of restitution or reparation or fine.<sup>473</sup> Because the provisions of Criminal Procedure Law § 420.10 are made applicable to a mandatory surcharge, sex offender fee, DNA databank fee, and crime victim assistance fee by C.P.L. § 420.35(1), it is assumed that these charges can also be collected from the defendant's cash bail.

The court is given the authority by C.P.L. § 420.10(1)(c), to direct that payment of the fine, restitution or reparation and such designated surcharge be a condition of the sentence in any case where the defendant is sentenced to a period of probation. By the authority of C.P.L. § 420.35(1), this also applies to the collection of the mandatory surcharge, sex offender fee, DNA databank fee, and crime victim assistance fee.

A defendant who fails to pay the mandatory surcharge, sex offender registration fee, or DNA databank fee,<sup>474</sup> or fails to pay a fine, fee or surcharge,<sup>475</sup> faces possible incarceration, or additional incarceration. However, provision is made in C.P.L. § 420.10(5) for a defendant to challenge the incarceration based upon the inability to pay.

Penal Law § 60.35(8) provides that in the case of defendants sentenced to serve less than 60 days in jail or prison, at the time of imposition of the mandatory surcharge, sex offender registration fee, DNA databank fee, crime victim assistance fee, or supplemental sex offender victim fee, all courts must, and a town or village court may, issue a summons for that person to appear before the court if after 60 days from the date it was imposed it remains unpaid. The collection remedies that may be used by the court upon the appearance when payment has not

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<sup>473</sup> N.Y. CRIM. PROC. LAW § 420.10(1)(e).

<sup>474</sup> *Id.* § 420.35(1).

been made for any of the above fees except, apparently, the supplemental sex offender victim fee, are provided in C.P.L. §§ 420.10, 420.4 and 430.20 and are made applicable by C.P.L. § 420.35(1). The supplemental sex offender victim fee is not included in C.P.L. § 420.35(1).

For defendants sentenced to more than 60 days incarceration, as noted above, money may be collected from their “inmate’s fund.”<sup>475</sup> In addition, Penal Law § 60.35(8) makes the civil penalties of Penal Law § 60.30 applicable. It is unclear whether Penal Law § 60.30 provides additional collection remedies being written in the negative:

This article does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty and any appropriate order exercising such authority may be included as part of the judgment of conviction.

The amount owed for any fine, restitution or reparation becomes a judgment and subject to civil collection through application of C.P.L. § 420.10(6). The amount owed for any mandatory surcharge, sex offender registration fee, DNA databank fee, and a crime victim assistance fee imposed pursuant to Penal Law § 60.35(1) (which would appear to exclude the new \$1,000.00 supplemental sex offender victim fee), Vehicle and Traffic Law § 385(20-a) and § 401(19-a), or a mandatory surcharge imposed pursuant to Vehicle and Traffic Law § 1809 or § 27.12 of the Parks, Recreational and Historic Preservation Law also becomes a judgment subject to civil collection. C.P.L. § 420.35(1) makes the provisions of C.P.L. § 420.10(6) applicable to create civil judgment status for these debts.

The procedures for reducing all of the above financial penalties to judgment are set forth in C.P.L. § 420.10(6). The court issues an order containing the amount to be paid by the defendant. The court’s order must direct the district attorney to file a certified copy of such order

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<sup>475</sup> *Id.* § 420.10(3).

<sup>476</sup> N.Y. PENAL LAW § 60.35(5).

with the county clerk. The order must then be entered by the county clerk in the same manner as a judgment in a civil case. The entered order is deemed to constitute a judgment-roll and immediately after entry of the order the county clerk must docket the entered order as a money judgment pursuant to C.P.L.R. § 5018.

Not only is such judgment subject to all civil collection remedies, but it will also be reported on any credit report.

When a defendant can prove to the satisfaction of the court that due to indigence, the payment of all or part of a mandatory surcharge, sex offender registration fee or DNA databank fee will work an unreasonable hardship on the person or his or her immediate family, C.P.L. § 420.40 authorizes the court to defer the obligation to pay. However, even if deferred, the amount owed must be entered in an order, and become a judgment, by a procedure set forth in C.P.L. § 420.40(5) that tracks the language of C.P.L. § 420.10(6). As of 2004, by legislative prohibition, under no circumstances can the mandatory surcharge, sex offender registration fee, DNA databank fee or the crime victim assistance fee be waived.<sup>477</sup> The only exception that is made in that subdivision is that a court may waive the crime victim assistance fee if such defendant is eligible for youthful offender adjudication and the imposition of such fee would work an unreasonable hardship on the defendant, his or her family, or any other person who is dependent on such defendant for financial support.

The probation administrative fee of \$30.00 per month for persons on probation for DWI, as authorized by Executive Law § 257-c, is made subject to the civil proceedings for collections of C.P.L. § 420.10(6) by subdivision two of Executive Law § 257-c.

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<sup>477</sup> N.Y. CRIM. PROC. LAW § 420.35(2).



The civil judgment that arises as a result of the application of C.P.L. § 420.10(6) and § 420.40(4) may well have the most long lasting effects of any portion of the sentence. As a civil judgment it will appear on any credit report. This will affect the person against whom the judgment is filed in two ways. First, it may give rise to the inference that the applicant for a credit card, loan or mortgage is not credit worthy. Second, it is likely to adversely affect his or her prospects for employment.

### **5. Credit Reports and Employment**

Increasingly employers are checking the credit histories of prospective employees. Some employers routinely screen job applicants by obtaining background investigation reports from consumer reporting agencies. These reports contain information about civil judgments, unpaid debts and often contain information about the individual's credit rating, criminal history, and employment history.

Consumer reporting agencies are regulated by the New York Fair Credit Reporting Act (General Business Law § 380) and the federal Fair Credit Reporting Act (15 U.S.C. § 1681). A consumer reporting agency is authorized to furnish a consumer report for employment to prospective employers.

According to a 2003 survey conducted by the Society of Human Resource Management, there has been a considerable increase in the use of credit history background checks for employment screening purposes.<sup>478</sup> In the year 1996, 19% of employers ran credit checks. By 2003, 35% of employer's checked credit backgrounds.

Jobs providing access to money, from fast food cashiers to chief financial officers typically require credit checks. Jobs with government contracts and jobs that permit people to

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<sup>478</sup> Susan R. Hobbs, *Daily Labor Report*, THE BUREAU OF NATIONAL AFFAIRS, INC., May 3, 2004, at No. 84, S-7-8.

enter homes, whether to kill bugs, shampoo rugs, or care for the elderly increasingly use credit checks. Succinctly stated by Lewis Maltby, president of National Worknights Institute, a nonprofit organization in Princeton, New Jersey, “[t]he bottom line is that a bad credit report can cost you a job no matter how qualified you are.”<sup>479</sup>

This is a sobering thought in light of the fact that a year after being released 60% of people formerly incarcerated have not found legitimate employment.<sup>480</sup>

## 6. Paying in Prison

Pursuant to the authority of Penal Law § 60.35(5) the New York State Department of Correctional Services (“DOCS”) collects more than \$2.5 million annually from inmates’ funds – from inmates earning an average of one dollar a day – for the fees, fines and surcharges imposed by the courts.<sup>481</sup> That totals \$22 million collected from inmates between April 1995 and March 2003.<sup>482</sup> During this same period of time DOCS collected nearly \$15 million in fees that DOCS itself imposed.<sup>483</sup> These numbers do not include the \$20 million in inmate “collect call only” telephone commissions paid annually to the Department.

Prisoners can receive money paid into the inmate fund from family and from the state for their labor, earning on average \$1.00 a day.<sup>484</sup> According to the New York State Department of Correctional Services, of the \$131.2 million prisoners received from family or from their

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<sup>479</sup> Jennifer Bayot, *Use of Credit Reports Grows in Screening Job Applicants*, N.Y. TIMES, Mar. 28, 2004, at 1.

<sup>480</sup> Nora V. Demleitner, “*Collateral Damage*”: *No Re-entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1040 (2002).

<sup>481</sup> *DOCS Today*, Vol. 13, No. 4 (Apr. 2004).

<sup>482</sup> *Id.*

<sup>483</sup> *Id.*

<sup>484</sup> *Id.*

“employment” between April 1995 through March 2003, they paid 28% – or \$37 million – right back to the state.<sup>485</sup>

Directive Number 2788 issued by the State of New York Department of Correctional Services establishes the procedure for the collection of money to pay the obligations of the incarcerated person by prison officials, including all of the financial penalties referred to above and judgments for child support payments, “gate money,” and work release room and board fees. When a new encumbrance is established, all money in the “inmate’s fund” is applied to collection. If there are insufficient funds available in the “inmate’s fund” to pay off an encumbrance when it is established, then all of the money that is in the account is taken as payment. The balance due on the unsatisfied encumbrance is collected at a rate of 20% of any money earned while working inside the prison and 50% of any money sent into the “inmate’s fund,” including any money sent by family or friends for commissary. When two encumbrances are active at the same time, up to 40% of weekly earning and 100% of the money sent to the “inmate’s funds” from outside the prison is collected. For people on work release, after room and board costs are deducted, 100% of their wages are garnished if they have two or more outstanding judgments, and 20% if they have one.<sup>486</sup>

## **7. Paying on Parole and Probation**

As noted above, Executive Law § 259-a(9)(a) authorizes the Division of Parole to charge a supervision fee of \$30.00 per month for each person on parole, conditional release, presumptive release and post-release supervision. These fees are waivable based upon a showing of indigence and unreasonable hardship.<sup>487</sup> The rate of collection of these fees has been low

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<sup>485</sup> *Id.*

<sup>486</sup> *DOCS Today*, Vol. 13, No. 4 (Apr. 2004).

<sup>487</sup> N.Y. EXEC. LAW § 259-a(9)(a).

since the inception of the fee and has diminished over the years. In 1993 the collection rate was 10%. By 2001 it had dropped to 1%. For the period October 2000 to September 2001 \$179,498.00 was collected from the over 50,000 parolees statewide.<sup>488</sup>

According to the Division of Parole's data, during the period October 2000 to September 2001 58% of all people on parole in New York were unemployed, and 8% were employed part-time.<sup>489</sup> Although 66% of all people on parole were unemployed or only employed part-time, less than 1% of supervision fees were waived for indigence.<sup>490</sup>

In contrast to the low rate of collection of parole supervision fees, some counties have found the collection of probation supervision fees to be a "revenue enhancement" to vigorously pursue. For example, in 1999 alone, the County of Onondaga collected over \$212,000.00 for non-DWI probation supervision fees (\$171,072.00) and alcohol/drug testing (\$41,1136.00).<sup>491</sup> Onondaga County started collecting these fees in December 1, 1996 based upon the passage of Local Law 10 of 1996 and continues collecting to this day. This despite the fact that the New York State Attorney General issued an opinion in 2003 indicating that the state had preempted the collection of these fees and that a county may not collect such fees for probation services.<sup>492</sup> New legislation has been proposed to authorize probation to collect additional user fees.<sup>493</sup>

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<sup>488</sup> Division of Parole Briefing Book FY 2000-01.

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> *See* Onondaga County Probation Department 1999 Annual Report.

<sup>492</sup> If the rate of collection of fees remained constant between 1997 through 2004, Onondaga would have collected over \$1.6 million in unauthorized fees from its probationers.

<sup>493</sup> Senate Bill S. 2842-A proposes to amend Executive Law § 257-c to allow for the imposition of a \$30.00 per month probation administrative fee for any person convicted of any crime and sentenced to probation, and also for the imposition of an \$8.00 per test, drug testing fee and an \$8.00 per day electronic monitoring fee. Governor Pataki's Executive Budget for 2006 not only proposes to include the same amendments as Senate Bill S2842-A, but also proposes several additional fees including an amendment to Penal Law § 60.35 that adds a new \$25.00 probation fee for any person on probation who is subject to a DNA bank fee. The new fee would be paid to

## 8. Collateral Estoppel

There are various federal, state and municipal statutes (as well as some common law equitable remedies) that impose financial penalties, fines, forfeitures, restitution, disgorgement, and treble damages. Some are part of, or follow from the underlying criminal conviction such as fines or criminal forfeiture. Others are separate civil causes of action and/or remedies. Nevertheless, in the event of a criminal conviction, the civil liability may naturally follow because the convicted person will be collaterally estopped by her criminal conviction from contesting the essential elements of the claim against her. The elements of the doctrine of collateral estoppel, and some of the penalties, fines, forfeitures and other remedies that may be imposed upon a criminal defendant, either as part of the criminal proceeding or thereafter, are outlined below.

It is settled law that a litigant is collaterally estopped from re-litigating an issue that has been determined adversely to the litigant in a prior proceeding. Under New York law, the doctrine of collateral estoppel, or issue preclusion, “bars a party from re-litigating in a subsequent proceeding an issue clearly raised in a prior proceeding and decided against that party where the party to be precluded had a full and fair opportunity to contest the prior determination.”<sup>494</sup>

The Court of Appeals has opined that “no injustice is committed when criminal defendants are estopped from relitigating issues determined in conformity with [the normal]

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probation to compensate them for supervising and ensuring compliance with the payment of the \$50.00 DNA bank fee. Likewise, there is a proposed \$25.00 probation fee for any person on probation who is subject to a sex offender registration fee so that probation can ensure compliance with payment of that fee. The net result of these new fees would be that an individual would be required to pay a fee totaling \$50.00 so that probation could supervise the payment of two other fees. See analysis by Center for Community Alternatives *available at* [http://www.communityalternatives.org/justice\\_strategies/financial\\_penalties.htm](http://www.communityalternatives.org/justice_strategies/financial_penalties.htm).

<sup>494</sup> *Weiss v. Manfredi*, 83 N.Y.2d 974, 976 (1994).

safeguards [attendant to a criminal conviction].”<sup>495</sup> Moreover, a guilty plea is accorded the same preclusive effect in a subsequent civil proceeding as is a conviction after trial.<sup>496</sup> However, a conviction on the basis of a violation alone is not entitled to collateral estoppel effect in a subsequent civil action.<sup>497</sup>

There are two requirements to invoke collateral estoppel: (1) “[t]here must be an identity of issue which was necessarily decided in the prior action and is decisive of the present action” and (2) “there must have been a full and fair opportunity to contest the decision now said to be controlling.”<sup>498</sup> The burden of demonstrating that the issue in the second action is identical and necessarily decided in the prior action is upon the moving party, while the burden of establishing that there was not a full and fair opportunity to litigate the issue rests on the party resisting the application of collateral estoppel.<sup>499</sup>

However, “[a] finding of fact in an earlier proceeding, even though put in issue by the pleadings there, is not binding in a later proceeding, if the finding of fact was not essential to the determination of the earlier proceeding.”<sup>500</sup> Thus, “‘gratuitous’ findings, that is, those not essential to the determination, lack a preclusive effect,” and “an issue is ‘decisive in the present action’ if it would prove or disprove, without more, an essential of element of any of the claims

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<sup>495</sup> *S.T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300, 305 (1973).

<sup>496</sup> *United States v. Private Sanitation Indus. Ass’n*, 811 F. Supp. 808, 813 (E.D.N.Y. 1992), *aff’d*, 995 F.2d 375 (2d Cir. 1993).

<sup>497</sup> *Gilberg v. Barbieri*, 53 N.Y.2d 285, 292-94 (1981).

<sup>498</sup> *Schwartz v. Public Adm’r*, 24 N.Y.2d 65, 71 (1969).

<sup>499</sup> *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 456 (1985).

<sup>500</sup> *Menna v. Joy*, 86 A.D.2d 138, 141 (1st Dep’t 1982); *see also Bland v. New York*, 263 F. Supp. 2d 526, 551 (E.D.N.Y. 2003).

set forth in the complaint.<sup>501</sup> Furthermore, collateral estoppel does not attach to determinations made as a matter of law in the prior proceeding.<sup>502</sup>

A determination whether the first action genuinely provided a full and fair opportunity requires consideration of the realities of the prior litigation.<sup>503</sup> The doctrine of collateral estoppel only applies where the issue sought to be precluded was thoroughly explored in the prior proceeding, and the resulting judgment has some indicia of correctness.<sup>504</sup> Accordingly, under New York law, whereas a conviction for a felony or misdemeanor is accorded collateral estoppel effect in a subsequent proceeding because of all the constitutional safeguards that must accompany the criminal proceeding,<sup>505</sup> a conviction for a mere violation does not carry with it the same protections, and therefore may not be afforded preclusive effect because the litigant did not have a full and fair opportunity to contest the facts.<sup>506</sup>

Notably, the collateral estoppel effect of a criminal conviction in state court will also be binding on the litigant in a subsequent federal action.<sup>507</sup> Under the full faith and credit statute,<sup>508</sup> a federal court is required to accord a state court judgment the same preclusive effect that the judgment would receive in state court.<sup>509</sup>

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<sup>501</sup> *Bland*, 263 F. Supp. 2d at 551.

<sup>502</sup> *Koch v. Con Edison Co.*, 62 N.Y.2d 548, 555 (1984), *cert. denied*, 469 U.S. 1210 (1985); *Mazzoeki v. State Farm Fire & Cas. Corp.*, 1 A.D.3d 9 (3d Dep't 2003).

<sup>503</sup> *Halyalkar v. Bd. of Regents*, 72 N.Y.2d 261, 269-70 (1988); *Schwartz*, 24 N.Y.2d at 72.

<sup>504</sup> *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986); *Bland*, 263 F. Supp. 2d at 552.

<sup>505</sup> *S.T. Grand*, 32 N.Y.2d at 304-05.

<sup>506</sup> *Gilberg*, 53 N.Y.2d at 292-94; *see also Private Sanitation Indus. Ass'n*, 811 F. Supp. at 813-14.

<sup>507</sup> *Private Sanitation Indus. Ass'n*, 811 F. Supp. at 813.

<sup>508</sup> 28 U.S.C. § 1738.

<sup>509</sup> *Migra v. Warren City Sch. Dist. Bd.*, 465 U.S. 75, 81 (1984).

In light of the foregoing, a defendant who is convicted after trial of a felony or misdemeanor will be collaterally estopped from contesting in a subsequent civil proceeding or administrative hearing any facts that have been determined adversely against him in the prior criminal action. Moreover, even without a trial, a plea of guilty will estop that same criminal defendant from contesting the factual basis for the various elements of the underlying crime to which he pled guilty. Indeed, the criminal defendant pleading guilty would be further precluded from contesting certain facts which he specifically admitted in his allocution.

## **9. Forfeitures**

### **a. In rem forfeiture**

There are basically two types of forfeiture: in rem and in personam. In rem forfeiture is based on the ancient belief that the “thing” (for example, the instrumentality of the crime) can be punished for doing wrong, and forfeited to the government. The action therefore typically lies against the res (or thing) itself, with the criminal defendant, or any other person with an interest in the res, needing to intervene in that action by filing a verified claim stating his interest.

Because the verified claim itself may constitute a false statement to the government, and because the criminal defendant may be deposed regarding how he obtained his interest in the res, thereby risking a waiver of his Fifth Amendment right against self-incrimination, as a practical matter, criminal defendants are usually precluded from contesting a civil in rem forfeiture. Moreover, in the context of a civil forfeiture action, the court can draw an adverse inference against a claimant who asserts the Fifth Amendment.

Historically at least, because it was the res that was deemed to have done wrong, there has often been no correlation between the severity of the in rem forfeiture and the culpability of the criminal defendant (for example, the forfeiture of an entire home used to facilitate a relatively minor drug transaction). At least federally, however, law is emerging that requires that there be



some proportionality between the underlying criminal activity and the amount and value of the res to be forfeited.

Finally, the fact that a criminal defendant may have already been punished for the crime, including by the imposition of monetary sanctions, does not protect him from losing his interest in the res in a subsequent civil forfeiture. Because the defendant in the in rem action is the thing, not the defendant who has already been convicted and punished, no double jeopardy applies. The emerging law, however, does recognize that civil forfeiture may constitute a punishment, and accordingly, a defendant who has already been punished (for example, by a large fine in the criminal case), may seek to limit the extent of the subsequent civil forfeiture by relying on the Excessive Fines Clause of the Eighth Amendment.

The federal statutes that authorize in rem civil forfeitures include: the Civil Forfeiture statute, 18 U.S.C. § 981 (which, among other things, allows the forfeiture of the proceeds of various predicate crimes); the forfeiture provisions of the Controlled Substances Act, 21 U.S.C. § 881; the forfeiture provisions of the Currency and Foreign Transactions Reporting Act, 31 U.S.C. § 5317(c); the provision for the enforcement of Foreign Confiscation Orders, 28 U.S.C. § 2467; and the statutory provisions authorizing forfeiture of conveyances used in offenses involving undocumented aliens, 8 U.S.C. § 1324(b).

Under New York law, there are several in rem forfeiture statutes aimed at vehicles, equipment and conveyances involved in specific criminal activity including N.Y. Penal Law § 410 (in rem civil forfeiture of equipment used to produce, and vehicles used to transport obscene materials); N.Y. Penal Law § 415 (in rem civil forfeiture of conveyances used to transport certain gambling records); and N.Y. Public Health Law §§ 3387-3388 (in rem civil forfeiture of

controlled substances, and of conveyances used in connection with the transportation of controlled substances under circumstances constituting a felony).

**b. In personam forfeiture**

In personam forfeiture is directed against the individual defendant himself and his property; however, even if the specific property involved in the crime cannot be located, the in personam nature of the proceeding typically permits the government to forfeit substituted assets instead.

At least federally, in personam forfeiture is usually included with the counts of a criminal indictment. In this regard, the Supreme Court has determined that criminal forfeiture is an element of the sentence to be imposed after conviction and is not a substantive charge in and of itself.<sup>510</sup> The amount of the criminal forfeiture is therefore hopefully proportional to the underlying crime. Because it is determined as part of the same criminal action, there are no issues as to double jeopardy, although a criminal forfeiture may still be subject to challenge under the Excessive Fines Clause.

The federal statutes authorizing in personam criminal forfeitures include the Criminal Forfeiture Statute, 18 U.S.C. § 982; the Racketeer Influenced and Corrupt Organizations (“RICO”) Act, 18 U.S.C. § 1963,<sup>511</sup> and the Comprehensive Drug Abuse and Control Act 21 U.S.C. § 853.

In New York State, the Penal Law permits the forfeiture of property in a criminal prosecution following the defendant’s conviction of a felony controlled substance offense.<sup>512</sup>

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<sup>510</sup> *Libretti v. United States*, 516 U.S. 29, 38-39 (1995).

<sup>511</sup> The RICO statute also allows private individuals to seek treble damages against a RICO defendant, whether or not it is preceded by a criminal conviction. *See* 18 U.S.C. § 1964(c).

<sup>512</sup> N.Y. PENAL LAW § 480.

New York State also recognizes in personam forfeiture for all other felony offenses, but unlike federal law, the forfeiture allegations generally are not charged as part of the criminal indictment, but rather are asserted by way of a subsequent civil proceeding. Thus, New York law allows a prosecutor to pursue a separate civil action for in personam forfeiture against a defendant. However, except in drug-related cases, the forfeiture action may only be maintained after there has been a criminal conviction.<sup>513</sup> In the case of drug-related offenses, by contrast, the prosecutor need only prove by clear and convincing evidence that the property was the proceeds of, or instrumentality of, the drug-related offense to be entitled to forfeiture, even if there has been no criminal conviction.<sup>514</sup>

In a limited number of circumstances, New York also recognizes criminal in personam forfeiture. Thus, in felony drug cases, New York prosecutors need not bring a separate civil forfeiture action in order to confiscate the defendant's property, but can seek the forfeiture along with the substantive counts of the indictment.<sup>515</sup> Similarly, New York's Enterprise Corruption Act (the so-called "Little RICO Act") contains a criminal in personam forfeiture provision modeled on that in the federal RICO statute.<sup>516</sup>

### **c. Local and administrative forfeitures**

In addition to the foregoing, there are a web of other statutes, local ordinances and administrative regulations, too numerous to mention, that permit the administrative and/or judicial forfeitures of property. As its name implies, administrative forfeiture occurs when a regulatory or law enforcement agency is given authority by statute to seize and/or forfeit to the

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<sup>513</sup> See N.Y. C.P.L.R. § 13-A.

<sup>514</sup> *Id.*

<sup>515</sup> See N.Y. PENAL LAW § 480.

<sup>516</sup> See *id.* § 460.30.

government money or property, that, for example, constitutes the proceeds of prohibited activity or was used to facilitate the prohibited activity. Often, there are procedures whereby a claimant can challenge an administrative forfeiture judicially.

There are also numerous local laws and ordinances that allow for the seizure and forfeiture of property used in violation of law, most commonly, with regard to the forfeiture of motor vehicles used by a driver who is impaired by alcohol or drugs, is engaged in drug offenses or prostitution, or otherwise acting in violation of law.<sup>517</sup> Many of these statutes and ordinances are poorly drafted and their constitutionality is questionable.

For example, in *Krimstock v. Kelly*,<sup>518</sup> the Second Circuit Court of Appeals found unconstitutional NYC Code 14-140, which allows the seizure and forfeiture of “all property . . . suspected of having been used as a means of committing a crime or employed in aid or furtherance of crime . . .”<sup>519</sup> Typically, the provision is used to seize and forfeit vehicles driven by operators who are impaired by drugs or alcohol. The Second Circuit held that, because the Code failed to provide owners with a prompt, post-seizure procedure to challenge the government’s probable cause for the initial seizure and the subsequent retention of the vehicle pending a final determination of forfeiture, the Code’s provisions violated both the Fourth and Fourteenth Amendments of the United States Constitution.<sup>520</sup>

In *Nassau County v. Canavan*,<sup>521</sup> the New York Court of Appeals, following the lead of *Krimstock*, determined that Nassau County’s civil forfeiture statute was unconstitutional under

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<sup>517</sup> See, e.g., New York City Administrative Code (“NYC Code”) 14-140; Nassau County Administrative Code 8-70(g)(3).

<sup>518</sup> 306 F.3d 40 (2d Cir. 2002), *cert denied*, 539 U.S. 969 (2003).

<sup>519</sup> See NYC Code 14-140.

<sup>520</sup> *Krimstock*, 306 F.3d at 68-70.

<sup>521</sup> 1 N.Y.3d 134 (2003).

both the federal and state Constitutions because it failed to provide for a prompt post-seizure hearing before a neutral magistrate.<sup>522</sup> The Court further found the Nassau statute to be unconstitutional as written for failing to provide for limitations on the forfeiture of the interests that innocent owners might have in the subject property.<sup>523</sup>

#### **10. Restitution, Disgorgement and Other Financial Penalties**

In addition to the normal penalties imposed in the context of the criminal proceeding, there are further financial penalties and consequences that can follow a criminal conviction, particularly given the collateral estoppel impact of prior conviction when trying to defend oneself in a subsequent civil action, whether that action is with the government or private litigants.

For example, the federal RICO Act<sup>524</sup> can subject a criminal defendant to substantial financial exposure even beyond that imposed directly by his conviction. Under RICO, the defendant may be exposed to private litigants for treble damages for injuries flowing from the predicate criminal acts, or in a case brought by the government, for broad injunctive relief, including prohibitions from engaging in particular business activities, and directives to disgorge all illicit profits for payment to the United States or into a fund to support broad injunctive relief. Under the New York's Enterprise Corruption Act ("Little Rico"), the defendant may be liable for fines or forfeitures as set forth further above.

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<sup>522</sup> *Id.* at 142-45.

<sup>523</sup> *Id.* at 143-44. Subsequent to the Court of Appeals' decision in *Canavan*, the Nassau County Supreme Court determined that the County's amended forfeiture statute still constituted an unconstitutional taking of private property by failing to allow for the interests of innocent owners. *See County of Nassau v. Pereira*, N.Y.L.J., Aug. 30, 2005, at 16 (Sup. Ct. Nassau Co. Aug. 18, 2005).

<sup>524</sup> 18 U.S.C. § 1961.

As another example, if the victim of a defendant's fraud is the federal government, the federal False Claims Act<sup>525</sup> permits the government to bring a civil action seeking fines of between \$5,000 and \$10,000 for each false claim filed, as well as recovery of three times the government's damages.

## **11. Additional Financial Consequences**

In addition to the direct financial penalties imposed by courts or administratively, a person with a criminal conviction faces many other collateral consequences that have financial implications. This includes such consequences as diminished earning capacity, diminished employment prospects, loss of professional licenses, bars from bidding on public contracts, bars from some public and subsidized housing as well as difficulties in obtaining public benefits. These issues are addressed in other chapters of this report. Several of these "other" financial consequences are addressed here to recognize their significance, but no analysis or recommendations are offered in this chapter.

### **a. Child support arrears**

A significant financial consequence faced by formerly incarcerated parents is the accrual of child support arrears during the time they were in prison. The problem is caused by the position taken by New York courts that prohibits downward modification orders while a person is in prison. The rationale for this court constructed policy is that the imprisoned parent's "current financial hardship is solely the result of his wrongful conduct."<sup>526</sup> As a consequence of this policy, many previously incarcerated parents are faced with massive arrears that accumulated during a period of time when they had absolutely no ability to make payments.

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<sup>525</sup> 31 U.S.C. § 3729.

<sup>526</sup> *Knights v. Knights*, 71 N.Y.2d 865, 865 (1988); *Onondaga County Dep't of Soc. Servs. ex. rel. Gloria T. v. Timothy S.*, 294 A.D.2d 27 (4th Dep't 2002).

Once released these accumulated arrears create additional financial problems. This issue is addressed comprehensively in the chapter of this report on family reunification.

**b. Creation of civil liability**

Several statutes create civil liability related to criminal offenses. General Obligations Law Article 11 creates civil causes of action for victims of the illegal sale of intoxicating liquor, victims injured by the illegal sale of controlled substance, victims of checks drawn on insufficient funds, and for mercantile establishments who are the victim of a larceny. Article 12 of General Obligations Law, known as “the drug dealer liability act” creates a cause of action, and imposes liability on any person convicted of dealing drugs who causes damage to another person that is the result of the use of an illegal drug.<sup>527</sup>

New York was the first state to enact a “Son of Sam” law in 1977, in response to the public outrage that resulted when offenders were seen to profit from the notoriety resulting from their own crimes. Prompted by the events surrounding the arrest of serial killer David Berkowitz, a.k.a Son of Sam, the original Son of Sam law directed all proceeds from the sales of “books, magazines, motion pictures,” or other media exploitations of crimes, otherwise payable to the convicted perpetrator, to be paid to the Crime Victims Board (“CVB”) for the benefit of victims of the crime.<sup>528</sup>

In June 2001 Executive Law § 632-a was amended and the depth and breadth of its scope was greatly extended. Significantly, the law now allows crime victims to sue the convicted criminal defendants who caused them harm for *any* money and property that the defendant receives from *any* source (including money earned for daily labor while incarcerated), even

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<sup>527</sup> See N.Y. GEN. OBLIG. LAW § 12-103. Liability established. A person who knowingly participates in a drug market within this state and has been convicted of a crime for such participation in a drug market and is a drug trafficker shall be liable for civil damages as provided in this article.

<sup>528</sup> See N.Y. EXEC. LAW § 632-a.

though the seven year statute of limitation has run, by expanding the statute of limitation to run for up to three years from the time of the discovery of any funds in the possession of the convicted person.<sup>529</sup> The financial and proprietary interests of a “convicted person” are subject to collection under the Son of Sam Law, if the funds were received anytime during his sentence, including probation, parole, and post-release supervision.<sup>530</sup> Specified crimes include convictions for violent felony offenses as defined in Penal Law section 70.02, class B felonies, and any felony categorized as a felony in the first degree, grand larceny in second and fourth degrees, and possession of stolen property worth more than \$50,000.<sup>531</sup> Excluded from the list of offenses are drug and marijuana charges, welfare fraud, the criminal conversion of prescription medications and prescriptions, gambling and prostitution.<sup>532</sup> Additionally, when a payment of \$10,000 or more is received by a criminal defendant, from any source (excluding child support and earned income), the CVB must be notified.<sup>533</sup> In turn, the CVB notifies crime victims of their right to bring civil actions and recover damages. These civil actions must be commenced within three years of having received notification.<sup>534</sup>

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<sup>529</sup> *Id.*; see also Al O’Connor, “Legislative Review 2001” Public Defense Backup Center Report, Vol. XVI, Number 5. As a rule, under C.P.L.R. § 215(8), crime victims have one year to commence a civil action against a defendant, once a criminal action has been commenced against the same defendant, concerning the same event or transaction from which the civil action arose. C.P.L.R. § 213-b extended the time limitation within which a crime victim may commence a civil action to recover damages from a defendant convicted of that crime to seven years from the date of the crime. The Son of Sam Law indefinitely extended the Statute of Limitations for recovery by permitting crime victims and their families to commence a civil action within three years of the discovery of any monetary or proprietary interests of the convicted person.

<sup>530</sup> See N.Y. EXEC. LAW § 632-a(1)(c)(ii).

<sup>531</sup> See *id.* §§ 632-a(1)(e)(i)(A)-(B), (1)(e)(i)(c).

<sup>532</sup> *Id.* § 632-a(1)(e)(ii); see also Anthony J. Annucci, *Anatomy of the Modern Prisoners’ Rights Suit: New York’s Expanded Son of Sam Law and Other Fiscal Measures to Deter Prisoners’ Suits While Satisfying Outstanding Debts*, 24 PACE L. REV. 631, 646 (Spring 2004).

<sup>533</sup> N.Y. EXEC. LAW §§ 632-a(1)(c) and (2)(a).

<sup>534</sup> *Id.* § 632-a(3).



Moreover, anyone who receives funds on behalf of a convicted person is required to notify the CVB of the payment. Mandatory reporting is required of the Department of Correctional Services and local correctional facilities. Failure to do so by anyone with knowledge or information of such payment will result in the imposition of severe fines and penalties.

Once the crime victim notifies the CVB that she is interested in bringing suit against the defendant, to avoid wasting the defendant's assets, the CVB will seek provisional remedies on behalf of the crime victim, including attachment and injunction.<sup>535</sup> All judgments obtained pursuant to the Son of Sam Law, in excess of the first one thousand dollars deposited in an inmate account, and from up to 90% of compensatory damages and 100% of punitive damages awarded to criminal defendants in civil suits, can be accessed as compensation for victims of criminal offenses.

Executive Law § 634 creates a subrogated claim on behalf of New York State against any person who caused injury to a victim for whom the Crime Victims Board makes an award.

**c. Access to the courts and filing fees**

Special provision is made by C.P.L.R. § 1101(f) to allow for courts to permit the payment of reduced filing fees for a person who is incarcerated. These fees can be assessed against the persons "inmate account" at the institution where they are confined.

**d. MCI collect telephone calls**

People in New York who are sentenced to prison, often serve out their sentence at correctional facilities hundreds of miles from their home communities. Their spouses and children, parents and grandparents often do not have the resources necessary to travel these

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<sup>535</sup> *Id.* § 632-a(6)(a).

distances, making in-person visits an infrequent luxury. Under these circumstances, the telephone becomes the primary means for families to keep in touch with their loved ones in prison.

For anyone having a telephone conversation with a friend or family member in a New York State prison, means being a customer of MCI. Since 1996, MCI has had an exclusive contract with DOCS. MCI has had a virtual monopoly over prison phone calls. Every collect call from a person in prison costs \$3.00 plus 16 cents a minute. This is more than six times the cost of a regular phone call.<sup>536</sup> Each year, New York State receives more than 57% of all the money generated by the MCI prison phone calls.<sup>537</sup> This totals more than \$20 million per year.<sup>538</sup>

Assembly Bill A07231 has been proposed to address this problem by providing for the use of a debit card system and reasonable collect call system rates.

The American Bar Association, Criminal Justice Section recently recommended that prison and jail inmates be afforded reasonable opportunity to maintain telephonic communication with the free world with an appropriate range of options at the lowest possible rates. The resolution was approved by the House of Delegates in 2005.

**e. Travel costs**

Because people in prison are generally housed hundreds of miles from their communities, families may be forced to spend considerable portions of their meager resources to visit their loved ones.

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<sup>536</sup> Errol Louis, *Innocent Victims*, N.Y. DAILY NEWS, Nov. 16, 2004, at 51.

<sup>537</sup> *Id.*

<sup>538</sup> *DOCS Today*, Vol. 13, No. 4 (Apr. 2004).

**f. Prisoners of the census**

Communities suffer financial consequences in state and federal funding as a result of the census counting people where they are incarcerated and not where they come from. This financial consequence is analyzed in detail in a recent law review article authored by Eric Lotke and Peter Wagner.<sup>539</sup>

**g. Participation fees**

Any person released from prison on temporary release, participating in work release, is charged 20% of his or her net work release wages as a participation fee (room and board). Day reporting fees are charged against the inmate account at the rate of \$10.00 per week.<sup>540</sup>

**B. POSSIBILITIES FOR CHANGE**

**1. General Thoughts**

The imposition of financial penalties has rarely been addressed as a collateral consequence of a criminal conviction by researchers, legislators, or policy analysts.<sup>541</sup> The barriers to re-entry caused by the imposition of financial penalties and user fees have for the most part been ignored.

Society has dual – and sometimes conflicting – goals of defraying some of the cost of maintaining the criminal justice system by placing that burden on people who have been convicted of criminal offense and also promoting the successful reintegration of people returning to their communities from prison as self-supporting, law abiding citizens. Striking a balance between these two goals can only be accomplished after careful consideration of the policy

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<sup>539</sup> Eric Lotke & Peter Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*, 24 PACE L. REV. 587-607 (2005).

<sup>540</sup> New York State Dep't of Correctional Services Directive #2788.

<sup>541</sup> See Center for Community Alternatives, *Sentencing for Dollars: Policy Considerations*, available at [http://www.communityalternatives.org/articles/policy\\_consider.html](http://www.communityalternatives.org/articles/policy_consider.html).

issues at stake and a clear understanding of who it is that is being asked to shoulder this financial burden.

One study, in California, looked at the wide range of fines, fees, surcharges, penalties, and assessments levied on criminal defendants in that state. This study identified over 3,100 separate penalties scattered throughout 27 different government codes.<sup>542</sup> Their concern was primarily focused on inept and unequal fee collection practices. The report of this California Performance Review Committee recommended the consolidation of all of these penalties into one more moderately adjusted fee. This would aid in a more uniform collection practice, and of course give rise to a more realistic approach to the amount any one person could be called upon to pay.

One of the policy goals in assessing financial penalties is to strike the proper balance between shifting costs along to offenders when the penalty bears some relationship to the offense, and the need to promote successful re-entry by eliminating undue financial burdens and negative credit histories, which create barriers to employment. It is beyond argument that there are difficult times ahead for people returning from prison, particularly those with added financial burdens imposed as a result of their criminal conviction. Creating an environment where people with criminal convictions find it even more difficult to find or keep employment is counterproductive. If the overarching goal is to promote public safety, then budgetary concerns may have to give way to long-term prospects for crime reduction through the successful reintegration of people who have served their prison sentence.

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<sup>542</sup> See The Report of the California Performance Review, *Issues and Recommendations* (CPR Vol. IV): GG34 Simplify and Consolidate Court-Ordered Fines (2004), available at <http://www.cpr.ca.gov/report/cprprt/issec/gg/part/gg34.html>.

**a. Arguments in support of financial penalties**

A number of the arguments that are advanced in favor of imposing financial penalties or consequences on people who are convicted of crimes are grounded in revenue production. They are seen as a way to balance the budget. By imposing fees on people who commit crimes, it is seen as a justifiable cost shifting from the “taxpayer” to the “offender.”<sup>543</sup> From a political perspective it is seen as one more way to prove that government is “tough on crime.” It is also a way to support community corrections. There are even those who argue that there is a benefit to the person who is being called upon to pay these fees. That is, they will benefit from the program that they help to fund. Finally, there is the argument that addresses the ultimate goal of a criminal justice system - public safety. The logic is that the imposition and collection of these fees and restitution promotes a greater sense of responsibility.

**b. Arguments favoring the limitation of financial penalties**

As awareness about collateral consequences and re-entry has developed, the arguments against the imposition of excessive financial penalties have mounted. The imposition of financial penalties on poor defendants is seen as creating a monetary burden that is overwhelming.<sup>544</sup> The civil judgments that aid in the enforcement of these penalties give rise to other collateral consequences: bad credit, inability to obtain financing, and poor credit histories that are used by prospective employers to screen out job applicants. There are other possible negative consequences of imposing these penalties. One argument suggests that individuals burdened with these fees are induced to commit new crimes, while others simply abscond from supervision under the pressure of collection efforts. Parole and probation revocations for a new

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<sup>543</sup> John Howard Society of Alberta, *Correctional User Fees* (2001), available at <http://www.johnhoward.ab.ca/docs/userfees/cover.html>.

<sup>544</sup> R. Barry Ruback, *The Imposition of Economic Sanctions in Philadelphia: Costs, Fines and Restitutions*, Federal Probation (June 2004).

crime or failure to report may simply hide the fact that probationers and parolees are suffering from fee overload. In addition, when the State and its agencies become financially dependent on fees for revenue, there is a very real inducement to engage in net widening.<sup>545</sup>

From a philosophical perspective, some argue that people convicted of criminal offenses are not “voluntary consumers” and should not be forced to pay for services that they do not seek. They suggest that by placing the burden of these fees on the convicted individual personally, the community responsibility for crime and public safety is ignored. There is also the danger that as parole and probation become more dependent on fees, collection can easily become the measure of their performance, rather than being measured by how well they do their job as it relates to public safety and re-entry. Finally, some have argued that the imposition of ever increasing financial penalties is counterproductive to the goal of re-entry, and ultimately public safety. Given the dire economic conditions of most people returning to their communities from prison, any accumulated debt at all can create a hardship.

**c. Upon whom do we impose financial penalties?**

In order to address the question of whether it is realistic to expect payment of fines, fees, surcharges and other financial penalties we must first come to grips with the profile of the people upon whom we are imposing these financial penalties. Ninety-three percent of all people admitted to prison eventually return to their communities.<sup>546</sup> Any payment of financial penalties must be viewed through the lens of the prevailing social and economic conditions of people returning from prison. They are primarily black and Hispanic, with serious social and medical problems, are largely uneducated, unskilled, suffer mental illness, lack solid family supports,

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<sup>545</sup> See American Probation and Parole Association Report, *Supervision Fees*, available at <http://www.appa-net.org/about%20appa/supervis.htm>.

<sup>546</sup> Joan Petersilia, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 3 (2003).

have minimal prospects for employment, and now they have the added stigma of a prison record and the distrust and fear that it inevitably carries with it. The neighborhoods from which most people on parole come suffer starkly lower household income, high rates of single parent households, and high rates of poverty. Together these characteristics make up the social and economic circumstances of the re-entering population.

Of all people released from New York State prisons in 2003, 83% were released under some form of parole supervision.<sup>547</sup> For this reason, a profile of New York's parolees provides us with a snapshot of the characteristics of people leaving prison and re-entering their communities. From data released by the New York State Division of Parole for March 2004 a picture can be pieced together. The parolee population is largely minority, poorly educated, underemployed, and concentrated in urban New York. Fifty-two percent of parolees were black, 29% Hispanic, and 92% were male. Sixty-one percent resided in the five boroughs of New York City. Forty-nine percent of all parolees were unemployed, 81% needed services for drug abuse, and 15% had only a grade school education.<sup>548</sup> Data from the Department of Correctional Services helps to complete the profile. For all people in New York State prisons on January 1, 2003, 36% tested below an 8th grade reading level and more than half had not graduated from high school or received a GED. Forty-nine percent reported having at least one or more living children.<sup>549</sup>

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<sup>547</sup> See New York State Dep't of Correctional Servs., *Characteristics of Inmates Discharged 2002*, Table 1.1 (of the 26,662 releasees in 2003, 56% were release onto parole, and 27% were released to parole supervision as a result of their conditional release).

<sup>548</sup> See New York State Division of Parole, *Parolee Facts* (Mar. 2004), available at [http://parole.state.ny.us/program\\_statistics.html](http://parole.state.ny.us/program_statistics.html).

<sup>549</sup> See New York State Dep't of Correctional Servs., *Hub System: Profile of Inmate Population Under Custody on January 1, 2003*.

Significant portions of people returning from prison are HIV-positive. New York leads the nation in this regard. In 2002, 7.5% of all people in custody in New York were HIV-positive and New York alone held one fifth of all people in prison nationwide known to be HIV-positive.<sup>550</sup>

National data helps to further our understanding about people returning to their communities from prison. Data from 1997 show that nearly one third of adults in prison were unemployed in the month before their arrest compared to 7% in the general population.<sup>551</sup> From data compiled by the Bureau of Justice Statistics and released in a Special Report in November 2000 it is fair to conclude that about 80% of all defendants charged with a felony in the United States are indigent.<sup>552</sup> It has been estimated that almost one-half of all people who have been previously incarcerated carry with them so many medical problems that it is unrealistic to expect them to re-enter society as normal productive citizens without much greater assistance than is currently available.<sup>553</sup> Nearly 16% of all people in prison, jail, or on probation were identified as mentally ill by a Bureau of Justice Statistics study.<sup>554</sup> The National Adult Literacy Survey has established that 11% of people in prison, compared with 3% of the general population, self-

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<sup>550</sup> Laura Maruschak, *HIV in Prisons and Jails*, 2002 (Bureau of Justice Statistics, Wash., D.C. 2004).

<sup>551</sup> Joan Petersilia, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 40 (2003).

<sup>552</sup> Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* (Bureau of Justice Statistics, Wash., D.C. 2000). The data was obtained from the Nation's 75 most populous counties. Indigence is based upon a determination that the defendant qualified for publicly financed counsel, either assigned counsel or public defender.

<sup>553</sup> Richard B. Freeman, *CAN WE CLOSE THE REVOLVING DOOR? RECIDIVISM VS. EMPLOYMENT OF EX-OFFENDERS IN THE U.S.* 11 (2003).

<sup>554</sup> Paula M. Ditton, *Mental Illness and Treatment of Inmates and Probationers*, at 1 (Bureau of Justice Statistics, Wash., D.C. 1999).



reported having a learning disability.<sup>555</sup> For people who were formerly incarcerated nationwide, the unemployment rate has been placed as high as 60%, one year post-release.<sup>556</sup>

With this profile in mind, what else do we know about the “average” person returning from prison? Employment rates for less educated men remained stagnant even after one of the longest economic expansions in history. Twenty-two percent of young men with a high school diploma or less were not working.<sup>557</sup> Some of the factors that contribute to this downward employment trend are: a decline in job availability for less-educated workers overall, due to an increase in demand for literacy and technical skills; the movement of manufacturing, construction, and transportation jobs away from the inner cities; and employer discrimination, particularly against African Americans.<sup>558</sup>

Families of people returning from prison could potentially help them pay the financial penalties, however, they disproportionately find themselves in difficult financial straits as well. Fifty-three percent of African Americans returning from prison grew up in single parent families compared to 33% of their white counterparts, and 40% of their Hispanic counterparts.<sup>559</sup> In addition, 42% of African American’s in prison had an immediate relative who had served time,

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<sup>555</sup> Stefan LoBuglio, *Time to Reframe Politics and Practices in Correctional Education*, ANNUAL REVIEW OF ADULT LEARNING AND LITERACY, Ch. 4. Vol 2 (National Center for the Study of Adult Learning and Literacy, Cambridge, MA 2001).

<sup>556</sup> Center for Employment Opportunities, *Issue Overview: Crime and Work*, at 1, available at [http://www.ceoworks.org/Roundcrime\\_work012802.pdf](http://www.ceoworks.org/Roundcrime_work012802.pdf) (citing Petersilia at the Reentry Roundtable).

<sup>557</sup> Ann Cammett, *Making Work Pay: Promoting Employment and Better Child Support Outcomes for Low-Income and Incarcerated Parents*, at 6 (New Jersey Institute for Social Justice 2005), available at <http://www.njisj.org/reports/makingworkpay.pdf>.

<sup>558</sup> *Id.*

<sup>559</sup> Allen Beck, *Survey of State Prison Inmates, 1991* (Bureau of Justice Statistics, Wash., D.C. 1993).

as compared to 33% whites, and 35% Hispanics. Sixty-seven percent of women and 56% of men who are in prison had a child or children under age 18.<sup>560</sup>

Empirical evidence demonstrates that people leaving prison will have an extremely difficult time finding employment after release. There is a serious stigma attached to a criminal history - particularly a prison record. Surveys of employers reveal a great reluctance to hire a person with a felony conviction.<sup>561</sup> In a study by Holzer, he found that more than 60% of employers were unwilling to hire an applicant with a criminal record.<sup>562</sup> In a study by Devah Pager, she found that acknowledging a prison record cut a white man's chances of getting called back for an interview in half, and decreased a black man's chances for an interview by a much larger two-thirds. Even more startling was her finding that a white man with a criminal records was still more likely to be called back for an interview than a black man with no criminal history.<sup>563</sup> Even when a person with a prison history was able to find a job, Kling found that there was an impact on future earnings, being lowered by about 30%. Employers willing to hire people who had been previously incarcerated tended to offer lower wages and benefits.<sup>564</sup>

As noted above, African Americans and Hispanics make up more than 81% of all people on parole in New York. Yet African Americans and Hispanics are in a much worse financial position than their white counterparts to pay any financial penalties. The median net worth of Hispanic households in 2002 was \$7,932.00, while it was \$5,988.00 for African American households, and \$88,651.00 for white households. Stated another way, the median net worth for

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<sup>560</sup> *Id.*

<sup>561</sup> Joan Petersilia, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 117 (2003).

<sup>562</sup> Harry Holzer, *What Employers Want: Job Prospects for Less-Educated Workers* (Sage 1996).

<sup>563</sup> Devah Pager, *The Mark of a Criminal Record*, 108 *AM. J. OF SOC.* 5, 937-75 (2003).

<sup>564</sup> Jeffrey Kling, *The Effect of Prison Sentence Length on the Subsequent Employment and Earnings of Criminal Defendants* (2002) (unpublished Manuscript, on file with Princeton University).

white households was 14 times that of African American households, and 11 times that of Hispanic households. 26% of Hispanic households and 32% of African American households had zero or negative net worth in 2002. Only 13% of white households were so situated.<sup>565</sup>

Unemployment data across racial and ethnic lines would help us analyze the ability to pay financial penalties for people returning to their communities from prison. Unfortunately, uncounted in this data are all those who are too disabled to work, those in prison, those working in the underground economy, and those who have given up even looking for a job. David Hilfiker has examined unemployment data taking these categories into account. Looking at all American men of working age, 27% are not working. Among African American men, over 35% are not working, and among African American men who have not completed high school, 63% are not working.<sup>566</sup>

People leave prison typically with no savings or assets, limited job training and work experience, discriminated against in their search for employment as a result of race, ethnicity, and the stigma of a criminal history, and a host of barriers to employment. A comprehensive statutory and regulatory analysis showed that people with criminal records encounter a vast array of legal restrictions that bar them from a wide array of occupations and professions.<sup>567</sup> More and more occupational bars are being imposed against people with various criminal convictions. There has been an expansion of prohibitions against hiring teachers, childcare workers, and related professionals with prior criminal records.<sup>568</sup> As recently as April 1, 2005 New York State

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<sup>565</sup> Rakesh Kochhar, *The Wealth of Hispanic Households: 1996 to 2002*, Pew Hispanic Center (2004), available at <http://pewhispanic.org/files/reports/34.pdf>.

<sup>566</sup> David Hilfiker, URBAN INJUSTICE: HOW GHETTOS HAPPEN 53 (2002).

<sup>567</sup> S.M. Dietrich, *Criminal Records in Employment*, in EVERY DOOR CLOSED (A.E. Hirsch et al. Eds., 2002).

<sup>568</sup> Marc Mauer & Meda Chesney-Lind, INVISIBLE PUNISHMENT 22 (2002).

Department of Health amended its regulations to prohibit the employment of any person convicted of a felony in the preceding 10 years in the field of nursing homes or home care.<sup>569</sup> The amendment of these regulations was followed by legislation in 2005 to the same effect.<sup>570</sup> In 2001 the Legal Action Center produced a survey that provided information about statutory restrictions that affect the ability of individuals with criminal records to receive over 100 state licenses in New York.<sup>571</sup>

The expansion of legal barriers to employment has been accompanied by an increase in the ease of checking criminal records due to new technology and expanded public access to records. One's criminal past has become both more public and more exclusionary, limiting the universe of available work.<sup>572</sup>

The ability of people returning home from prison to pay financial penalties is thus seen to be affected by high unemployment, stigma of a criminal history, race discrimination, bad credit history caused by the financial penalties themselves, low education, poverty, low work experience, low skill levels, high levels of mental health medical disabilities, legal bars to employment, and decrease in earning power. They find themselves at the bottom of the employability hierarchy and subject to legal sanctions imposed by lawmakers that serve to ensure economic deprivation including sanctions on certain economic opportunities that others do not suffer.<sup>573</sup>

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<sup>569</sup> 10 NYCRR §§ 400.23, 763.13, 766.11 and 18 NYCRR § 505.14.

<sup>570</sup> N.Y. PUB. HEALTH LAW §§ 2899. 2899-a; N.Y. EXEC. LAW § 845-b.

<sup>571</sup> *See* New York State Occupations License Survey, authored by the Legal Action Center (2001).

<sup>572</sup> Jeremy Travis, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 68 (2005).

<sup>573</sup> *Id.* at 164.

Can we realistically continue to impose financial penalties on a re-entering population under such circumstances, knowing that it is likely to prove counterproductive to the reintegration of so many?

**d. Forfeiture, collateral estoppel, and multiple proceedings**

Insofar as financial penalties, fines, forfeitures, restitution, disgorgement, and/or treble damages can be imposed by state or federal government, a fundamental problem is that multiple punishments may, in effect, be meted out against a criminal defendant and his family because of legal fictions that do not comport with reality, and without having any relationship to financial impact on victims from the defendant's criminal conduct.

In this regard, orders of restitution (whereby the criminal defendant is directed to pay money into a fund with the aim of compensating and making his victim(s) whole), or disgorgement (whereby a criminal defendant is compelled to "disgorge" his illicit gains on the theory that he should not be allowed to profit from his criminal activity) are equitable remedies that relate directly to criminal activity for which the defendant has been convicted. Accordingly, the penalty by its nature should fit the crime.

However, under varying circumstances, both New York State and federal law recognize that an individual may be both criminally prosecuted (where, based on a beyond a reasonable doubt standard, the government seeks to impose punishment on a defendant for criminal activity), and sued civilly (where, by a lesser standard of clear and convincing evidence or a preponderance of the evidence, the government seeks to impose fines or other financial penalties that are also aimed primarily at punishing the individual). Moreover, because of the collateral estoppel effect of a prior criminal conviction, it is often a foregone conclusion that the defendant will be found liable in the subsequent civil proceeding for fines, forfeitures or other financial

penalties based on the same illegal conduct for which he has already been punished in the prior criminal proceeding.

In *United States v. Halper*, the Supreme Court attempted to place some limits on this “double punishment” problem, when it recognized that, even in a proceeding designated as civil in nature, the nature of the action might still constitute punishment and violate the Double Jeopardy provisions of the Fifth Amendment of the United States Constitution.<sup>574</sup> In this regard, the *Halper* Court held that one who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction cannot be fairly characterized as remedial, but serves instead the purpose of deterrence or retribution.<sup>575</sup> The Supreme Court cautioned in *Halper*, however, that a subsequent civil financial sanction (in that case, monetary penalties and treble damages under the federal False Claims Act) needed only provide “rough remedial justice” to the government in compensation for its losses to avoid the proscription against double punishment.<sup>576</sup>

Several years later, the Court disavowed this analysis in light of “the wide variety of novel double jeopardy claims spawned in the wake of *Halper*.”<sup>577</sup> Instead, the Court in *Hudson* held that the key was whether the Legislature intended the subject statute to be criminal or civil in nature, and then enumerated several factors to be considered in this determination including:

1. Whether the sanction involves an affirmative disability or restraint;
2. Whether it has historically been regarded as a punishment;
3. Whether it comes into play only on a finding of scienter;

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<sup>574</sup> *United States v. Halper*, 490 U.S. 435, 443 (1989).

<sup>575</sup> *Id.* at 448-49.

<sup>576</sup> *Id.* at 443-49.

<sup>577</sup> *See Hudson v. United States*, 522 U.S. 93, 98 (1997).

4. Whether its operation will promote the traditional aims of punishment, retribution and deterrence;
5. Whether the behavior to which it applies is already a crime;
6. Whether an alternative purpose to which it may be rationally connected is assignable for it; and
7. Whether it appears excessive in relation to the alternative purpose assigned.<sup>578</sup>

In an apparent effort to ease this reversal of its earlier position, the Court in *Hudson* noted that other constitutional provisions addressed some of the ills at which *Halper* was aimed.<sup>579</sup> In this regard, the Court noted that “[t]he Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irrational,” and that “[t]he Eighth Amendment protects against excessive fines, including forfeitures.”<sup>580</sup> Notwithstanding this, it is clear that *Hudson* offers a criminal defendant small comfort against multiple punishments, whether designated criminal or civil in nature.

In any event, a criminal defendant, who is convicted and later faces an *in rem* civil forfeiture proceeding against his property, cannot rely on Double Jeopardy principles at all, because the Supreme Court has held that *in rem* civil forfeitures are neither “punishment” nor “criminal” for purposes of Double Jeopardy analysis.<sup>581</sup>

Nevertheless, despite the apparent inconsistency, the Supreme Court has also held that *in rem* civil forfeiture *is* a “punishment” for purposes of Eighth Amendment Excessive Fines

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<sup>578</sup> *Id.* at 99-100.

<sup>579</sup> *Id.* at 102-03.

<sup>580</sup> *Id.* at 103.

<sup>581</sup> *United States v. Ursery*, 518 U.S. 267 (1996).

analysis. Thus, the Court has held that an *in rem* civil forfeiture action is subject to the dictates of the Excessive Fines Clause because the forfeiture constitutes a “payment to the sovereign as punishment for some offense.”<sup>582</sup> Thus, if the government brings a subsequent civil proceeding seeking fines or forfeitures of a criminal defendant’s property interests, even if in an *in rem* action, the defendant may be able to claim the protections of the Excessive Fines Clause.

In *United States v. Bajakajian*, the Supreme Court, applying the Excessive Fines Clause for the first time, struck down a forfeiture as an excessive fine under the Eighth Amendment.<sup>583</sup> Bajakajian, while attempting to leave the United States failed to report that he was carrying \$357,144. He later pled guilty to willfully violating 31 U.S.C. § 5316(a)(1)(A), which requires one to report all currency transported internationally, in excess of \$10,000. Pursuant to 18 U.S.C. § 982(a)(1), the government also sought forfeiture of all the money in a subsequent bench trial. The Supreme Court determined, however, that full forfeiture of the money would be “grossly disproportionate” to the underlying criminal offense, and a violation of the Excessive Fines Clause of the Eighth Amendment.

Nevertheless, the standard for implicating the Excessive Fines Clause is a high one, and as noted above, Double Jeopardy principles do not apply to *in rem* civil forfeitures at all, and are unlikely to be effective in precluding other subsequent civil actions seeking fines or other financial penalties. Accordingly, it might be advisable for Congress and/or the New York State legislature to enact legislation limiting the extent to which subsequent civil penalties and/or forfeiture actions can impose additional financial penalties, either directly or indirectly, upon a

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<sup>582</sup> See *Austin v. United States*, 509 U.S. 602, 622 (1993); see also *Ursery*, 518 U.S. at 281.

<sup>583</sup> *United States v. Bajakajian*, 524 U.S. 321(1998).



criminal defendant who has already been fined or otherwise assessed a financial penalty in a prior criminal action.<sup>584</sup>

Notably, Congress recently enacted a long overdue “Civil Asset Forfeiture Reform Act of 2000” (“CAFRA”) which addressed several of the often criticized provisions of federal forfeiture laws. Among the reforms enacted were provisions placing the burden of proof for forfeiture squarely upon the government, rather than on the claimant; creating time-frames within which the government must start forfeiture proceedings after seizure of the res; and codifying a uniform “Innocent Owner” defense to an *in rem* forfeiture proceeding.

With regard to the present discussion, Section 16 of CAFRA also broadly expanded the availability to the federal government of seeking an *in personam* forfeiture in the course of a criminal proceeding in any case in which civil *in rem* forfeiture would otherwise be available.<sup>585</sup> Thus, the federal government presently has the option of proceeding either with an *in personam* forfeiture against a defendant in the course of his criminal trial - in which case the extent of the forfeiture and other financial penalties or assessments imposed upon the defendant can all be analyzed together by the Court in order to avoid the constitutional prohibitions of the Double Jeopardy and/or Excessive Fines Clauses – or of bringing a separate civil forfeiture proceeding.<sup>586</sup>

Because of the benefit of addressing all potential financial consequences of a criminal conviction in one proceeding, it may make sense to recommend that, to the extent that a criminal

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<sup>584</sup> Significantly, as noted previously, New York law in most cases *requires* the prosecutor to bring a subsequent civil proceeding in order to forfeit property of the criminal defendant. *See* N.Y. C.P.L.R. § 13-A. Only in limited circumstances, such as prosecutions for narcotics felonies or for Enterprise Corruption, can the prosecutor seek forfeiture as part of the criminal case. *See* N.Y. PENAL LAW §§ 480, 460.30.

<sup>585</sup> *See* 28 U.S.C. § 2461(c).

action is brought against an individual, the government should be required to seek forfeiture of that defendant's interests in the course of that proceeding, rather than in a subsequent civil action. The problem with proposing such legislation as the law of forfeiture presently stands is that a subsequent civil proceeding may be necessary in any event to forfeit or otherwise resolve the potential interests of individuals or entities other than the criminal defendant. Moreover, a lesser burden of proof would apply in the civil case than in the criminal one, with the government only needing to establish by a preponderance of the evidence that it was entitled to penalties or to forfeiture. Thus, for example, even if a criminal defendant were to be acquitted on a criminal forfeiture count in the course of the criminal action, the government might still proceed and obtain forfeiture of that defendant's interests in the subject property in the course of a subsequent civil proceeding.

On another matter and as detailed further above, recent decisions of the New York Court of Appeals and the Second Circuit Court of Appeals have determined that both the federal and state Constitutions require that a prompt, post-seizure hearing be provided to a potential claimant in order to challenge the validity of the initial seizure and retention of her property for intended forfeiture.<sup>587</sup> In *Canavan*, the New York Court of Appeals further determined that a forfeiture statute would be unconstitutional unless it provided for protection against the forfeiture of the interests of innocent owners.<sup>588</sup> Although it is well beyond the purview of this report, it may be

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<sup>586</sup> Of course, the government can, and often does bring a civil forfeiture action against the res without there ever having been any criminal proceeding against an individual defendant as long as the res was involved in, or constitutes the proceeds of criminal activity.

<sup>587</sup> See *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir.), cert. denied, 539 U.S. 969 (2003); *Nassau County v. Canavan*, 1 N.Y.3d 134 (2003).

<sup>588</sup> *Canavan*, 1 N.Y.3d at 143-44.

that a Special Committee should be created to develop a model forfeiture statute that might be adopted by states or municipalities with some assurance that it will meet constitutional muster.

**2. Specific Recommendations: Legislative Remedies – Protect People From Being Overburdened by Financial Penalties**

**a. Consolidate all financial penalties into one fee**

All of the financial fines, fees, surcharges, penalties and assessments should be consolidated into one fee schedule. That schedule should be based upon a sliding scale adjusted for an individual's ability to pay. The fee would be moderate, set with a realistic ability to pay in mind. Waivers for indigency would be made readily available.

**b. Amend C.P.L. § 420.35(2) to allow for waiver of certain financial penalties**

Amend Criminal Procedure Law § 420.35(2) to allow for the discretionary waiver of the mandatory surcharge, sex offender registration fee, DNA databank fee, and the crime victim assistance fee for anyone sentenced to incarceration, and for any defendant who demonstrates to the court's satisfaction, at the time of sentencing, that such fees and surcharges will create a financial hardship.

**c. Impose a moratorium on all new financial penalties and the increase of existing ones**

A moratorium on any new financial penalties or the increase of existing financial penalties should be imposed until the impact of the financial burden on re-entry can be studied.

**d. Repeal the supervision fees imposed pursuant to Executive Law § 259-a(9)(a) and § 257-c**

The parole supervision fees authorized by Executive Law § 259-a(9)(a) and the probation supervision fees authorized by Executive Law § 257-c could be repealed. In the alternative, a more effective and expanded use of waivers of supervision fees for indigency could be

implemented. Although these waivers already exist in New York for both parole and probation supervision fees, they are seldom used.

**e. Prohibit the reference to any judgment that is the result of a financial penalty arising from a criminal conviction in a credit history report**

The judgments that result from the non-payment of certain financial penalties arising from a criminal conviction including fines, restitution or reparation, mandatory surcharge, sex offender fee, DNA databank fee, and crime victim assistance fee unduly prejudice and inhibit employment efforts when employers review the credit histories of prospective employees and become aware of the judgments arising from criminal financial penalty. Limited purpose is served by allowing employers to screen out prospective employees based upon a judgment arising from a criminal financial penalty. Conversely, the additional barrier to employment that this practice creates runs contrary to the public policy of this state to encourage the employment of persons previously convicted of one or more criminal offenses.<sup>589</sup>

**f. Consider the filing of a re-entry impact statement for any new legislation imposing financial penalties**

The legislature should engage in careful study and analysis before they impose new penalties. Because most new fines, fees, and surcharges are imposed in a vacuum, unrelated to all of the other consequences that may be imposed, a re-entry impact statement should be considered for any legislation proposing new financial penalties or the increase of existing penalties. Such an impact statement would require the legislature to look at all of the financial consequences that are already connected to this particular conviction before imposing any new or additional ones. It would also require an analysis of how the new or increased financial penalty would affect reintegration.

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<sup>589</sup> See N.Y. CORRECT. LAW § 753(1)(a).

**g. Prohibit retaliation for failure to pay financial penalty**

Prohibit the use of a person's failure to pay a financial penalty, correctional user fee, or supervision fee, as a basis to deny the issuance of a Certificate of Relief from Disability, or a Certificate of Good Conduct, or to refuse discharge from supervision while on parole, conditional release, or post-release supervision when otherwise qualified, in those instances when such non-payment is due to indigence or a legitimate inability to pay.

**h. Consolidate all financial penalties into one article in the Penal Law**

Consolidating all financial penalties into one article in the Penal Law will serve two purposes. First, it will provide ease of access for defense counsel, prosecutors, and judges. No longer will they have to search through a scattered array of statutes in order familiarize themselves with the financial penalties to be imposed in each case. This will also enhance the ability of defense counsel to be able to discuss the collateral consequences of the conviction with his or her client as required by professional standards.<sup>590</sup> Second, it will ensure that the legislature can efficiently be able to assess the sum of all penalties already imposed as a result of a criminal conviction, when considering the imposition of new or increased financial penalties.

This recommendation is consistent with the argument set forth by Jeremy Travis that these invisible punishments should be brought into open view. They should be made visible as critical elements of the sentence, and they should be openly included in our debates over

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<sup>590</sup> See National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation, Guideline 8.2 and 6.2 (3d printing, 2001); American Bar Association Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 14-3.2 (3d ed. 1993); Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State, adopted by the Chief Defenders of New York State, Standard VII, Duties of Counsel (July 25, 2004).

punishment policy, incorporated in our sentencing jurisprudence, and subjected to rigorous research and evaluation.<sup>591</sup>

**i. Require disclosure to defendant prior to plea**

Both defense counsel and the Judge should review with the defendant, all of the financial penalties that will result from the conviction, prior to the time a plea of guilty is entered

**j. Provide comprehensive training for defense counsel, judges, and prosecutors about the financial consequences of criminal convictions.**

It is not unusual for a defendant to find out after the plea has been entered and the sentence imposed, that there are many financial penalties for which he or she will be held responsible. Similarly, defense counsel, judges, and prosecutors rarely have a full appreciation for the full extent of the financial penalties that will end up being part of the sentence. Training, in this regard, will serve the dual purpose of ensuring that both defense counsel and judges will be familiar with the financial consequences of a conviction so that they can explain them to the defendant. This training will also foster a much greater understanding and appreciation for the fact that the sentence needs to take into account the “invisible punishments” that a defendant faces in addition to the sentence placed on the record in the courtroom.

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<sup>591</sup> See generally Marc Mauer & Meda Chesney-Lind, *INVISIBLE PUNISHMENT* (2002).

## **VI. HOUSING**

### **A. THE LAW AND ITS EFFECTS**

Access to housing is widely recognized as central to the stability of individuals and their communities. The Universal Declaration of Human Rights, ratified by the United Nations in 1948, acknowledges housing as a fundamental human right, and several international treaties and documents have recognized this as well.<sup>592</sup> Although New York State has not embraced the right to permanent housing, it has outpaced the federal government by recognizing a constitutionally protected right to adequate shelter.<sup>593</sup>

This Chapter examines the barriers to securing and maintaining housing in New York State for people who have been arrested or incarcerated. Part 1 outlines the current state of affordable housing in New York – a necessary context for this report. Part 2 examines barriers to housing in the private housing market, and Part 3 does the same for the subsidized or public housing context, focusing particularly on conventional public housing projects. Part 4 concludes with some possible effects of barriers to housing for people with arrests or criminal records.

#### **1. Affordable Housing in New York State**

Although New York provides emergency shelter for its residents, the state faces a severe permanent affordable housing shortage. This problem is only growing more significant over time. Across New York State, an extremely low-income household can afford only half the cost

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<sup>592</sup> UCHR, G.A. Res.217A (III) art. 25(1), U.N. Doc. A/810 (adopted Dec. 10, 1948). See Human Rights Watch, *No Second Chance: People with Criminal Records Denied Access to Public Housing* 22, n.55 (2004) for an extensive list of examples.

<sup>593</sup> See *Callahan v. Carey*, Sup. Ct, N.Y. Co., Ind. No. 42582/79 (consent decree entered into by New York City and State requiring shelter for homeless men), *Callahan v. Carey*, 307 A.D.2d 150, 762 N.Y.S.2d 349 (1st Dep't 2003) (applying Callahan consent decree); *Eldredge v. Koch*, 98 A.D.2d 675, 469 N.Y.S.2d 744 (1st Dep't 1983) (including homeless women in the Callahan consent decree), *McCain v. Koch*, 70 N.Y.2d 109 (1987) (extending right to shelter to families), *Mixon v. Grinker*, 88 N.Y.2d 907 (1996) (requiring medically appropriate emergency shelter for individuals with HIV or AIDS).

of “fair market rent.”<sup>594</sup> A worker earning minimum wage can only afford a third of the actual fair market rent for the state; in order to afford a two bedroom apartment, she would have to work 121 hours a week.<sup>595</sup> In 1999, at least 40.5% of all New York households paid more than 30% of their income in rent.<sup>596</sup>

In recent years, significant cutbacks in public housing programs in the state have increased competition in the affordable private housing market.<sup>597</sup> In 2005, over 128,000 families were on the waiting list for Section 8 vouchers in New York City alone – a list that has been closed since 1994 as the few recycling vouchers are reserved for the direst situations, such as to house victims of domestic violence.<sup>598</sup> Even as the government provides less funding for this program, private landlords have increasingly chosen to avoid Section 8 tenants and the

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<sup>594</sup> National Low Income Housing Coalition, *Out of Reach 2004* (2004), available at [www.nlihc.org/oor2004/data.php?getstate=on&state%5B%5D=NY](http://www.nlihc.org/oor2004/data.php?getstate=on&state%5B%5D=NY). Extremely low income is defined as 30% of the Area Median Income. Fair market rent is generally defined by the U.S. Department of Housing Preservation and Development as the 40th and 50th percentile rent for a two-bedroom apartment according to the most recent U.S. Census data.

<sup>595</sup> *Id.*

<sup>596</sup> Census data is available at [http://factfinder.census.gov/servlet/QTTTable?\\_bm=n&\\_lang=en&qr\\_name=DEC\\_2000\\_SF3\\_U\\_DP4&ds\\_name=DEC\\_2000\\_SF3\\_U&geo\\_id=04000US36](http://factfinder.census.gov/servlet/QTTTable?_bm=n&_lang=en&qr_name=DEC_2000_SF3_U_DP4&ds_name=DEC_2000_SF3_U&geo_id=04000US36). Regional statistics also show a shortage in affordable housing. For instance, one third of renters in the Hudson Valley pay more than 30% of income in rent, defined by the Census Bureau as a rental burden. Most potential homebuyers in the region cannot afford the median monthly costs of ownership. David M. Muchnick, *The Crisis of Affordable Housing for Hudson Valley's Working People* (Sept. 2003) (prepared for the AFL-CIO). In New York City, nearly a quarter of renters spent more than 50% of their income in rent in 2000. Women's City Club of New York, *NEW YORK CITY'S AFFORDABLE HOUSING CRISIS 3* (2004), available at <http://www.housingfirst.net/housingres.html>.

<sup>597</sup> Fiscal Year 2005 represented a 0.8% reduction in federal Department of Housing and Urban Development (HUD) funding, and the proposed budget for 2006 would cut funding an additional 11.6%. National Low Income Housing Coalition, 2/28/2005, <http://www.nlihc.org/news/2-28-05chart.pdf>. New York City received a \$23 million loss in Section 8 funding and vouchers administered by New York State's Division of Housing and Community Renewal were reduced by \$1.8 million. David W. Chen, *Cut in U.S. Housing Aid Raises Concerns for Poor*, N.Y. TIMES, Jan. 27, 2005. In 2003, three quarters of households eligible for public housing assistance did not receive it because of limited supply. Harvard University Joint Center for Housing Studies, *THE STATE OF THE NATION'S HOUSING 29* (2004).

<sup>598</sup> New York City Housing Authority, *PHA Plan – Draft: Annual Plan for Fiscal Year 2006*, at 24 (2005), available at <http://www.nyc.gov/html/nycha/html/about/agencyplan.shtml>. The federal Section 8 program provides rent subsidies to income qualifying individuals and families, to be administered by the states. A Section 8 voucher allows a household to pay one third of its income in rent, the remainder of the rent to be paid by the government.



attendant government bureaucracy. Similar waiting lists exist for conventional public housing, which are no longer being constructed, and Mitchell-Lama middle-income units, which are turning over to market-rate housing.<sup>599</sup>

Exacerbating the effects of these government rollbacks, the rent regulation laws in New York City were modified in 1997 to allow owners to drastically increase rents in regulated buildings upon vacancy. During a stable tenancy, landlords can also raise rent regularly according to a formula set by the Rent Guidelines Board. Once rents reach \$2000, the apartment becomes unregulated.<sup>600</sup> As the result of the relaxation of rent regulation, between 1994 and 2003 at least 118,113 New York City units became destabilized, and the rate of deregulation has been increasing over time.<sup>601</sup> Buildings constructed throughout the state since 1974 or with fewer than six units avoid regulation altogether.<sup>602</sup>

As the amount of regulated or subsidized housing has decreased, the number of New Yorkers looking for housing has risen and average wages have declined. Between 1990 and 2000, New York City population increased almost 10%, and the vacancy rate has remained

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<sup>599</sup> The waiting list for conventional public housing in New York City in 2005 was over 149,000 families. *Id.* at 25. The Mitchell-Lama program, which subsidized the creation of moderate-income affordable housing in New York City, is currently reaching maturation, allowing building owners to opt out of the program and sell their buildings to be used for non-affordable market rate housing. As the result of these buy-outs, tens of thousands of New Yorkers now cannot afford to live in the apartments where they resided for years. See Office of the State Comptroller, *Mitchell-Lama Buyout Program Report* (2005) and accompanying press release.

<sup>600</sup> For more on Section 8, public housing, rent regulation, and Mitchell-Lama buy-outs, see Joe Lamport, *Affordable Housing in 2004*, GOTHAM GAZETTE, Apr. 5, 2004, available at <http://www.gothamgazette.com/article/issueoftheweek/20040405/200/936>; Joe Lamport, *After Mitchell-Lama*, GOTHAM GAZETTE, Mar. 2004, available at <http://www.gothamgazette.com/article/housing/20040308/10/907>.

<sup>601</sup> NYC Rent Guidelines Board, *Changes to the Rent Stabilized Housing Stock in New York City in 2003*, at 9 (2004), available at <http://www.housingnyc.com/html/research/cresearch.html#bookpdf>. This study notes that, due to non-mandatory reporting of certain types of deregulation, these numbers represent a floor and could in fact be much higher.

<sup>602</sup> See <http://www.housingnyc.com/html/resources/dhcr/DHCR1.html> for more information on rent stabilization and rent control. Fifty-one New York municipalities have some form of rent control, for which a person must have been living in the apartment continuously since July 1, 1971. New York City has continued to

extremely low – currently lower than 3%.<sup>603</sup> Incomes of New Yorkers have not kept pace with rising housing costs.<sup>604</sup> Although New York City provides the most alarming data, New York State faces similar issues. For instance, New York State’s population rose 5.5% between 1990 and 2000<sup>605</sup>, and in 1999 median household income was only \$43,393 with 14.6% of individuals living below the poverty line.<sup>606</sup> As affordable housing becomes scarcer, the need for it has grown more severe.

Given the lack of affordable housing, homelessness in New York remains an ever-growing problem.<sup>607</sup> Homelessness is particularly pressing for individuals involved in the criminal justice system. Incarceration almost invariably leads to loss of stable housing, as incarcerated individuals are considered to have vacated their apartments or homes. When a

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regulate through rent stabilization rules, which have been eroded over time as discussed above. See [www.housingnyc.com](http://www.housingnyc.com) for information on New York City rent regulation and affordable housing generally.

<sup>603</sup> NYC Rent Guidelines Board, *2005 Income and Affordability Survey* 1, 4 (2005), available at <http://www.housingnyc.com/html/research/cresearch.html#bookpdf> (citing the 2002 Housing Vacancy Survey for vacancy rate). New York City Mayor Bloomberg proposed a housing plan in December 2002 to build or renovate an estimated 65,000 residential units for New Yorkers over five years. This plan has been less successful than projected, and has met with significant critique. See, e.g., Rebecca Webber, *The State of Bloomberg’s Affordable Housing Plan*, GOTHAM GAZETTE, Aug. 2003 available at <http://www.gothamgazette.com/article/housing/20030811/10/488>; Mark Berkey-Gerard, *Critiquing the Mayor’s Housing Plan*, GOTHAM GAZETTE, Mar. 9, 2003 available at [www.gothamgazette.com/article/feature-commentary/20030309/202/302](http://www.gothamgazette.com/article/feature-commentary/20030309/202/302).

<sup>604</sup> Inflation-adjusted wages in New York City decreased 1.5% in 2003 in addition to a 5% drop in 2002. New York City is ranked 11<sup>th</sup> highest in rental rates nationwide – the average rent having risen 33% from 1975 to 1999 – but 37<sup>th</sup> in median household income – income having risen only 3% during the same time period. See NYC Rent Guidelines Board, *supra* note 603, at 4; Policy Link and Pratt Institute Center for Community and Economic Development, *Increasing Housing Opportunity in New York City* (2004), available at [www.policylink.org/pdfs/NYIZ-Summary.pdf](http://www.policylink.org/pdfs/NYIZ-Summary.pdf).

<sup>605</sup> See <http://quickfacts.census.gov/qfd/states/36000.html>.

<sup>606</sup> See [http://factfinder.census.gov/servlet/QTTable?\\_bm=n&\\_lang=en&qvr\\_name=DEC\\_2000\\_SF3\\_U\\_DP3&ds\\_name=DEC\\_2000\\_SF3\\_U&geo\\_id=04000US36](http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&qvr_name=DEC_2000_SF3_U_DP3&ds_name=DEC_2000_SF3_U&geo_id=04000US36)

<sup>607</sup> For example, in February 2005, 36,200 people slept each night in New York City homeless shelters and thousands more spent the night in public places or doubled up temporarily with relatives. The City’s number of homeless single adults has increased 41% since 1994, and currently nearly one in twenty of all New York City residents (one in ten of the city’s black population) have utilized the shelter system. See [http://www.coalitionforthehomeless.org/advocacy/basic\\_facts.html](http://www.coalitionforthehomeless.org/advocacy/basic_facts.html)

person returns to her community after her release from prison or jail, she usually finds herself homeless, relying on local shelter systems or the generosity of family members or friends. In New York City, over 30% of single adults in the shelter system were recently released from local jails (substantially more if prisons are included), and many cycle between shelters and incarceration.<sup>608</sup> Those recently released from prison face significant hurdles to accessing appropriate housing, including federal bars to subsidized housing, landlord discrimination, and a general absence of affordable housing in New York State.

Research indicates that homelessness is also directly linked to re-incarceration of people who have served jail or prison sentences. For instance, homeless individuals on parole have been shown to be seven times more likely to abscond after the first month of release than those located in more permanent housing.<sup>609</sup> Access to affordable housing has also been linked to decreased crime rates in low-income communities where people with criminal records often reside.<sup>610</sup> Although reconnection with family members and establishing community connections can help reduce re-incarceration, legal bars to allowing a family member back into the home after a conviction often make this impossible.<sup>611</sup>

New York does not provide a right to counsel in housing matters, which compounds the difficulties faced by those re-entering from prison or jail and their family members who would

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<sup>608</sup> Council of State Governments, Report of the Re-Entry Policy Council, Chapter D, Policy Statement 19 (2004), available at <http://www.reentrypolicy.org/report/ps19-housing.php> [hereinafter RPC Report].

<sup>609</sup> Likewise, 32.8% of people released from New York State prisons who resided in shelters were imprisoned again within two years. See RPC Report, *supra* note 608, at Policy Statement 19; Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release*, 3 CRIM. & PUB. POL. 137, 144 (2004); Marta Nelson, Perry Deess, & Charlotte Allen, *The First Month Out: Post-Incarceration Experiences in New York City* (1999), available at [http://www.vera.org/publications/publications\\_5.asp?publication\\_id=208](http://www.vera.org/publications/publications_5.asp?publication_id=208).

<sup>610</sup> See [http://www.housingfirst.net/housing\\_safety.html](http://www.housingfirst.net/housing_safety.html).

<sup>611</sup> Jeremy Travis et al., FROM PRISON TO HOME: DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 35-36 (2001), available at [http://www.urban.org/pdfs/from\\_prison\\_to\\_home.pdf](http://www.urban.org/pdfs/from_prison_to_home.pdf); Nelson, et al., *supra* note 609, at 8-12.

take them in. Family members often must defend their rights to their private or government-subsidized homes without the benefit of counsel. Tenants are unable to effectively defend their rights when faced with the morass of applicable federal, state, and local laws, adjudicators who expect them to understand a legalistic culture and language, and experienced counsel who represent the public housing authority or other landlords.<sup>612</sup> Tenant success in such cases is low, resulting in often unwarranted eviction and homelessness. For instance, a study in New York City showed that represented tenants avoided eviction in 90% of cases, whereas unrepresented tenants would have been evicted in 85% of those cases.<sup>613</sup> Thus, even when a landlord or housing authority incorrectly brings eviction proceedings against an individual or family for perceived criminal activity, the tenants are often unable to defend the home that is rightfully theirs.

## 2. Private Housing

In this section, we describe the barriers to securing and maintaining private housing in New York State for people with arrests or criminal records. Unlike with publicly subsidized housing, private landlords are able to exert substantial individual control over whom to choose for tenancy. Part B outlines the barriers to securing private housing faced by people with criminal histories. New York laws regulate tenancy once a person is selected, and provide landlords with numerous rights over people with arrests or criminal records. City and state programs and laws also encourage landlords to evict people who have been arrested or convicted

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<sup>612</sup> Studies show that, while 98% of landlords are represented in Housing Court, only 12% of tenants are. See Laura Abel, *Make 'You Have a Right to a Lawyer' a Reality in Housing Court*, Tenant Inquilino, Mar. 2005, at 3-4, available at [http://www.brennancenter.org/presscenter/oped\\_2005/oped\\_2005\\_0406b.html](http://www.brennancenter.org/presscenter/oped_2005/oped_2005_0406b.html).

<sup>613</sup> Barbara Mule & Michael Yavinsky, *Saving One's Home: Collateral Consequences for Innocent Family Members* 1-2, 16-18, n.42 (unpublished manuscript).

of a crime in many cases. Part C describes the legal means used to evict households that have a member with criminal or arrest records.

**a. Barriers to securing private housing**

Due to the scarcity of affordable housing and its extremely high demand, individuals charged with crimes and their families often encounter great difficulty in securing and maintaining stable housing, especially as New York State and City human rights laws provide no protection against discrimination by landlords based on criminal record.<sup>614</sup> In this context, people with criminal records encounter significant barriers to securing housing, as landlords rely on their concerns about public safety and the general stigma attached to criminal histories in deciding which tenants to accept into their buildings. In addition to trying to ensure consistent rent payment, landlords also want to protect themselves from liability to other tenants for housing a “known criminal” in the building, and from government forfeiture for allowing the building to be used for illicit purposes.<sup>615</sup>

Private landlords and non-profit housing developers often inquire into individual’s background and deny housing to those with criminal records.<sup>616</sup> Landlords can access such information without the applicant even knowing. Criminal convictions are often listed in

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<sup>614</sup> See N.Y. EXEC. LAW § 296(5) (2004); N.Y.C. ADMIN. CODE § 8-107(5)(a).

<sup>615</sup> See, e.g., Heidi Lee Cain, *Comment: Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 149-150 (Spring 2003). See generally B.A. Glesner, *Landlords as Cops: Tort, Nuisance, and Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679 (Summer 1992).

<sup>616</sup> On the issue of tenant screening, see, e.g., Anthony Thompson, *Navigating Hidden Obstacles to Offender Reentry*, 45 B.C. L. REV. 255, 277-279 (2004); Cain, *supra* note 615, at 149-158; Robert R. Stauffer, *Note, Tenant Blacklisting: Tenant Screening Services and the Right to Privacy*, 24 HARV. J. ON LEGIS. 239 (1987); Simon Rodberg, *No ‘Justice,’ No Peace: Can Community Organizations Succeed Where Jails Fail?*, THE AMERICAN PROSPECT, Feb. 14, 2001, available at <http://www.prospect.org/webfeatures/2001/02/rodberg-s-02-14.html> (describing community development corporations’ reluctance to housing people with criminal records). Recently, landlords have been encouraged by the FBI to increase their surveillance of possible future tenants. Michael Weissenstein, *Renters Could Get Extra Scrutiny Through Anti-Terrorist Measures*, ASSOCIATED PRESS STATE AND LOCAL WIRE, June 3, 2002.

commercial credit reports, or can be easily accessed through the Office of Court Administration statewide criminal record search, the Department of Correction inmate locator, or background checks conducted by private agencies.<sup>617</sup> These records are often rife with bureaucratic errors, such as listing arrests that resulted in dismissals or non-criminal convictions that should be automatically sealed, including incomplete entries of cases that were disposed of, or reporting data that is completely erroneous.<sup>618</sup> Human Rights Watch reports that private landlords are following the lead of public housing authorities in denying housing to those with criminal records and their family members, effectively eliminating access to housing altogether.<sup>619</sup>

These multiple bars to securing and maintaining private housing are compounded by the recently released person's difficulty paying security deposits and broker's fees, lack of personal and employment references, poor credit history, parole restrictions limiting contact with the harmful influences of certain family members or friends, and public housing restrictions that restrict people with criminal records from moving in with their family members.<sup>620</sup>

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<sup>617</sup> The Office of Court Administration search is publicly available for \$52 at <http://www.courts.state.ny.us/apps/chrs/>. The Department of Corrections allows anyone to look up an individual's incarceration in New York State for free at <http://nysdocslookup.docs.state.ny.us/kinqw00>.

<sup>618</sup> See Criminal Procedure Law §§ 160.50, 160.55 for rules on the sealing of records in New York state when the outcome is favorable to the defendant. The most recent study on criminal record accuracy found that 87% of New York Division of Criminal Justice Services rap sheets contained at least one mistake or omission and 41% contained more than one error. Legal Action Center, *Study of Rap Sheet Accuracy and Recommendations to Improve Criminal Justice Recordkeeping*, i (1995); see also Legal Action Center, *Setting the Record Straight* 3-5 (2001), available at [http://www.lac.org/pubs/pubs\\_top.html](http://www.lac.org/pubs/pubs_top.html).

<sup>619</sup> Human Rights Watch, *supra* note 592, at 19.

<sup>620</sup> See Travis, *supra* note 611, at 35-36.

**b. Barriers to maintaining private housing**

**i. Bawdy House Laws**

Once a person with a criminal record has secured housing, New York law allows – and even sometimes encourages – eviction upon criminal charges.<sup>621</sup> Such evictions can occur upon an individual’s first arrest, even if she has no prior record. Private landlords can bring such eviction proceedings under the “Bawdy House” law for using the premises “as a bawdy-house, or house or place of assignation for lewd purposes, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business.”<sup>622</sup> In these cases, the landlord must prove by a preponderance of the evidence that the resident engaged in illegal conduct through a business on more than one occasion involving the premises<sup>623</sup> with the participation, knowledge, or passive acquiescence of one or more of the tenants of record.<sup>624</sup> Cases are most often brought for drugs, prostitution, or gambling offenses.<sup>625</sup>

The District Attorney (“D.A.”) often serves a Demand Letter on the landlord at the moment criminal prosecution begins, requiring that the landlord begin eviction proceedings. This letter includes various threats, such as possible inclusion in the criminal case, significant financial sanctions, and/or forfeiture of the entire property in order to “elicit the cooperation of

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<sup>621</sup> See generally McGregor Smyth, *The Consequences of Criminal Proceedings in New York State* 8-9 (2005) (on file with The Bronx Defenders) [hereinafter Smyth, *Consequences*].

<sup>622</sup> N.Y. REAL PROP. ACT. & PROC. LAW § 711(5). The other statutes described as the “Bawdy House” law are N.Y. Real Prop. Law § 231(1) and N.Y. Real Prop. Act. & Proc. Law § 715.

<sup>623</sup> See, e.g., *Lituchy v. Lathers*, 35 Misc. 2d 556, 232 N.Y.S.2d 627 (1st Dep’t 1962), *ARJS Realty Corp. v. Perez*, 230 N.Y.L.J. 19, Aug. 27, 2003 (Civ. Ct. N.Y. Co. 2003).

<sup>624</sup> See, e.g., *Lloyd Realty Corp. v. Albino*, 146 Misc. 2d 841 (Civ. Ct. N.Y. Co. 1990); *220 W. 42 Assocs. v. Cohen*, 60 Misc. 2d 983 (1st Dep’t 1969), *Normandy Realty v. Boyer*, 2 Misc. 3d 407 (Civ. Ct. Bronx Co. 2003), *Farhadian v Diaz*, N.Y.L.J., Feb. 26, 1990, at 23, col 4 (1st Dep’t). But see *ARJS Realty Corp.*, 230 N.Y.L.J. 19, Aug. 27, 2003 (holding that the statute requires strict liability as written). This issue currently remains unresolved, although the majority of the case law supports a necessary finding of knowledge or acquiescence.

<sup>625</sup> See Mule & Yavinsky, *supra* note 613, at 13-16; Smyth, *Consequences*, *supra* note 621, at 8.

landlords who might be apprehensive about initiating such proceedings on their own.”<sup>626</sup>

Because eviction proceedings under these statutes often begin as soon as a search warrant is executed in the apartment, evictions can occur whether or not a criminal conviction results.<sup>627</sup>

Thus, an individual who is acquitted of a crime in criminal court, or had her case dismissed outright, can still be evicted for the same charges.<sup>628</sup> Nearly one in three people arrested in New York State are never convicted of a crime, but still face these consequences.<sup>629</sup> It is sufficient to prove that any member of the household used the apartment to conduct an illegal business with the passive acquiescence of the tenant of record; thus, an entire family could be evicted for a guest’s illegal activity.<sup>630</sup> In New York City, the District Attorneys’ Narcotics Eviction Programs assist landlords in bringing such actions.<sup>631</sup> Tenants, often unrepresented, have little chance of success against the significant resources and support available to landlords in these cases. Since the inception of the Manhattan DA’s program in 1988, tenants have been evicted from over 6,000 locations.<sup>632</sup> In 2003, the Bronx DA effected the removal of over 100 tenants,

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<sup>626</sup> N.Y. REAL PROP. LAW § 231(1). See, e.g., Office of the Bronx District Attorney, *Drug Crime*, available at <http://www.bronxda.nyc.gov/fcrime/dcrime.htm> (detailing narcotics prevention methods, including eviction) (hereinafter “Bronx DA report”).

<sup>627</sup> See, e.g., Karah Woodward & Cassi Feldman, *Breaking the Seal: DAs Dig Up Old Court Files*, CITY LIMITS WEEKLY, June 7, 2004, available at <http://www.citylimits.org/content/articles/weeklyView.cfm?articlenumber=1530>.

<sup>628</sup> This can occur because civil proceedings do not need to reach the standard of proof required for criminal convictions.

<sup>629</sup> In 2004, only 67.3% of felony arrests statewide resulted in a conviction. See New York State Division of Criminal Justice Services, *Dispositions of Felony Arrests New York State*, available at <http://www.criminaljustice.state.ny.us/crimnet/ojsa/dispos/nys.htm>.

<sup>630</sup> N.Y. REAL PROP. ACTS LAW § 711(5); see also *supra* note 622.

<sup>631</sup> See, e.g., New York County District Attorney’s Office, *Narcotics Eviction Programs*, available at <http://www.manhattanda.org/community/narcotics.htm> (hereinafter “NY County DA Report”); Bronx DA report, *supra* note 626.

<sup>632</sup> <http://www.manhattanda.org/community/eviction.htm>.



and its official policy is to pursue eviction “[e]ven when criminal prosecution of a drug dealer fails to result in a conviction.”<sup>633</sup>

Although the Narcotics Eviction Program states that it “reviews each case individually and is careful not to seek eviction where fairness requires a different remedy,”<sup>634</sup> tenants’ attorneys report that this is not always the case. In one case, Karen<sup>635</sup> worked on the night shift at a hospital, and had lived in her Bronx apartment for over thirty years. She had never had any trouble with the landlord or the law, but had recently taken her son, James, into her home. Because James worked and kept his room clean with the door open, Karen never had any cause for concern until he was arrested dealing drugs in another neighborhood. When the police found drugs hidden in small containers in the back of his closet, James was arrested and incarcerated. James and his mother immediately agreed that he could not return to her home. Nonetheless, the D.A. and landlord initiated eviction proceedings against Karen and her fourteen-year-old daughter. Karen fought the eviction for over a year during which the D.A. refused to settle, citing a zero tolerance policy for drug arrests. In the end, the case settled twenty minutes before the trial began, on the stipulation that Karen had suggested originally – that James not be allowed back into the apartment. If she had not been represented, she would likely have had to move.<sup>636</sup>

Similarly, Susan and her husband, Paul, almost lost their apartment when the police entered and found multiple bags of powder. It turned out that the powder consisted of crushed eggshells for a religious ceremony, but the police also found a small bottle with cocaine residue left by a friend after a party in the apartment. Although Susan and Paul received disorderly

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<sup>633</sup> <http://www.bronxda.nyc.gov/fcrime/dcrime.htm>.

<sup>634</sup> NY County DA Report, *supra* note 631.

<sup>635</sup> Names have been changed.

<sup>636</sup> Interview with Bronx attorney who represents tenants who cannot afford legal representation, June 2005.

conduct violations, their eviction case dragged on for a year and a half before it settled with the assistance of their attorney.<sup>637</sup>

**ii. Other Eviction Options: Nuisance and Substantial Obligation of the Lease**

In addition to Bawdy House cases, private landlords can also evict tenants under a common law nuisance theory, under the New York City Nuisance Abatement Law, or as a violation of a “substantial obligation” of the lease for alleged criminal behavior of the tenant of record or another resident.<sup>638</sup> In one nuisance case, an elderly, disabled tenant was almost evicted due to the actions of her guest and caretaker, an elderly man. After significant drinking, he ended up in an argument with a neighbor. The guest was arrested for a violation, but the landlord brought a nuisance claim to vacate the apartment that was only dropped after the tenant’s attorney’s intervention.<sup>639</sup> In rent controlled or stabilized buildings, incarceration may also lead to non-primary residence holdover proceedings if a tenant is vacant from a regulated apartment for over 180 days.<sup>640</sup>

**iii. De Facto Eviction: Non-renewal and Temporary Restraining Orders**

Often, a landlord does not have to take any affirmative action at all to remove a tenant. When the tenant does not have a rent-regulated apartment, the landlord can refuse to renew the tenant’s lease after learning of an arrest. Many tenants fail to challenge such actions, even if

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<sup>637</sup> Interview with Bronx attorney who represents tenants who cannot afford legal representation, June 2005.

<sup>638</sup> N.Y.C. ADMIN. §§ 7-701-722. (Public Nuisance Law). For common law nuisance actions *see, e.g., Domen Holding Co. v. Aranovich*, 1 N.Y.3d 117 (2003) (upholding a nuisance cause of action to evict a tenant for a guest’s behavior); *160 West 118th St. Corp. v. Gray*, N.Y.L.J. 19, Dec. 15, 2004 (Civ. Ct. N.Y. Co.) (upholding a nuisance cause of action); Glesner, *supra* note 615; Smyth, *Consequences*, *supra* note 621, at 8-9.

<sup>639</sup> Interview with Bronx attorney who represents tenants who cannot afford legal representation, June 2005.

<sup>640</sup> N.Y. RENT STABILIZATION CODE § 2520.11(k); *see also* Rent Guidelines Board, *Primary Residence FAQ*, available at <http://www.housingnyc.com/html/resources/faq/primary.html>; Smyth, *Consequences*, *supra* note 621, at 9.

they have been living in the apartment for years. For instance, one family faced eviction when a tenant broke a railing during an argument with the landlord over repairs. The landlord immediately stopped renewing the month-to-month lease until the tenants' attorney was able to negotiate for them to stay until they could find another place to live.<sup>641</sup>

Temporary restraining orders also de facto evict many tenants from their homes. For instance, when the complaining witness to a criminal charge lives in the same apartment as the defendant, judges routinely issue restraining orders that bar the tenant from re-entering the apartment, even when that person is the rent-paying tenant of record and regardless of whether the complaining witness even requests such an order. Such situations render the individual homeless while he awaits trial.<sup>642</sup> Additionally, one New York City legal services office reported an initiative by the police to remove individuals with drug, prostitution, and chop-shop arrest records from their apartments through restraining orders and the New York City Nuisance Abatement Law. In these cases, the police department files an action against the landlord for maintaining a public nuisance.<sup>643</sup> Months after a tenant's arrest for a minor drug possession charge, the police department claims that there is an immediate need for the tenant to be removed from the premises and obtains an emergency temporary restraining order.<sup>644</sup> The police department and the D.A. come to the apartment at night and lock the individual out before she has a chance to remove any of her belongings, and place a police lock on the door. By the time the police allow the individual to return to remove her belongings, the apartment has often been

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<sup>641</sup> Interview with Bronx attorney who represents tenants who cannot afford legal representation, June 2005.

<sup>642</sup> Interview with Bronx attorney who represents tenants who cannot afford legal representation, June 2005.

<sup>643</sup> N.Y.C. ADMIN. §§ 7-701-722. Under the Public Nuisance Law, a landlord can be held liable for up to one thousand dollars per day that the public nuisance has been intentionally maintained or can be served with a permanent injunction requiring surrender of the property. N.Y.C. ADMIN. § 7-704.

broken into. In one case, a woman with AIDS was locked out of her apartment at ten o'clock at night and had to spend the night in the park three months after an arrest for a minor drug charge. When she returned, her cats were missing as well as most of her personal belongings. Later, she received a non-criminal violation for disorderly conduct and her criminal charges were dropped. However, she had lost her home, her pets, and her trust in her service providers; she remained unreachable by her attorney and the housing agency that had found her the apartment.<sup>645</sup>

### **3. Public Housing**

This section considers the eligibility and termination rules for both conventional public housing and housing choice voucher programs (often referred to as “section 8” programs), which are administered by the US Department of Housing and Urban Development (“HUD”).

Conventional public housing provides rental housing for eligible low-income families, the elderly, and persons with disabilities. The Housing Choice Voucher program provides assistance to very low-income families, older adults, and people with disabilities in the private market.<sup>646</sup> In New York and other states, conventional public housing and most of the voucher programs are managed by local Public Housing Authorities (“PHAs”).

Part B reviews the development and current state of the laws excluding people who have engaged in criminal activity from accessing public housing. Part C discusses the policy reasons behind these exclusionary rules.

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<sup>644</sup> N.Y.C. ADMIN. §7-707(a) allows a judge to sign an order granting police authority to remove a tenant upon a showing of drug activity on the premises.

<sup>645</sup> Conversation with Lisa Isaacs, Esq., Unit Director, Queens Legal Services Corp., June 3, 2005.

<sup>646</sup> For an overview of conventional public housing, see <http://www.hud.gov/offices/pih/programs/ph/index.cfm>. For an overview of HUD's voucher programs, see <http://www.hud.gov/offices/pih/programs/hcv/index.cfm>.

**a. Federal and local restrictions on access to public housing by people with criminal records**

**i. Development of Exclusionary Rules:  
“One Strike And You’re Out”**

Federal housing laws began to target people with criminal records as early as 1988. In that year, a provision of the Anti-Drug Abuse Act mandated that all PHAs must use lease provisions that provide for evictions based upon a tenant’s criminal or drug-related activity “on or near” public housing premises.<sup>647</sup>

In 1996, this legislation was used to form the basis of a set of exclusionary laws and regulations that became known as “one strike and you’re out” rules. This initiative was launched by President Clinton in his state of the union address of that year, when he encouraged stronger enforcement of the Anti-Drug Abuse Act and other laws relating to exclusion from public housing on the basis of past or present criminal activity. President Clinton stated:

I challenge local housing authorities and tenant associations: Criminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the rule for residents who commit crime and pedal drugs should be one strike and you’re out.<sup>648</sup>

At the same time, Congress joined the effort by enacting the Housing Opportunity Extension Act of 1996 (“Extension Act”), which expanded PHAs’ authority to evict or deny admission based on criminal activity, including, among other things, by: 1) expanding the bases for eviction to include any criminal activity or drug-related criminal activity occurring “on or off” public housing premises; 2) requiring the National Crime Information Center to provide

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<sup>647</sup> Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of the United States Code). As enacted, the 1988 statute required that public housing leases shall “provide that a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.” 42 U.S.C. § 1437d(1)(5) (1988).

criminal records to PHAs for screening purposes; 3) declaring that any tenants who had been evicted for drug-related criminal activity are ineligible for housing assistance for three years from the date of eviction; and 4) authorizing PHAs to evict or refuse admission to individuals who are illegally using controlled substances, or who are engaging in a pattern of drug or alcohol abuse.<sup>649</sup>

This new legislation and the Clinton initiative prompted HUD to respond by developing a set of “One Strike and You’re Out” guidelines, which required local PHAs to exercise their authority under the new legislation, and also announced plans to tie PHAs’ rating and funding levels to the strength of their screening and termination procedures.<sup>650</sup> In 1998, the final substantive piece of legislation in the development of the “one strike” policy was put in place with the Quality Housing and Work Responsibility Act, which authorized PHAs to deny admission to any individual who, within a “reasonable time” prior to the date of eligibility for housing assistance, had engaged in “any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents.”<sup>651</sup>

Together, the three acts noted above and the HUD “one strike” guidelines and regulations form the heart of the current set of rules excluding individuals with virtually any history of criminal activity from public housing assistance. The full body of rules and regulations governing screening and eviction, however, are found in widely dispersed sections of the US

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<sup>648</sup> President William Jefferson Clinton, State of the Union Address (Jan. 23, 1996) (transcript available at <http://www.gpoaccess.gov/sou/index.html>).

<sup>649</sup> Pub. L. No. 104-120, § 9, 110 Stat. 834 (1996).

<sup>650</sup> HUD Notice PIH 96-16 (HA) (Apr. 29, 1996).

<sup>651</sup> Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2640 (1998).

Code and the CFR, as well as in the individual policies of the more than 3,300 PHAs throughout New York and the United States.<sup>652</sup> The next section will describe in more detail many of these individual laws and regulations and the extent of the discretion granted to the PHAs. It will also look briefly at some of the screening policies implemented by the New York City Housing Authority (“NYCHA”), the largest PHA in New York State.

**ii. Rules Excluding Individuals Who Have Been in Contact with the Criminal System**

**(a) Mandatory exclusions**

Federal law requires that individuals who engage in certain prescribed criminal activity must be prohibited from accessing housing assistance and/or must have their leases terminated.

**(1) Admission/eligibility**

Any household with a member who is subject to lifetime registration requirements under a state sex offender registration program, and any household with a member who has been convicted of methamphetamine production on the premises of federally-assisted housing, is permanently ineligible for housing assistance.<sup>653</sup>

Households that have been evicted from public housing because of the drug-related activity of a household member must be denied eligibility for housing assistance for three years from the date of the eviction, unless the affected household member has successfully completed a supervised rehabilitation program or the circumstances leading to the eviction no longer exist (*e.g.*, the affected person is no longer a member of the household).<sup>654</sup>

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<sup>652</sup> HUD states that there are approximately 1.3 million households living in public housing units, managed by 3,300 PHAs. See <http://www.hud.gov/offices/pih/programs/ph/index.cfm>. This number does not include those households that are relying on housing voucher programs administered by HUD and the PHAs.

<sup>653</sup> 42 U.S.C. § 13663(a) and 42 U.S.C. § 1437n(f).

<sup>654</sup> 24 C.F.R. § 982.553.

A household must be denied eligibility if a household member is currently using an illegal controlled substance, or is using controlled substances or abusing alcohol in a way that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents. A PHA *may* grant admission if the household can show that the affected household member has been rehabilitated; however, the PHA is not required to consider such evidence.<sup>655</sup>

**(2) Termination of tenancy**

If a PHA discovers that a tenant living in public housing has ever been convicted of methamphetamine production on the premises of federally-assisted housing, the tenant must be evicted.<sup>656</sup>

**(b) Discretionary exclusions**

Federal housing law also authorizes local PHAs to deny eligibility and to terminate the lease if any member of a household has certain kinds of criminal records (including histories of arrests).

**(1) Admission/eligibility**

Households with family members who have engaged in (1) any drug-related criminal activity; (2) any violent criminal activity; or (3) any other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises may be denied access to public housing or housing assistance if the criminal activity engaged in by the household member occurred within a “reasonable” time before the household seeks admission.<sup>657</sup>

Note that a general mitigation provision provides that consideration *shall* be given to the time, nature, and extent of the applicant’s conduct (including the seriousness of the offense) and

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<sup>655</sup> 42 U.S.C. § 13661.

<sup>656</sup> 24 C.F.R. § 966.4.

<sup>657</sup> 42 U.S.C. § 13661.



that consideration *may* be given to factors that might indicate a reasonable probability of “favorable future conduct” such as rehabilitation or a willingness to participate in counseling programs.<sup>658</sup>

**(2) Termination of tenancy**

PHAs have the discretion to terminate the lease of any household with a member who uses illegal controlled substances, or who abuses alcohol in a way that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.<sup>659</sup>

PHAs have discretion to terminate the lease of any household with a member who engages in any drug-related criminal activity on or off the premises, or who engages in any criminal activity threatening the health, safety, or right to peaceful enjoyment of the premises by other tenants, or by persons residing in the immediate vicinity of the premises.<sup>660</sup>

**(c) Other key provisions**

PHAs have the authority – but are not required – to evict tenants for drug-related activity even if the tenant did not know, could not foresee, or could not control behavior by other occupants or guests.<sup>661</sup>

PHAs may terminate assistance “regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction.”<sup>662</sup>

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<sup>658</sup> 24 C.F.R. § 960.203.

<sup>659</sup> 42 U.S.C. § 13662.

<sup>660</sup> 42 U.S.C. § 1437d(l)(6).

<sup>661</sup> *HUD v. Rucker*, 535 U.S. 125 (2002).

<sup>662</sup> 24 C.F.R. § 966.4(l)5(iii)(A) (conventional public housing); 24 C.F.R. § 982.553(c) (2004) (analogous provision for Section 8 program).

PHAs and landlords can require the exclusion of an offending household member – including a dependent minor – as a condition of admission or continued benefits.<sup>663</sup>

**(d) Focus on NYCHA**

The NYCHA is the largest PHA in the state and the country.<sup>664</sup> The following two tables show the NYCHA’s eligibility rules for both conventional public housing and the housing voucher program, established pursuant to the discretion granted to it under 42 U.S.C. § 13661 and 24 C.F.R. § 982.553. In contrast to the broader standards for conventional public housing, the ineligibility period for section 8 applicants applies more narrowly to sex offenders subject to a lifetime registration requirement, persons who commit violent felonies, and persons convicted of controlled substances or alcohol-related offenses.<sup>665</sup> In addition, the NYCHA keeps a separate shortlist of less serious crimes that it will disregard when determining eligibility.<sup>666</sup>

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<sup>663</sup> 24 C.F.R. § 960.203.

<sup>664</sup> See New York City Housing Authority, *NYCHA Fact Sheet*, revised on Dec. 19, 2005, available at <http://www.nyc.gov/html/nycha/html/about/factsheet.shtml>. *The Fact Sheet* states that NYCHA serves about 175,116 families and approximately 417,328 authorized residents.

<sup>665</sup> See New York City Housing Authority, *Applications Manual*, Chap VI, Sec. II, Subsec. E; *Id.* at Ex. FF, “Standards for Admission: Conviction Factors & End of Ineligibility Periods – Section 8 Housing Assistance Program”; *Id.* at Ex. HH, “Overlooked Offenses – Section 8 Housing Assistance Program.”

<sup>666</sup> See *id.* at Ex. H, “Overlooked Offenses – Public Housing Program.”

<b><i>NYCHA Public Housing</i></b>	
<b>Criminal Conviction</b>	<b>Years After Serving Sentence</b>  (including completion of probation/parole and payment of fine)
Subject to a lifetime registration requirement under a state sex offender registration program	Until the convicted person is no longer subject to a lifetime registration requirement
<i>Felonies</i>	
Class A, B, and C	6 years
Class D and E	5 years
<i>Misdemeanors</i>	
Class A	4 years  (5 years if 3+ convictions for Class A m/d or felonies within last 10 years)
Class B or unclassified	3 years  (4 years if 3+ convictions for m/d or felonies within last 10 years)
<i>Violations or Infractions</i>	
Violations or DWI	2 years  (3 years if 3+ convictions for felonies, m/d, violations or DWI infractions within last 10 years)
<i>Multiple Convictions</i>	Ineligible for longest applicable period.

<i><b>NYCHA Section 8</b></i>	
<b>Criminal Conviction</b>	<b>Years After Serving Sentence</b>  (including completion of probation/parole and payment of fine)
Subject to a lifetime registration requirement under a state sex offender registration program	Until the convicted person is no longer subject to a lifetime registration requirement
<i>Violent Behavior, Controlled Substances or Alcohol Related Offenses</i>  Class A, B, and C  Class D and E	6 years  5 years
<i>Controlled Substances or Alcohol Related Offenses</i>  Class A Misdemeanors  Class B or Unclassified Misdemeanors	4 years  (5 years if 3+ convictions for Class A m/d or felonies within last 10 years)  3 years  (4 years if 3+ convictions for m/d or felonies within last 10 years)
<i>Controlled Substances or Alcohol Related Offenses</i>  Violations or DWI	2 years  (3 years if 3+ convictions for felonies, m/d, violations or DWI infractions within last 10 years)
<i>Multiple Convictions</i>	Ineligible for longest applicable period.

Source: The Bronx Defenders, *The Consequences of Criminal Proceedings in New York State* (Mar. 2005).

**b. The policy reasons for excluding people with criminal records from public housing**

**i. Public Safety**

Since 1988, legislative initiatives restricting people with criminal records from access to public housing have been motivated by a desire to increase public safety. In 1996, President Clinton focused on the safety of families living in public housing projects when he urged HUD and the PHAs to more actively enforce a “one strike” policy:

In my State of the Union address I challenged local housing authorities and tenant associations to adopt this one strike and you’re out policy, to restore the rule of law to public housing. To simply say, if you mess up your community you have to turn in your key; if you insist on abusing or intimidating or hurting other people you’ll have to live somewhere else. ... There is no reason in the world to put the rights of a criminal before those of a child who wants to grow up safe or a parent who wants to raise that child in an environment where the child is safe, in no danger of being shot down in a gang war, and can’t be stolen away by drug addiction.<sup>667</sup>

HUD also focuses on safety concerns as the driver of its “one strike” and other policies designed to exclude from public housing people who have come into contact with the criminal system. For example, HUD’s 1996 notice to PHAs informing them of changes to various screening, lease, and eviction provisions mandated by the “Housing Opportunity Program Extension Act of 1996” states that, “these requirements are consistent with the Department’s determination to take every reasonable step to help HAs promote safer public and assisted housing.”<sup>668</sup>

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<sup>667</sup> President William Jefferson Clinton, Remarks by the President at the One Strike Crime Symposium (Mar. 28, 1996), available at <http://www.clintonfoundation.org/legacy/032896-speech-by-president-at-one-strike-crime-symposium.htm>.

<sup>668</sup> HUD Notice PIH 96-27 (May 15, 1996).

In addition to being motivated by concerns about public safety, HUD officials have also argued that “one strike” policies have in fact caused crime to drop on public housing premises and in surrounding neighborhoods. In 1997, more than a year after the “one strike” initiative was implemented, Secretary of Housing and Urban Development Andrew Cuomo stated in a press release that, “[d]rug dealers and other criminals are entitled to only one kind of government housing – a prison cell. The sooner we can get them out of public and assisted housing, the better. As a result of the President’s zero tolerance of crime in public housing, we’re making dramatic progress in reclaiming crime-infested neighborhoods around the nation.”<sup>669</sup>

Nevertheless, despite the clear concern about public safety and the motivations behind these policies, no studies exist showing any causal link between the exclusion of people with criminal records and reduced crime in or near public housing.<sup>670</sup> Moreover, the broad exclusions outlined above mostly affect people charged with non-violent, minor offenses. In 2004 in New York State, more than two-thirds of adult arrests were for misdemeanors, while less than 9% were for violent felonies.<sup>671</sup> To give some context of the effect of these exclusions, 44,768 people in New York City alone in 2004 were convicted of Disorderly Conduct, P.L. § 240.20, a non-criminal violation.<sup>672</sup> Each of them is now presumptively ineligible for public housing in

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<sup>669</sup> Office of the Vice President, *Vice President Gore Announces \$217.3 Million In Grants To Fight Crime And Drugs In Public And Assisted Housing* (Nov. 7, 1997), available at <http://www.clintonfoundation.org/legacy/110797-vp-announces-grants-to-fight-crime-in-public-housing.htm>.

<sup>670</sup> See Human Rights Watch, *supra* note 592, at 35 (finding no direct evidence in the literature, even after repeated requests to HUD and various PHAs).

<sup>671</sup> New York State Division of Criminal Justice Services, *Adult Arrests: 1994 - 2004*, available at <http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/index.htm>. Numbers were similar for New York City: almost two-thirds of adult arrests were for misdemeanors and only 10% were for violent felonies. *Id.*

<sup>672</sup> New York State Division of Criminal Justice Servs., Computerized Criminal History System (as of April 2005).

New York City for an average of three years – two years after the completion of their typical sentence to a one-year conditional discharge.

## ii. Distributing a Scarce Resource

Although public safety is most often stated as the prime concern of restrictions on access to public housing, it is not the only concern. The HUD and PHAs are acutely aware that public housing is a scarce resource, and restrictions on access based on a person’s criminal record are sometimes promoted as a method of rationing that resource. For example, the HUD notice introducing the “one strike” initiative to PHAs explained that:

Because of the extraordinary demand for affordable rental housing, public and assisted housing should be awarded to responsible individuals...At a time when the shrinking supply of affordable housing is not keeping pace with the number of Americans who need it, it is reasonable to allocate scarce resources to those who play by the rules. There are many eligible, law-abiding families who are waiting to live in public and assisted housing and who would readily replace evicted tenants.<sup>673</sup>

At around the same time, in a letter responding to questions raised at a HUD conference on the legal issues generated by the one strike initiative, HUD Associate General Counsel Robert S. Kenison stated that, “[b]ecause the number of public housing units far exceeds the demand for those units, HUD considers a tough but straight-forward One Strike approach necessary to ensure that only law abiding tenants have access to this limited resource.”<sup>674</sup>

These pronouncements make clear that HUD’s exclusionary policies are not only rooted in a concern for public safety; they are also promoted as a system to reward law-abiding persons and to punish those who have engaged in criminal activity.

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<sup>673</sup> HUD, “One Strike and You’re Out” Policy in Public Housing, I(b) (Mar. 1996), contained in HUD Notice PIH 96-16 (HA) (Apr. 29, 1996), and available at [http://www.housingresearch.org/hrf/hrf\\_RefLib.nsf](http://www.housingresearch.org/hrf/hrf_RefLib.nsf).

<sup>674</sup> See HUD, Information for Public Housing Attorneys, available at <http://www.hud.gov/ogc/ogcphawb.html>.

#### **4. Consequences of Barriers to Housing**

##### **a. Eviction cases and hearings affect ongoing criminal cases**

Eviction cases can have a serious impact on the outcome of the individual's criminal case. In testifying in Housing Court or a PHA administrative hearing, a tenant will often go on the record about facts relating to a pending criminal matter. In actions brought by the Narcotics Evictions Program, representatives from the D.A.'s office observe and participate in housing court proceedings, providing a direct connection between the criminal and civil case. In contrast, the individual's criminal defense attorney often remains unaware of such civil proceedings and unable to assist the client in strategic decision making.<sup>675</sup>

##### **b. Screening and eviction rules cast a wide net**

Although safety is one of the goals of the laws restricting access to public housing, to the extent the regulations and policies of HUD encourage PHAs to screen and evict persons based on a broad definition of criminal activity (which can include simply being arrested), and to deny admission to persons years after they have completed a sentence for past criminal activity, these rules cast a net that can exclude people who may very well be good tenants.

PHAs do have the option to, and in some circumstances are required to, consider certain mitigating factors that allow for a more nuanced and appropriate response to a person's criminal activity that includes an individualized review of that person's suitability as a tenant.<sup>676</sup> But there is at least some tension between the exercise of this discretion, and HUD incentives to

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<sup>675</sup> McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments As an Advocacy Strategy*, 36 UNIV. OF TOLEDO L. REV. 479, 496 (2005); Mule & Yavinsky, *supra* note 613, at 15.

<sup>676</sup> See the general mitigation provisions for PHAs' screening procedures at 24 C.F.R. § 960.203.



successfully screen and evict those with criminal records.<sup>677</sup> Similarly, in the private market, District Attorney incentives to evict tenants from private buildings may conflict with any interest in considering mitigating factors.

In addition, persons who have been denied access to public or private housing or who have been evicted based on their criminal activity or the criminal activity of a household member must negotiate a complex set of procedures in order to challenge any decision or eviction, usually without the help of an attorney.<sup>678</sup> Proper representation is important even at the earliest stages of the procedure, as courts have very limited review powers once an administrative decision has been made.<sup>679</sup>

**c. Lack of access to stable housing may have a negative effect on children and families**

Laws excluding people with criminal records from accessing housing may have unintended consequences for the families of those individuals, including their children. For example, without access to stable, affordable housing, it is unlikely that a person leaving prison would be able to be reunited with his or her children.<sup>680</sup> Similarly, a family may be faced with eviction even if just one member of the household engages in criminal activity; indeed, an

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<sup>677</sup> For example, the Public Housing Management Assessment Program evaluates PHAs and assigns points based on a number of quantitative indicators, which are ultimately linked to funding levels. Indicator #8, “Security,” states that PHAs must establish eviction and screening guidelines and must be able to document that it “successfully” screens out applicants and/or “appropriately” evicts tenants who have engaged in criminal activity. 24 C.F.R. § 901.45.

<sup>678</sup> See Mule & Yavinsky, *supra* note 613, at 17. Mule and Yavinsky note that approximately 10% of tenants are represented in judicial eviction proceedings statewide, and that the same statistic applies to tenants appearing at administrative hearings at the New York City Housing Authority. Research also shows that represented tenants are more likely to achieve a successful outcome in eviction proceedings. See Carol Seron, et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City Housing Court: results of a Randomized Experiment*, 35 L. & SOC'Y REV. 419 (2001).

<sup>679</sup> Mule & Yavinsky, *supra* note 613, at 7-8.

<sup>680</sup> See G. Rubenstein & D. Mukamal, *Welfare and Housing – Denial of Benefits to Drug Offenders*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 37, 48 (Marc Mauer & Meda Chesney-Lind eds., 2002).

individual engaging in proscribed activity merely has to be under the tenant's control for the PHA or landlord to have the authority to evict.<sup>681</sup>

In addition, although families are often a key source of support for people who have left prison and are trying to reintegrate into their communities, exclusion rules can prevent people leaving prison from returning to live with their families if their families are receiving public housing assistance.<sup>682</sup>

**d. Lack of access to stable housing may increase recidivism**

A growing body of evidence shows that people leaving jail or prison often have difficulty finding stable housing. For example, in New York City up to 20% of people released from city jails each year are homeless or have unstable housing arrangements.<sup>683</sup> A draft of a study prepared by the NYC department of Homeless Services also found that more than 30% of single adults entering shelters under the Department of Homeless Services are persons recently released from city and state correctional institutions.<sup>684</sup> Studies in other jurisdictions have shown similar trends.<sup>685</sup>

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<sup>681</sup> See *HUD v. Rucker*, 535 U.S. 125 (2002) (holding that PHAs have the authority to evict even if the tenant had no reason to know of the household member's conduct). Note, however, that NYCHA policies prevent it from evicting a tenant if the person who committed the offense has been removed from the tenant's household by the time of the administrative hearing.

<sup>682</sup> See M. Bobbitt & M. Nelson, *The Front Line: Building Programs that Recognize Families' Role in Reentry* 2-3 (2003), available at [http://www.vera.org/publications/publications\\_5.asp?publication\\_id=249](http://www.vera.org/publications/publications_5.asp?publication_id=249); see also RPC Report, *supra* note 608, at Policy Statement 19; Human Rights Watch, *supra* note 592, at 41.

<sup>683</sup> Supportive Housing Network of New York, *Blueprint to End Homelessness in New York City* 13 (2002).

<sup>684</sup> See NYC Dep't of Homeless Services, *Summary of DOC/DHS Data Match* (draft of data analysis submitted for review as part of the New York City Department of Correction and Department of Homeless Services Discharge Planning Initiative, Jan. 22, 2004) cited in RPC Report, *supra* note 608, at Policy Statement 19.

<sup>685</sup> A 1997 California study found that an estimated 30-50% of parolees in metropolitan areas such as San Francisco and Los Angeles were homeless. See California Dep't of Corrections, *Prevention Parolee Failure Program: An Evaluation* (1997).

In addition, there is some evidence showing that a lack of stable housing is linked to recidivism. For example, a recent study tracked almost 50,000 individuals who were released from New York State prisons and returned to New York City between 1995 and 1998. It found that 11% of these individuals entered a city homeless shelter, and 33% of that group was re-incarcerated within two years of their release. Further, risk of reincarceration increased 23% with prerelease shelter stay, and 17% with post release shelter stay.<sup>686</sup>

This quantitative evidence can be supplemented with strong experiential evidence that stable housing is a factor in success after leaving prison.<sup>687</sup> The logic of this position was expressed by President George Bush in his 2004 state of the union address, when he introduced a new re-entry initiative for people leaving prison:

This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit more crimes and return to prison.<sup>688</sup>

## **B. POSSIBILITIES FOR CHANGE**

The recommendations presented below are directed toward improving public safety and reducing public costs by reducing barriers to housing for people with criminal arrests or records. As discussed in Part A, the provision of housing is central to an individual's stability. Without housing, it is difficult to raise a family, hold down a job, or maintain connections to a community. Although public safety concerns provide the justification for barring people with

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<sup>686</sup> Metraux & Culhane, *supra* note 609, at 148. Another study by Metraux and Culhane for the Corporation for Supportive Housing in New York showed that the use of state prisons and city jails dropped by 74% and 40%, respectively, when people with mental illness and past criminal records were provided supportive housing. Dennis Culhane, Stephen Metraux, & Trevor Hadley, *The New York, New York Agreement Cost Study: The Impact of Supportive Housing on Services Use for Homeless Mentally Ill Individuals* 4 (2001), available at <http://www.csh.org/html/NYNYSummary.pdf>.

<sup>687</sup> See, e.g., Nino Rodriguez & Brenner Brown, *Preventing Homelessness Among People Leaving Prison* (2003), available at [http://www.vera.org/publication\\_pdf/209\\_407.pdf](http://www.vera.org/publication_pdf/209_407.pdf).

<sup>688</sup> See President George W. Bush, State of the Union Address (Jan. 20, 2004) (transcript available at <http://www.gpoaccess.gov/sou/index.html>).

criminal records from housing, it is in fact much safer to provide them with a place to live. The barriers discussed above assume that the person will disappear entirely if not given housing; instead she will likely move to a homeless shelter or double up in an apartment with people that might include influences she would rather avoid. People with criminal records or arrests do not vanish when they are denied housing; instead they are forced to keep moving around, often within the very same neighborhood that has been “rid” of them.

Providing housing opportunities is also far less costly than funding homelessness programs, shelters, corrections beds, and the criminal justice system in general. Although these funding priorities are not generally seen as direct tradeoffs, research shows that anti-eviction measures would result in a large net savings, as they prevent homelessness.<sup>689</sup> Information on recidivism for those living in shelters indicates that similar savings could be calculated within the criminal justice system if stable housing becomes available.

Because access to federally funded public housing is extremely limited, people with arrests and convictions must turn to the private market for housing. As described in Part A, the process of securing and maintaining private housing is very difficult for people with criminal histories. Until the criminal justice system prioritizes housing upon release, the government creates more affordable housing open to people with criminal records, and private landlords are obligated to allow people with criminal backgrounds irrelevant to being a good tenant into their buildings, the people who are among the most in need of stable housing will be least likely to get it. The recommendations below work hand in hand to address these issues and eliminate the various barriers to private housing faced by people with criminal or arrest records and their families.

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<sup>689</sup> See, e.g., Abel, *supra* note 612, at 3-5 (citing a study by the New York City Human Resources Administration).

**1. State Legislative Remedies: Protect People with Criminal Records from Unjust Discrimination**

- Pass human rights law limiting discrimination based on criminal accusations.

Pass New York State law modeled on the employment discrimination law (NY Exec Law § 296(16)) prohibiting denial of or eviction from housing based on a criminal case with a favorable disposition or an accusation with a pending criminal case.

- Pass human rights law limiting discrimination based on criminal convictions.

Pass New York State law modeled on New York Corrections Law §§ 750-755 and federal Fair Housing Act, 42 U.S.C. § 3613, to prohibit unfair discrimination against individuals with criminal records and their households. Such a statute would include a requirement that Certificates of Relief from Disabilities be considered in making decisions about housing, that applicants may only be screened for convictions legitimately related to public safety concerns, and that tenants may only be evicted for similar convictions.

- Guarantee a private right of action and attorney's fees. Pass New York State law combining New York Corrections Law § 755 and federal Fair Housing Act, 42 U.S.C. § 3613, to allow for enforcement of the above provisions through a choice of the Human Rights Commission or a private right of action in Civil Court. Include a provision allowing for the award of plaintiff's attorney's fees to promote private attorneys general.

- Pass New York State legislation limiting evictions of households based on one member's criminal conviction. Pass legislation prohibiting an entire household's eviction, even if the person with a criminal record would be evicted under the above provisions, as long as that occupant's tenancy is terminated.

- Amend the Bawdy House Law. Have it reflect the above revisions.

- Pass New York State legislation providing landlord protection for negligence liability for having tenants with criminal records. If the non-discrimination provisions above are adopted, the legislature should include an incentive for landlords. It should be an affirmative defense to negligence theories of premises liability if a landlord or housing owner can demonstrate that it complied with the balancing test set forth above.<sup>690</sup>

**2. Federal Legislative Remedies: Reduce Barriers to Public Housing Subsidies for People with Criminal Records and People Leaving Incarceration**

- Repeal all federal laws requiring PHAs to automatically exclude or evict certain types of people with criminal charges or convictions. See Section A above for mandatory exclusions/terminations. Persons and households subject to mandatory exclusions/terminations include: 1) any person subject to lifetime registration requirements under a state sex offender registration program; 2) any person who has been convicted of methamphetamine production on the premises of federally-assisted housing; 3) any person who has been evicted from public housing because of drug-related activity in the past three years; and 4) any person who is currently using an illegal controlled substance, or is using controlled substances or abusing alcohol in a way that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents. Instead, all admission and eviction determinations should be individualized.

- Pass federal or state law requiring PHAs to conduct an individualized assessment of each applicant with a criminal record before making a decision about admission or eviction.

- Pass federal or state law providing that PHAs *must* consider all mitigating factors before making a decision about admission or eviction. In addition to the mitigating factors

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<sup>690</sup> See Chapter II, Employment, *supra* for additional discussion.

already listed in the general mitigation provisions, PHAs must consider: 1) the best interests of any minor children of the applicant or tenant; 2) any evidence of rehabilitation; and 3) whether exclusion will render the applicant homeless. (For general mitigation provisions, see 24 C.F.R. § 982.552(c)(2) (section 8); 24 C.F.R. § 960.203 (admission); 24 § C.F.R. 966.4(l)(5)(vii)(B) (termination).)

- Pass federal or state law requiring that PHA screening and eviction guidelines can only consider criminal activity that is relevant to being a good tenant.

### **3. Purpose and Justification for Legislative Changes**

Passing the state and federal legislation described above would curtail current discrimination against individuals with criminal records and/or arrests very similar to the protections that New York State already provides in the employment context.<sup>691</sup> Such provisions reflect recommendations that have been put forward by a number of organizations working on these issues, but as of yet no such measures have been passed.<sup>692</sup> Barring eviction based on investigation, arrest, or favorable disposition would limit evictions and tenant screening based on actions that the criminal justice system deems insufficient to warrant severe punishment. Additionally, such legislation would limit the eviction of entire households based on one member's conviction. Thus, families would not become homeless based entirely upon the actions of one member of the household.

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<sup>691</sup> N.Y. EXEC. LAW § 296.16; N.Y. CORRECT. LAW §§ 750-755.

<sup>692</sup> ABA Standards: Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, *available at* [http://www.abanet.org/crimjust/standards/collateral\\_toc.html](http://www.abanet.org/crimjust/standards/collateral_toc.html) [hereinafter ABA Standards]; Nancy Fishman, Briefing Paper: *Legal Barriers to Prisoner Reentry in New Jersey* (Apr. 11, 2003), *available at* [http://www.njisj.org/reports/barriers\\_report.html](http://www.njisj.org/reports/barriers_report.html) [hereinafter NJ report]; East Bay Peace and Justice Community Summit, Briefing Packet: *All of Us or None*, *available at* <http://www.allofusornone.org/documents.html>.

Limiting screening and evictions to those where the convictions would directly threaten the safety and welfare of other tenants or the property would ensure that individuals are able to secure and maintain housing despite low-level offenses or offenses that occurred far in the past. Additionally, requiring landlords to consider Certificates of Relief from Disabilities would make such certificates meaningful by limiting housing consequences to those in which public safety is truly threatened. The American Bar Association Criminal Justice Standards support such prohibition of “discretionary disqualification of a convicted person from...housing...unless engaging in the conduct underlying the conviction would provide a substantial basis for disqualification even if the person had not been convicted.”<sup>693</sup>

Currently, discrimination based on criminal records has a disparate impact on protected racial classes because those with criminal records are disproportionately people of color. Creating protective legislation would close the loophole in current anti-discrimination law that allows such discrimination to take place. As discussed in Part A, inability to secure and maintain housing can be as severe as fines and imprisonment for the individuals involved, public safety can be compromised by such disproportionate punishments, and public costs are raised by the resulting homelessness and returns to incarceration. Instead of allowing high recidivism and crime rates by enforcing a virtual bar to housing, the above laws would create opportunities for individuals accused or convicted of a crime and their families to maintain a minimum level of stability.

New York does not currently provide a private right of action for discrimination under NY Correct. Law §§ 750-755. This barrier to filing suit limits effective enforcement of these

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<sup>693</sup> ABA Standards, *supra* note 692, at Standard 19-3.1.



anti-discrimination laws.<sup>694</sup> The state and federal Fair Housing Acts allow a private right of action for discrimination, as well as an administrative remedy, illustrating that this design is feasible.

Granting a private right of action in housing cases might be difficult given the need for consistency in the law. One response would be to amend the Human Rights Law and Corrections Law Article 23-A generally to allow for private enforcement and attorneys fees.

Similarly, the allowance for attorney's fees in such cases would enable individuals to effectively file suit, because the vast majority of people who face housing discrimination based on criminal record are unable to afford to hire an attorney. Allowing for attorney's fees awards in such suits would make it possible for such individuals to secure effective representation.

As discussed in Part A: Public Housing, federal law currently requires public housing authorities ("PHAs") to screen and evict tenants based on certain criminal convictions. Federal law also gives some discretion to PHAs in making screening or eviction determinations about other criminal arrests or convictions. The above recommended laws (those directed toward state legislation) would interact with the federal law, but they would not contradict it. The mandatory exclusions under federal law all fit neatly into the exception for allowing screening or eviction of tenants who threaten the safety or welfare of the tenants or property. All other limits on discretion function similarly to other state laws that regulate the PHAs, including the New York Human Rights Law which includes provisions such as one prohibiting discrimination based on sexual orientation, which does not exist in federal law,<sup>695</sup> and the rent stabilization regulations.

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<sup>694</sup> See Chapter II, Employment, *supra*.

<sup>695</sup> See, e.g., N.Y. EXEC. LAW § 296.2-a(b).

Consideration would need to be given to whether small building owners would be exempted from such a statute, or from the private right of action included therein. Some might be concerned that these provisions would be unreasonably punitive for small business owners and landlords. However, this legislation should be considered a valuable source of protection for civil rights, and such an award is easily avoidable for business owners and landlords who choose not to discriminate. A provision could limit application to landlords of a certain size, tracking the Multiple Dwelling Law or state Fair Housing Act.

Consideration would need to be given to whether to include home ownership, housing brokerages, and mortgage lenders, in addition to landlords, under the umbrella of such a statute. Such inclusion would widen the net of the law, increasing possible legal claims and burdens on attorneys and the courts. However, failing to include such parties would limit the impact of such legislation to a very specific set of circumstances, failing to address the root problem – that those with criminal records find it extremely difficult to secure housing. For instance, if brokers were allowed to discriminate, landlords could often avoid such liability by hiring a discriminatory brokerage. The federal Fair Housing Act includes all such entities within its purview.

The legislative solutions discussed above are relatively cost-free, but afford necessary protections to people attempting to secure and maintain housing after involvement with the criminal justice system. Although claims under such statutes would have attendant court costs, such costs seem necessary to protect the rights of individuals and families. The added procedural protections for PHAs would also increase the administrative burden of these agencies. However, many of these protections are already provided by NYCHA, by far the largest PHA in New York, proving that they are feasible.

#### 4. Housing Development: Guarantee Each Person Leaving Incarceration a Place To Live

Develop transitional supportive housing for people rendered homeless by incarceration.<sup>696</sup> People leaving prison or jail have been recognized as often having a variety of special needs. Studies show that the rate of mental illness among people who are incarcerated is two times that of people who have never been incarcerated.<sup>697</sup> 151,000-197,000 people released from U.S. correctional facilities each year are HIV positive and millions suffer from other infectious diseases. 80% of people in prison report a history of substance abuse.<sup>698</sup> Even people who do not have these problems have been found to benefit greatly from support services after leaving the institutionalized environment of a prison or jail. Currently, the vast majority people leaving incarceration do not have access to transitional housing programs or halfway houses. For those that do, access is mostly limited to those with a diagnosed mental illness or HIV.

A few examples do exist, including the Fortune Society's Fortune Academy in New York.<sup>699</sup> The supportive housing model provides a variety of support services and programming either onsite in congregate facilities or off-site in scatter-site programs. Temporary transitional programs usually function through a congregate model, as they provide peer support and group activities for residents. Providing such housing on a temporary basis to people returning from prison or jail would both meet the goal of providing each person being released from

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<sup>696</sup> RPC Report, *supra* note 608, at Policy Statement 19; Richard Cho et al., *Corporation for Supportive Housing: A Guide to Reentry Supportive Housing* (Apr. 2002), available at <http://www.csh.org/index.cfm?fuseaction=document.showDocumentList&parentID=53> [hereinafter CSH Report]; New Jersey Public Policy Research Institute, *Coming Home for Good: Meeting the Challenge of Prisoner Reentry in New Jersey* (Dec. 2003), available at [http://www.njsj.org/reports/cominghome\\_report.html](http://www.njsj.org/reports/cominghome_report.html).

<sup>697</sup> 8-16% of people incarcerated need psychiatric services. CSH Report, *supra* note 696, at 2.

<sup>698</sup> *Id.*

<sup>699</sup> See [www.fortunesociety.org/services.htm#housing](http://www.fortunesociety.org/services.htm#housing) for a description of the program.

incarceration with housing and provide those who need them with stabilizing services and structure.

Unless a new funding stream were created for this project, agencies would need to cobble together funding, which is available only from a very limited number of sources and would have to be augmented by state and local governments in order to become widely available. Some funding could be provided through the Department of Correctional Services by involving the transitional housing provider in post-release supervision.<sup>700</sup>

The social service agencies that usually develop supportive housing might have difficulty working with the criminal justice system because of different approaches to rules, policy advocacy, and attitudes toward the people that they are trying to serve. The two types of agencies also usually focus on different goals that might conflict – public safety versus client needs.<sup>701</sup> However, significant benefits can be realized from a relationship between community based housing providers and the criminal justice system, including (but not limited to) greater coordination that would lead to a much smoother transition from incarceration to post-release living.

Providing only temporary housing has serious costs as well as benefits. Such housing could be seen by individuals involved as one more way station in an institutionalized environment, as opposed to an actually necessary service. Many people would far prefer to move directly from incarceration into a permanent, stable home. Additionally, although many would benefit from structure and services, some people returning from incarceration do not want or need such services. Furthermore, being grouped together with other people returning home,

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<sup>700</sup> See CSH Report, *supra* note 696, at 24-30 for a comprehensive discussion of funding options.

while providing important peer support, might also prolong an individual's association with the criminal justice system and the attached stigma.

However, a large number of people would benefit from such housing. The temporary nature of the housing, although problematic in some ways, limits the negative impact of grouping people with criminal records together for a protracted period and allows them the stability and time to secure appropriate permanent housing and get on with their lives. Such an option is clearly preferable to sending people to homeless shelters, and in many cases would provide the help that individuals need. Additionally, if other affordable housing became available, supportive housing would only add an option for those who need it.

Creating congregated housing developments for people returning from prison or jail would likely encounter great community opposition. Such opposition can be countered by careful planning and involvement of the community, as evidenced by the Fortune Society's project and described by the Corporation for Supportive Housing.<sup>702</sup>

## **5. Develop Permanent Supportive Housing for People Returning from Prison or Jail**

For the reasons discussed directly above, many people with criminal records would greatly benefit from wider access to permanent supportive housing options. Such services are currently almost entirely limited to people with specific health needs, and often conduct screening that de facto excludes people with criminal records or open cases. However, moves are being made to create more such housing opportunities for people with criminal backgrounds,

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<sup>701</sup> See, e.g., CSH Report *supra* note 696, at 5, 7-8; Simon Rodberg, *Can Community Organizations Succeed Where Jails Fail?*, The American Prospect, Feb. 14, 2001, available at [www.prospect.org/webfeatures/2001/02/rodberg-s-02-14.html](http://www.prospect.org/webfeatures/2001/02/rodberg-s-02-14.html).

<sup>702</sup> CSH Report *supra* note 696, at 9-10.

such as the permanent housing provided by Fortune Society in the same facility as its temporary housing described above.<sup>703</sup>

Permanent supportive housing specifically geared toward people with criminal records might segregate people with criminal records from the general population and further stigmatize them. Such concerns could, however, be countered by focusing on creating housing under the scatter-site model, which would house people in existing apartments while subsidizing their rent and providing social services.

Many advocates might not be comfortable with such a model because it relies on the premise that people with criminal records have long-term special needs based entirely upon their involvement with the criminal justice system. Instead, it might be better to focus on creating more supportive housing generally and eliminating the barriers that people with criminal records face in trying to access such housing. This could be effected in part through passage of the above legislation.

#### **6. Encourage Housing Developers to Create Housing Open to People with Criminal Records**

In addition to creating new housing opportunities specifically for people with criminal backgrounds, housing developments built for low-income individuals generally should be encouraged to open their application processes to people with criminal records and perhaps even recruit this population specifically to fill vacancies. Often such developments, because they are in very high demand, screen for criminal background in accepting applicants. Currently, though, Fifth Avenue Committee CDC (“FAC”) in Brooklyn, NY operates a program for people

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<sup>703</sup> See [www.fortunesociety.org/services.htm#housing](http://www.fortunesociety.org/services.htm#housing).

returning from prison or jail. One component of this program is giving their clients priority in FAC's housing vacancies.<sup>704</sup>

Such reform efforts might meet resistance from housing developers and other tenants in low-income housing developments. However, non-profit organizations engaged in community development are likely to have a better understanding of the importance of stable housing for people with criminal records and might be more open to housing such individuals than other private landlords. Additionally, such projects would meet with less community opposition and would avoid much of the stigma of congregate supportive housing, as described above. Access to such housing would allow people returning from prison or jail the opportunity to gain stability and live a "normal" life at home. This model, however, would not provide services that some individuals might find necessary, except on an ad hoc basis as the developer is able to provide them.

Similar to problems faced by supportive housing facilities, non-profit housing developers might be reluctant to engage with the criminal justice system – something they might have to do if reaching out to people while they are incarcerated.<sup>705</sup>

Such encouragement would have to take a concrete form, and could work hand in hand with the anti-discrimination legislation discussed above. One option for realizing the desired outcome would be to provide tax incentives for developers to recruit a percentage of people with criminal backgrounds into their projects. Additionally, a statewide organizer could conduct outreach and coordination for such efforts.

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<sup>704</sup> See Rodberg, *supra* note 701; see also program description at <http://www.fifthave.org/CriminalJustice/CrimJusticeProgramOverview.htm>.

<sup>705</sup> *Id.*

**7. Prioritize the Creation of Affordable Permanent Housing in New York State. Increase Federal and State Funding for Programs such as Section 8 and Conventional Public Housing**

The affordable housing crisis in New York is at the root of many of the barriers to housing for people with criminal backgrounds. Landlords would not be able to be so selective if the demand for their housing were lower and non-profits would be more likely to reach out to people returning from prison or jail to fill their beds. Instead, in the current competitive climate, only people with no problems or barriers arising out of a criminal background are able to secure low cost housing; all others are screened out. Many programs to protect, encourage, and create affordable housing have been developed over the years, and state and local governments must prioritize them through increased funding in order to alleviate the ever growing need for housing in New York State.<sup>706</sup>

Coalitions have been working on the issue of affordable housing for years, and always encounter great opposition because of the fiscal burden of adequately funding these programs. Many would posit, however, that the costs of affordable housing are outweighed by the costs of homelessness and the related lack of stability and need for services that it brings.<sup>707</sup>

**8. Provide Better Transitional Planning Prior to Release from Prison or Jail**

Many groups working on the civil consequences of criminal convictions focus heavily on the need for improved discharge and transitional planning services prior to release from jail or

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<sup>706</sup> See the New York State Division of Housing and Community Renewal website at <http://www.dhcr.state.ny.us/general/affhsg.htm/> for an overview of some of the existing affordable housing programs in New York State.

<sup>707</sup> For organizations working on this issue *see, e.g.*, New York State Association for Affordable Housing at <http://www.nysafah.org/aboutus.html> and Association of Community Organizations for Reform Now at <http://www.acorn.org/index.php?id=2716>.



prison.<sup>708</sup> Such groups propose the following. Transition/discharge planners should work with community-based organizations to be aware of the full range of housing available and the legal restrictions to such housing, and keep a resource guide of appropriate housing options.

Transition planners should individually assess incarcerated people prior to release to determine specific housing needs and availability of housing to meet these needs. Although every effort should be made to secure housing prior to release, this date should not be delayed due to the unavailability of housing.<sup>709</sup>

All people leaving prison or jail should leave with a feasible housing plan. Transition planners should work collaboratively with service providers in the community, other involved government agencies providing financial, health, and housing assistance, and parole or probation officers to ensure a smooth transition from incarceration to the community. Efforts are being made across the country to improve discharge planning along the lines described above.<sup>710</sup>

Improving transitional planning would be a cost effective way to improve re-entry prospects for those leaving prison or jail. Costs would mostly involve increased training for discharge planners and potential increase in discharge planning staff to meet the needs described above.

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<sup>708</sup> See generally RPC Report, *supra* note 608, at Policy Statement 19; ABA Justice Kennedy Commission Recommendations, Kennedy Commission Report Resolution 121D (2004), available at [www.abanet.org/media/jkcrecs.html](http://www.abanet.org/media/jkcrecs.html); Fred Osher, et al., *A Best Practice Approach to Community Re-entry from Jails for Inmates with Co-occurring Disorders: The APIC Model* (Sept. 2002), available at <http://www.gainscenter.samhsa.gov/html/resources/publications.asp>; Rodriguez & Brenner, *supra* note 687; New Jersey Public Policy Research Institute, *Coming Home for Good*, *supra* note 696.

<sup>709</sup> Some states actually do not release people until appropriate housing is found. See Rodriguez & Brenner, *supra* note 687, at 4. The Statewide Reentry Policy Council recommends not following this approach, as it further penalizes the incarcerated individual for a lack of housing that is out of their control. RPC Report, *supra* note 608, at Policy Statement 19.

<sup>710</sup> See *supra* note 708.

This proposal, although an important step, would likely not have a large effect on housing for people returning from prison or jail unless combined with the other recommendations. First, the results would necessarily be extremely limited, due to the overall lack of affordable housing stock in New York State and the additional barriers faced by people with criminal records, as described in Part A. In the current state of the housing market, transitional planners can do little to address the true needs of people who are incarcerated. Second, an entire culture in the jail and prison system would have to be reformed. Employees of the criminal justice system would have to refocus on providing comprehensive assistance to people who are incarcerated and working with community organizations instead of the adversarial posture that correctional workers are taught to have toward inmates. Third, community groups might be reluctant to working with the criminal justice system, which might have very different priorities. Nonetheless, it is essential that these issues are addressed and that efforts be made to move toward providing a successful and community based transition out of prison or jail. Solutions include subcontracting transitional or discharge planning to community-based organizations.

#### **9. Provide Housing Stipends for the Period Directly after Release**

One of the important barriers to housing for people returning from incarceration is inability to pay the fees associated with securing a new apartment, such as broker's fees and security deposits, as most people returning from incarceration lack financial savings. Paying the first few months' rent is also very difficult while the individual looks for employment and other sources of income. In New York State, people who are eligible for public assistance can apply for a "one-shot deal" to assist with the costs of security deposit, broker's fee, first month's rent, and/or moving expenses. Such assistance is either provided in grant form or will have to be paid back in installments. Regardless, many people leaving jail or prison have a very difficult time accessing such benefits, especially under a tight timeframe as they attempt to secure housing

quickly.<sup>711</sup> Even when they are able to access such assistance, it is extremely limited and will not cover the first few months' rent.

Some states have implemented programs to provide funding for these needs. For instance, Allegheny County State Forensic Services provides for the first three months of living expenses for people with mental illness once they are released from prison.<sup>712</sup> Providing such funding for all people leaving incarceration would allow them to access housing immediately upon release instead having to remain homeless until they can secure a job and save enough funds to move.

Such programming would likely encounter serious opposition as lawmakers prioritize funding for social services. It might seem counterintuitive to some to provide this sort of expanded funding to “criminals” while people who have not committed crimes go unassisted. This concern might be alleviated by providing such funding to the homeless population in general (including incarcerated people in this population, as discussed above). However, it would become quite costly.

#### **10. Provide Housing Case Management for People Rendered Homeless as the Result of Criminal Arrest or Conviction**

Such services could be included in a one-stop community center for people with criminal convictions (generally applicable).<sup>713</sup> Housing assistance has been proven to be an effective way to enable homeless people to access housing and is currently provided by a variety of organizations. Funding housing case managers specifically for people with criminal

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<sup>711</sup> See *supra* Chapter IV, Benefits.

<sup>712</sup> See Allegheny County State Forensic Program (description available at <http://www.county.allegheny.pa.us/dhs/BH/acsfp.html>; see also RPC Report, *supra* note 608, at Policy Statement 19 for additional examples of financial assistance provided to people upon release from prison.

<sup>713</sup> See, e.g., Rodriguez & Brenner, *supra* note 687; New Jersey Public Policy Research Institute, *Coming Home for Good*, *supra* note 696.

backgrounds would create a resource that is knowledgeable about the barriers and programs that are open to this hard to house population. Case managers with such a knowledge base would help people with criminal backgrounds navigate the complicated path to securing a stable home. For example, the Vera Institute for Justice's Project Greenlight provided housing assistance to its clients.<sup>714</sup> This program worked together with the correctional system to identify people living in prison who needed assistance and to provide comprehensive services, including housing placement, for them.

Funding case managers throughout the state to work fulltime on housing people with criminal records would carry a significant cost in salaries and resources. Such a program could also be seen as duplicative, because some might claim that transition planners, resource guides, and general social services should be sufficient to assist a person in finding housing. However, others would argue that providing such assistance is necessary, given the state of constant change in the housing market and the specificity of the knowledge necessary to quickly house a person with a criminal record. Additionally, such assistance greatly increases the ability of people to be housed without the costs of building additional housing or providing ongoing social services.<sup>715</sup>

**11. Provide Training to People in Jail or Prison on Finding and Maintaining Housing; Teach People About Their Housing Rights under Federal, State, and Local Law**

Housing rights and skills workshops should take place in jails and prisons prior to release, as well as in criminal defense offices for defendants and their families while an individual is facing criminal charges.<sup>716</sup>

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<sup>714</sup> Rodriguez & Brenner, *supra* note 687.

<sup>715</sup> *Id.*

<sup>716</sup> McGregor Smyth, *Bridging the Gap: Civil-Defender Collaboration*, 37 CLEARINGHOUSE REV. 58, 60 (May-June 2003).

Costs are attached to such training programs, in terms of trainer's time, training materials, recruitment, and space.

**12. Generally**

- Lift LSC limitations to allow civil legal services attorneys to fully represent their clients in all relevant matters.
- Institute more collaboration between civil legal services and criminal defense practices to address all of the client's legal needs.<sup>717</sup>

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<sup>717</sup> See, e.g., *id.*; Cynthia Works, *Reentry – the Tie That Binds Civil Legal Aid Attorneys and Public Defenders*, 37 CLEARINGHOUSE REV. 328 (Sept.-Oct. 2003).



## VII. FAMILY

There are millions of parents and children in the United States who have been separated from each other by the criminal justice system, whether it be a short-term separation after an arrest or the much longer separation due to an extended prison sentence. Exposure to the criminal justice system, even prior to any trial or conviction, can have significant consequences for a family's ability to stay together. Once a parent is arrested, tried and/or convicted, the state child welfare services often must decide what course of action to take with regard to that parent's children. For example, simply charging a parent with a crime can be the impetus for removing children from a home on the basis that it is in the "best interests" of the children.<sup>718</sup> If there is no other parent in the home, or if other custodial arrangements cannot be made, the state must place the child in the temporary care of others.

Moreover, 2 million children in the United States currently have parents who are incarcerated, 50% more than ten years ago.<sup>719</sup> One in eight children, approximately 10 million, have at some point in their lives been separated from an incarcerated parent.<sup>720</sup> Many jurisdictions have programs that attempt to maintain the connection between an incarcerated parent and his or her children, with the goal of providing continuing support for the children and making reunification of the parents and the children as easy a transition as possible. However,

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<sup>718</sup> The "best interest of the child standard" is generally defined as steps taken that would not be contrary to the health and safety of the child. See N.Y. SOC. SERV. LAW § 384-b(1)(a)(ii).

<sup>719</sup> Nell Bernstein, *A Bill of Rights for Children of Prisoners* 1 (Sept./Oct. 2004); see also Christopher J. Mumola, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 182335, *Incarcerated Parents and Their Children*, at 1-2 (Aug. 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf> ("Of the Nation's 72 million minor children, 2.1% had a parent in State or federal prison in 1999. . . . Black children (7.0%) were nearly 9 times more likely to have a parent in prison than white children (0.8%). Hispanic children (2.6%) were 3 times as likely as white children to have an inmate parent."). As of January 1, 2005, in New York, 80, 192 children had a parent in the state prison system. New York State Dep't of Correctional Servs., *Hub System: Profile of Inmate Population Under Custody as of January 1, 2005*, at 17.

<sup>720</sup> Bernstein, *supra* note 719, at 1.

the distance of prisons from the urban centers from which most prisoners come and in which their families continue to live is a significant impediment for maintaining regular contact between an incarcerated person and his or her child. In addition, provisions of the federal Adoption and Safe Families Act (“ASFA”),<sup>721</sup> passed in 1997, which seeks to limit the length of foster care and place a child in an adoptive home as quickly as possible, may actually work to prevent family reunification.

When a parent is released from prison, he or she may incur serious financial burdens making it difficult to justify removing his or her children from foster care and reunify the family. These might include difficulty finding adequate employment, inability to secure appropriate housing (or being evicted from subsidized housing due to the conviction), or loss of public assistance. Among the most significant financial obstacles many parents face are tremendous arrears in child support payments that have accrued during their incarceration.

The negative impact on family stability that often accompanies criminal proceedings or convictions can also contribute to a greater likelihood that children of such families will themselves be arrested or convicted of crimes. Moreover, although services exist for juvenile offenders that assist in helping them to reintegrate back into their families, when both young offenders and their parents are enmeshed in the criminal justice system, reunifying an entire family becomes even more difficult.<sup>722</sup>

This Chapter examines the disruption of the family unit when one of its members is involved in the criminal justice system, and the barriers to securing unification of families after

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<sup>721</sup> Adoption and Safe Families Act, 42 U.S.C. §§ 670-679a (1997) (“ASFA”); *see also* N.Y.F.C.A. §§ 1055, 1035(b)(2) & N.Y. SOC. SERV. LAW § 384-b(1)(i)(i) (the parallel New York statutes).

<sup>722</sup> McLanahan & Bumpass, *Intergenerational Consequences of Family Disruption*, 94 AM. J. SOC. 130, 142-43 (1998); *see also* Jeffrey Fagan, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1590-159 & n. 150-152 (2003).



the removal of children or the incarceration of a parent resulting from a criminal charge or conviction.

**A. THE LAW AND ITS EFFECTS**

Exposure to the criminal justice system, even prior to any trial or conviction, can have significant consequences for a family's ability to stay together. The arrested individual may be the sole or primary source of family income or may be a single parent. In such cases, pretrial detention can lead to the loss of housing, the removal of the child from the home, the disruption of a child's schooling and financial distress for the family unit.<sup>723</sup>

The scope of the traumatic effects on families is most significant when a parent is subject to incarceration, a growing phenomenon in our society. In 1997, 61% of male Caucasian inmates and 68% of male black and Hispanic inmates were fathers.<sup>724</sup> Correspondingly, 78% of female Caucasian inmates, 82% of female black inmates and 79% of female Hispanic inmates were mothers.<sup>725</sup> As females are the fastest growing sector of the US prison population, growing at 8.3% per year between 1990 and 2000 (compared with 6.4% for males), the number of people in prison who are parents is likely to increase over the next decade.<sup>726</sup> In addition to increasing numbers of parents currently imprisoned, the length of prison sentences has increased consistently throughout the 1980s and 1990s, resulting in longer periods of separation of parents and their children.<sup>727</sup>

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<sup>723</sup> See Chapter VI, Housing, Chapter III, Education, and Chapter V, Financial Consequences, *supra*.

<sup>724</sup> Jessica Pearson & Chris Hardaway, *Designing Programs for Incarcerated and Paroled Obligors*, Welfare Information Network, Vol. 1 (Aug. 2000).

<sup>725</sup> *Id.*

<sup>726</sup> *Id.*

<sup>727</sup> Dania Palanker, *Reversing the Negative Economic Impacts of Increased Incarcerations on Ex-Offenders and Their Families*, 2001 KENNEDY SCH. REV. 156, 157-59.

## 1. Financial Hardship

When parents are incarcerated, their families face significant financial difficulties. The financial hardships on a family are often associated with the loss of a father's presence due to incarceration. For example, one study compared families with an imprisoned father to single mothers raising children after a divorce. A mother and her children face an estimated 73% drop in their standard of living following a divorce. This reduction in standard of living would likely increase when the separation is due to a father's imprisonment.<sup>728</sup>

Incarceration does not only affect "poor" families. The higher the incarcerated parent's income, the larger the resulting decrease in living standard. Conversely, for families in which the incarcerated parent makes little or no money, the imprisonment may have little effect on the families' economic situation. Although removing some inmates may decrease strains on families' finances, the removal of one parent or caretaker often creates other non-direct financial strains, such as limits to access to childcare and other resources that are essential to the survival of the urban poor.<sup>729</sup>

Further, families face increased and additional financial costs while attempting to maintain strong ties with the incarcerated family member. These ties could foster an easier transition and reunification after a prison sentence ends. In New York, most state prisons are substantial distances away from the urban centers in which most families of prisoners live. From New York City, many prison facilities are over 8 hours away from families of prisoners and require weekend trips. Bus rides can cost over \$50 per family member. The costs of visiting family members can be a significant burden on already strained family resources. In addition,

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<sup>728</sup> *Id.* at 167-68.

<sup>729</sup> Fagan, *supra* note 729, at 1590.

simple communications such as phone calls can impose an additional burden on a family. For example, the New York State Department of Correctional Services has an exclusive contract with MCI to provide all phone services for prisoners making collect calls to their homes. Because of the nature of this contract, substantial phone contact between an incarcerated person and his or her family can be prohibitively expensive.<sup>730</sup> An incarcerated person may also receive supplies from his or her spouse or family, which is an elective expense, but one that families might consider a necessity. Finally, families of prisoners are often faced with the burden of paying the legal expenses that accrue during the criminal proceedings leading up to and often continuing during the imprisonment.<sup>731</sup>

After release from incarceration, reuniting with a child is fraught with obstacles. Laws and regulations limit access to a range of benefits and entitlements from public assistance to housing for individuals with criminal convictions, which greatly impedes these parents' ability to achieve financial stability.<sup>732</sup> A foster care agency monitoring the children will find it difficult to justify reunification in court if a parent is having difficulty finding employment, adequate housing, or other adequate care for children.

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<sup>730</sup> *Shattered Families*, Fortune News 15 (Fall 2003). The New York Campaign for Telephone Justice, [www.telephonejustice.org](http://www.telephonejustice.org), was launched by the Center for Constitutional Rights (CCR) in the fall of 2004 to reform the phone system and establish equitable service for families of incarcerated persons. According to CCR, under the state's monopoly contract with MCI, the average prison phone call is billed at 19 minutes, costing just over \$6 and adding up to monthly phone bills of up to \$400. MCI has been allowed to charge 630% over the market rate. New York State gets a 57.5% kickback on MCI's profits.

<sup>731</sup> See Palanker, *supra* note 727, at 168.

<sup>732</sup> See Chapters IV and VI on Benefits and Housing, *supra*.

## 2. Separation – Effect on Children

### a. Loss of parental contact

The United States Department of Justice’s Bureau of Justice Statistics reported in 2000 that the majority of incarcerated individuals in the United States are parents of minor children.<sup>733</sup> Among federal prisoners 55% of fathers and 84% of mothers lived with their children prior to incarceration;<sup>734</sup> among state prisoners, almost half of the fathers and two-thirds of the mothers lived with their children before being imprisoned.<sup>735</sup> Approximately 80% of mothers who lived with their children prior to incarceration were single parents.<sup>736</sup> The average age of children with an incarcerated parent was 8 years old; almost 60% were less than 10 years old.<sup>737</sup> The impact of incarceration has fallen disproportionately on children of color. For African American children nationwide, 7% had at least one parent in prison in 1999. In New York State, approximately 81% of the prisoners are African American or Latino.<sup>738</sup>

A 1993 study of imprisoned fathers in New York maximum-security prisons found that 74% of fathers lived with their children prior to their incarceration.<sup>739</sup> Of these men, 89% will

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<sup>733</sup> Christopher J. Mumola, U.S. DEP’T OF JUSTICE, PUBL’N NO. NCJ 182335, *Incarcerated Parents and Their Children*, at 1 tbl. 1 (Aug. 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>. In *Family to Family, Tools for Rebuilding Foster Care; Partnerships Between Corrections and Child Welfare*, A Project of the Annie E. Casey Foundation, the authors report that incarcerated mothers are typically parents of two or three children. *Id.* at 8.

<sup>734</sup> *Incarcerated Parents*, *supra* note 733, at 1, tbl. 1.

<sup>735</sup> *Id.* at 3, tbl. 4.

<sup>736</sup> *Id.* at 4, tbl. 5; see Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1672, n.5 (2003).

<sup>737</sup> *Incarcerated Parents*, *supra* note 733, at 2.

<sup>738</sup> Genty, *supra* note 736, at 1672.

<sup>739</sup> John Hagan & Ronit Dinovitzer, *Unintended Consequences of Sentencing: Children of the Prison Generation*, 26 CRIME & JUSTICE 121, 139 (1999).

serve two or more years.<sup>740</sup> Eighty-two percent of women will serve at least two years.<sup>741</sup>

Although, in general, incarcerated parents want to maintain their status as a parent, want to remain close with their children and families, and expect to live with their children after their release, imprisonment places burdens on the family unit that might make those goals difficult to realize.

For incarcerated males, the separation from their families places a significant strain on their relationships. As a result, couples faced with this situation are more likely to divorce, resulting in a permanent division of the family unit – as opposed to the often-temporary separation caused by imprisonment.<sup>742</sup>

#### **b. Alternative custodial arrangements**

Imprisoned mothers, having often been the sole caretaker of the children prior to incarceration, face particular challenges to maintaining strong ties with their children and to reuniting with them at the end of a prison sentence. While incarcerated, mothers initially have to decide who will have custodial responsibility for the children. Many mothers may have to decide whether the father or another relative should informally take custody of their children through an affidavit granting guardianship (without court involvement) or whether they should formally petition family court to make decisions on behalf of their children. If an arrangement with the father or a relative cannot be accomplished, child welfare agencies must resort to traditional foster care arrangements, which often create many administrative and bureaucratic

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<sup>740</sup> Genty, *supra* note 736, at 1672, n.15.

<sup>741</sup> *Id.*

<sup>742</sup> Hagan & Dinovitzer, *supra* note 739, at 140. Indeed, under New York Family Law, when a spouse has been imprisoned for a continuous period of three years or more, this may be used as a ground for a divorce. N.Y. DOM. REL. LAW § 170(3). Even if the prison sentence is for fewer than three years, the separation can be used as an allegation for “cruel and inhuman treatment” as a ground for divorce. N.Y. DOM. REL. LAW § 170(1).

issues that can be difficult on both children and their parents. In many instances, the child welfare agency may remove children upon arrest and not involve the parent in the decision about where her children will be placed. For example, when the parent remains incarcerated there are frequently difficulties in securing the parent's attendance at proceedings in Family Court related to the child's custodial status, resulting in undue delay in the court's determinations or, in some instances, a deprivation of the parent's right to participate in the proceedings.

According to a Bureau of Justice Statistics Survey, approximately 10% of fathers and 2% of mothers in state prison had children in foster care.<sup>743</sup> For New York State, 18.1% of mothers had a child in foster care.<sup>744</sup> Many states, including New York, prefer placing the child with relatives in "kinship foster care," recognizing that such arrangements can minimize the disruption in the child's life caused by the separation from his or her parent.<sup>745</sup> However, provisions of certain state and federal statutes that limit the ability of persons to be foster or adoptive parents sometimes make this option unavailable.<sup>746</sup> The federal statute prohibits individuals with certain felony convictions from being approved as a kinship foster parent. In addition, state regulations not only prohibit individuals with a wider range of convictions from qualifying as a foster parent, but individuals living in the household with the kinship foster parent can disqualify the family member if they have a criminal history. Also state regulations can restrict family members from kinship care for non-criminal reasons. For example, the

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<sup>743</sup> Mumola, *supra* note 733, at 4.

<sup>744</sup> See Human Rights Watch, *Collateral Casualties: Children of Incarcerated Drug Offenders in New York*, tbl. 6 (2002).

<sup>745</sup> Jill Duell Berrick, *When Children Remain Home: Foster Family Care and Kinship Care*, 8 THE FUTURE OF CHILDREN 72, 74 (Spring 1998). As of 1998, the number of children placed in kinship foster care in New York closely approached the number of children in non-kinship foster care. *Id.*

<sup>746</sup> 42 U.S.C. § 671 (prohibiting those convicted of a felony for physical assault, battery or drug-related offenses within the past five years from being a foster parent).

relative's apartment may not meet a size requirement or the relative or a household member has prior ACS involvement.

**c. Visitation during parental confinement**

**i. Remote location of prisons**

A significant obstacle to incarcerated parents and their children maintaining relationships is that prisons tend to be built in remote rural locations far from the urban centers in which many incarcerated individuals previously lived with their families. For example, in New York State, according to a 2002 report, 72% of the individuals under the custody of the State Department of Correctional Services came from New York City and the surrounding suburban counties. Of these approximately 49,000 individuals, however, only 10,000 of them were incarcerated in the cluster of prisons closest to New York City, and approximately 24,000, by contrast, were imprisoned in the far northern and western sections of the state.<sup>747</sup>

The impediments these distances pose to families' efforts to maintain contact with their incarcerated loved ones are borne out by studies that reveal that fewer than half of incarcerated parents ever see their children in person.<sup>748</sup> Studies have indicated that half (or more) of the children with imprisoned mothers do not ever see their mothers during the prison term.<sup>749</sup> If a child is placed in foster care, contact between parent and child is made even more complicated, because most foster care agencies do not have the resources to facilitate in-person visits, and

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<sup>747</sup> New York State Dep't of Corr. Servs., *Hub System; Profile of Inmate Population Under Custody on January 1, 2002*, at 7 (2002) (cited in Genty, *supra* note 736, at 1680, n.60).

<sup>748</sup> Mumola, *supra* note 733, at 5, tbl. 6.

<sup>749</sup> Hagan & Dinovitzer, *supra* note 739, at 142; Barbara Bloom & David Steinhart, *Why Punish Children? A Reappraisal of the Children of Incarcerated Mothers in America*, (National Council on Crime and Delinquency 1993) (noting that 60% of children of incarcerated parents live more than 100 miles from the prison where their mother is being held).

many will not accept charges for the collect calls from parents in prison.<sup>750</sup> Agencies are required by statute to provide parents with visits with their children; but when a parent is incarcerated agencies fall far short of this mandate. In fact, this lack of contact could increase the risk that a mother's parental rights will be terminated while she is in prison.<sup>751</sup>

## ii. Prison visitation programs

The extent to which parents and children are able to visit during the parent's incarceration is also affected by the type of facility in which the parent is being held, and the nature of both the visitation facilities and the type of visitation programs in place at the facility. General population inmates in every facility can receive visitors. However, although maximum-security prisons have visiting hours seven days a week, in medium security prisons, visitors are often restricted to weekends only. In addition, some visiting room facilities are also inadequate in size, resulting in visits being cut short because of limited space.<sup>752</sup>

DOCS has a number of programs designed to support family contact and reunification that are in place at a limited number of prisons. For example, a model program for extended visitation exists at Bedford Hills Correctional Facility, where children are with their mother all day, for a weekend or for a week during the summer. Children may stay overnight in host homes within the community or in more congregate settings like a church.<sup>753</sup> The Family Reunion Program, currently available in some maximum security and a few medium security prisons, allows inmates to have overnight visits with families in trailers that are within the prison grounds

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<sup>750</sup> Women's Prison Association, *WPA Focus on Women and Justice; Barriers to Reentry* (Oct. 2003), available at [http://www.wpaonline.org/pdf/Focus\\_October2003.pdf](http://www.wpaonline.org/pdf/Focus_October2003.pdf).

<sup>751</sup> *Id.*; see Chapter VII.A.3 *infra*.

<sup>752</sup> The Correctional Ass'n of New York, *State of the Prisons 2002-2003: Conditions of Confinement in 14 New York State Correctional Facilities*, at 32 (June 2005).

<sup>753</sup> The Women's Prison Association & Home, Inc., *Partnerships Between Corrections and Child Welfare*, at 20 (2002), available at <http://www.aecf.org/initiatives/familytofamily/tools/16937.pdf>.



but outside the cellblock area. The program allows both spouses and children to periodically reunite with their family member.<sup>754</sup>

**d. Increased likelihood of delinquency**

When a parent is imprisoned, clinical studies have shown that children often suffer from depression, feelings of loss, and separation anxiety. These children often become rebellious by being disruptive at school or missing school altogether. In addition, children of incarcerated parents become much more likely to become imprisoned themselves. “[P]arental crime, arrests, and incarceration interfere with the ability of children to successfully master developmental tasks and to overcome the effects of enduring trauma, parent-child separation, and an inadequate quality of care. The combination of these effects produces serious long-term outcomes, including intergenerational incarceration.”<sup>755</sup>

The trauma of having an incarcerated parent is measurable, but no studies have been done regarding whether this trauma can be quelled by reunification. Moreover, it is unclear what percentage of parents who intend to reunite with their families in fact do so. Thus, it can be difficult to assess whether reunification significantly counters the negative affects on children who have had an incarcerated parent.

Studies do show, however, that the absence of parents has a great impact on juvenile delinquency rates.<sup>756</sup> For example, studies show that lack of parental involvement with their children, lax parental supervision, parental rejection, and unstable parental marital relationship

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<sup>754</sup> *State of the Prisons 2002-2003*, *supra* note 752, at 32-33. Family Works, while not a visitation program per se, is a program run by the Osborne Association in three prisons, Shawangunk, Sing Sing and Woodbourne. It provides parenting classes and other services to inmates to strengthen family ties and assist in maintaining connections between children and their fathers.

<sup>755</sup> *WPA Focus on Women and Justice; Barriers to Reentry*, *supra* note 750; *see also* Fagan, *supra* note 722, at 1590, and citations therein at n.150.

<sup>756</sup> Fagan, *supra* note 722, at 1590-1591.

are very good predictors of juvenile delinquency. At the same time, studies have shown the absence of fathers doubled the odds that males between the ages of 14 and 22 would be incarcerated at some point.<sup>757</sup>

### 3. Termination of Parental Rights

In 1997, Congress passed the Adoption and Safe Families Act (“ASFA”). The goal of this act was to reduce the length of time in which children were in foster care, and to accelerate the termination of parental rights and the freeing of children for adoption.<sup>758</sup> ASFA provisions make it easier for family courts to terminate the parental rights of an incarcerated parent. ASFA sets out the general rule that permanency decisions about children must be made within 12 months of the children’s entry into foster care, and that, with limited exceptions, petitions to terminate parental rights be filed when a child has been in foster care for 15 of the past 22 months.<sup>759</sup> In addition, ASFA allows the state to forgo reasonable efforts to plan for family reunification if the parent has involved in a violent offense with another child of the parent.<sup>760</sup>

Under New York’s adoption of ASFA, permanency hearings must take place within 30 days of a court determination that reunification services are not required or within 12 months of the date the child enters foster care. Under the Family Court Act, if parents do not visit or communicate with their children for six months, parents are deemed to have abandoned their

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<sup>757</sup> Hagan & Dinovitzer, *supra* note 739, at 147.

<sup>758</sup> 42 U.S.C. § 670-679a. See also the parallel New York State Statutes under N.Y.F.C.A. § 1055, 1035(b)(2) and N.Y. Soc. Serv. LAW 384-b(1)(i), which state that an authorized agency having the care of the child shall file a termination of parental rights petition pursuant to this section: “whenever: the child shall have been in foster care for fifteen months of the most recent twenty-two months; or a court of competent jurisdiction has determined the child to be an abandoned child; or the parent has been convicted of a crime as set forth in subparagraph (v) of this paragraph.”

<sup>759</sup> 42 U.S.C. § 671

<sup>760</sup> *Id.*

children.<sup>761</sup> For all practical purposes, this likely reduces ASFA's 15-month time period to a year. If the court determines that parental rights should not be terminated, permanency hearings shall again occur 12 months after the preceding hearing.<sup>762</sup>

New York, in adopting ASFA, has instituted some exceptions. For example, the state may elect not to file a petition to terminate parental rights if a relative is caring for the child or if the state welfare agency has documented compelling reasons that termination would not be in the best interests of the child. Incarceration can be used as a compelling reason if a parents' incarceration is not seen as excessive. In addition, children have the right to object to termination if they are over the age of fourteen.<sup>763</sup>

The agency that supervises the child's care is still required to make "diligent efforts" toward reunification even if a parent is incarcerated. These efforts should include arranging visitation with children, informing parents of their children's progress and engaging them in future planning and decision-making for their children.<sup>764</sup> If these efforts are not made, the agency should not be able to move forward with the termination petition. However, in many cases these exceptions are not exercised and the standard for establishing that "diligent efforts"

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<sup>761</sup> N.Y.F.C.A § 1055 (a)(B)(vii)(B)(2).

<sup>762</sup> N.Y. SOC. SERV. LAW §§ 358-a.

<sup>763</sup> See N.Y. SOC. SERV. LAW § 384-b-3-(1). Some states, like California, allow children over the 12 to object to termination proceedings. CAL. WELF. & INST. CODE § 366.

<sup>764</sup> See N.Y. SOC. SERV. LAW § 384-b-(1)(f)(5) (stating that diligent efforts include "making suitable arrangements with a correctional facility and other appropriate persons for an incarcerated parent to visit the child within the correctional facility, if such visiting is in the best interests of the child. When no visitation between child and incarcerated parent has been arranged for or permitted by the authorized agency because such visitation is determined not to be in the best interest of the child, then no permanent neglect proceeding under this subdivision shall be initiated on the basis of the lack of such visitation. Such arrangements shall include, but shall not be limited to, the transportation of the child to the correctional facility, and providing or suggesting social or rehabilitative services to resolve or correct the problems other than incarceration itself which impair the incarcerated parent's ability to maintain contact with the child.").

were made is low. The termination rules and exceptions are similar to those enacted in other nearby states such as Connecticut and New Jersey.<sup>765</sup>

The Administration of Children's Services of New York City ("ACS") has created "Best Practice Guidelines" for implementation of ASFA.<sup>766</sup> Among the best practices include making arrangements for recurring visitation between the parent and child. Although these best practices appear to be targeted toward families where the child was removed, and not families where the parent was incarcerated, the plan would serve to help ensure reunification in such a situation. ACS acknowledges that contact between child and parent is critical for reunification and permanency. ACS requires that a detailed visitation plan be implemented; however, for children of incarcerated parents, recurring visitation simply may not be practical.

ASFA has likely had a disproportionate impact on incarcerated parents with children in foster care. The vast majority of incarcerated parents will serve more than the 15-month limit for foster care placements. Nationally, the average length of time served by incarcerated parents is 6½ years.<sup>767</sup> For single incarcerated mothers, the average prison sentence for that population is 18 months.<sup>768</sup> Because child welfare agencies do not categorize cases according to whether a child has a parent in prison, there is no precise way to measure the effect ASFA has on the families of incarcerated parents, but one study reported that the number of orders issued under

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<sup>765</sup> C.G.S.A. § 17a-110, N.J.S.A. 4C-15 and 4C-53.

<sup>766</sup> See Adoption And Safe Families Act Guidelines, available at [http://www.ci.nyc.ny.us/html/acs/html/about/asfa\\_guidelines.shtml](http://www.ci.nyc.ny.us/html/acs/html/about/asfa_guidelines.shtml).

<sup>767</sup> Genty, *supra* note 736, at 1677.

<sup>768</sup> Jeremy Travis, Elizabeth M. Cincotta, & Amy L. Solomon, *Families Left Behind: The Hidden Costs of Incarceration and Reentry*, at 7 (Oct. 2003).

ASFA terminating parental rights of incarcerated inmates rose from 260 to 909 from 1997 to 2002, an increase of approximately 250%.<sup>769</sup>

#### **4. Parental Participation in Family Court Proceedings**

When children are removed from a household by the state child welfare agency, a petition is filed and the state is required to prove its case in a fact-finding hearing. The accusations in family court can arise from the facts of a parent's criminal case, *i.e.*, that the criminal behavior led the parent to neglect or abuse her children, or it could be based on other conduct. When such accusations are raised in family court, parents are entitled to legal representation, provided that they fall within the state's guidelines.<sup>770</sup>

Court-appointed attorneys, however, often lack the resources to provide important social work assistance to clients. Their high caseloads make it particularly difficult to visit clients in jail or prison. An issue of longstanding concern has been the lack of continuous legal representation of parents during the time period from the placement of their children in foster care until the termination proceeding. However, New York State recently enacted legislation designed to make more uniform permanency hearings for children placed outside of their homes.<sup>771</sup> These provisions establish continuing jurisdiction of the Family Court from the day the child has been placed until the date permanency is achieved through family reunification, adoption, independent living or a suitable permanency alternative. Specific deadlines are provided for the scheduling of permanency hearings, for notice to parents and other interested

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<sup>769</sup> Genty, *supra* note 736, at 1678 (note that the author described this as a very conservative estimate, because systematic records are not kept on this indicator).

<sup>770</sup> N.Y. SOC. SERV. L. § 384-b-(1)(f)(5).

<sup>771</sup> N.Y. F.C.A. Article 10-A, effective December 2005.

parties, and for the provision of legal counsel to parents who cannot afford to hire an attorney, to render continuous representation throughout the permanency planning process.<sup>772</sup>

It is unclear whether this much needed improvement in the access to and availability of legal assistance will address problems identified by incarcerated parents with children in foster care that impede their effective participation in family court permanency proceedings. Among those concerns has been the failure of incarcerated parents to be produced in Family Court,<sup>773</sup> the inability to see their children or speak to an agency caseworker, and the lack of meaningful legal assistance in navigating the child welfare system to keep their family intact while incarcerated.

The caseworker who monitors the children's placement in foster care is statutorily required to make sure parents keep in contact with their children and continue to make decisions in their cases.<sup>774</sup> Yet, incarcerated parents report that they do not know their caseworker or quickly lose contact with them when transferred between correctional facilities. Often they write letters to caseworkers, but receive no response when they try to ask for answers to questions about their children. Additionally, parents often say that they do not see their children, they lose track of them when their children change foster homes and they are not asked to participate in conferences about their children once incarcerated.

The lack of continuous legal representation, although not a topic that has been studied, appears to be an important link in the puzzle to understanding how parents can move quickly to termination of parental rights while they are incarcerated. It remains to be seen whether the

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<sup>772</sup> N.Y. F.C.A. §§ 1088-1090.

<sup>773</sup> The New York State Office of Children and Family Services has recently proposed an amendment to the Family Court Act that would allow for discretionary authority for the family court to permit an incarcerated parent in a federal, state or local correctional facility to participate in a hearing regarding a termination of parental rights by technological means, if reasonable efforts to produce the parent have been demonstrated. OCFS Departmental #205 (Mar. 27, 2006).

<sup>774</sup> N.Y. SOC. SERV. LAW § 384-b(7)(f)(1-5).

provision of counsel during permanency proceedings provided by Family Court Act § 1090 can overcome the myriad barriers to effective representation and active participation in these proceedings faced by incarcerated parents.

## 5. Child Support Arrears

Another significant barrier that formerly incarcerated parents face in their transition back into their communities is the accrual of child support arrears while in prison. Judges who impose child support obligations have significant discretion in determining whether circumstances exist that warrant revision of a child support order, but there is disagreement among the states about whether incarceration is a voluntary or involuntary act and is thus a basis for modification. Although courts in some states have ruled that incarceration is a sufficient circumstance to warrant modification of the child support obligation, courts in other states have ruled that incarceration is no justification, and still other states hold that it is partial justification and should be one of the many factors to consider.<sup>775</sup> The debate centers on whether incarceration is analogous to voluntary unemployment, making the non-custodial parent ineligible for modification of the support order.<sup>776</sup> New York law currently holds that incarceration is insufficient to justify elimination or reduction of an existing child support obligation or to suspend the accrual of arrearages during the period of imprisonment.<sup>777</sup>

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<sup>775</sup> Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 JUDGES' J. 5, (Winter 2004).

<sup>776</sup> *Id.* Courts that have viewed incarceration as voluntary do so on the basis that the imprisonment was the result of illegal actions voluntarily performed. Other courts have taken the view that if the incarceration was not intended to relieve child support obligations, the incarceration cannot be deemed voluntary for purposes of considering modification of the order. Rebecca May, *The Effect of Child Support and Criminal Justice Systems on Low-Income Non-Custodial Parents* (Center for Family Policy and Practice 2004), available at [http://www.cffpp.org/publications/effect\\_child.html](http://www.cffpp.org/publications/effect_child.html).

<sup>777</sup> *Knights v. Knights*, 71 N.Y.2d 865 (1988) (finding it was within the Family Court's discretion to find that father's incarceration was a voluntary act that did not warrant modification of child support order or suspension of accrual of arrears during incarceration); see also *Dep't of Soc. Servs. ex rel. Children C. v. Richard C.*, 250 A.D.2d 766 (2d Dep't 1998) & *Frasca v. Frasca*, 213 A.D.2d 589 (2d Dep't 1995) (same). Twenty other states join New

The practical effect of these different approaches is significant, because federal law prohibits retroactive forgiveness of child support arrearages.<sup>778</sup> As such, rulings on modifications based on incarceration determine the amount of arrears that incarcerated parents will be required to pay upon release.<sup>779</sup> Moreover, although New York Family Court Act § 413(1)(g) limits accrual of child support arrearages to \$500 where the non-custodial parent's income is less than or equal to poverty income guidelines, New York courts have held that this provision does not apply to lack of income due to incarceration.<sup>780</sup> Ultimately, these rules result not only in arrears accruing, but also penalties for the arrears. These penalties often have the effect of further limiting a parent's ability to gain or maintain employment. For example, if employed, a parent can have up to 65% of income become subject to execution to recover the child support arrears.<sup>781</sup> Arrears of more than four months can result in the loss of the parent's

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York in holding that incarceration provides no justification to eliminate or reduce an existing child support obligation. Fourteen states find incarceration to be a sufficient basis for modification of support obligations, and eleven have determined that incarceration is one factor to consider when determining whether to eliminate or reduce an open support obligation. Pearson, *supra* note 775, at 6; *see generally* Frank Wozniak, *Loss of Income Due to Incarceration as Affecting Child Support Obligation*, 27 A.L.R. 5th 540 (2004).

<sup>778</sup> The Child Support Enforcement and Paternity Establishment Program, enacted in 1975, was an effort by the Congress to reduce public welfare expenditures by obtaining child support from non-custodial parents on an ongoing basis. Title IV-D, Social Security Act, Pub. L. No. 93-647, § 101, 88 Stat. 2351 (codified as amended at 42 U.S.C. §§ 651-651). The 1986 Bradley Amendment to Title IV-D prohibited retroactive modifications to child support orders, regardless of the request. Prior to the amendment, obligors who amassed large child support arrears were able to have them reduced or eliminated through judicial intervention by providing good cause. Congress intended to eliminate this practice. The Bradley Amendment allows downward modification of child support orders, but only from the date of the new application to modify the order. All previously accrued arrears generally becomes a non-dischargeable debt. Ann Camett, *Making Work Pay: Promoting Employment and Better Child Support Outcomes for Low-Income and Incarcerated Parents*, New Jersey Institute for Social Justice (2005), at 3-4.

<sup>779</sup> Pearson, *supra* note 775, at 5.

<sup>780</sup> *Matter of Onondaga County Dep't of Soc. Servs ex rel. Gloria T. v. Timothy S.*, 294 A.D.2d 27 (4th Dep't 2002).

<sup>781</sup> N.Y. C.P.L.R. § 5242(c)(2)(i), (ii).



driver's license and/or occupational licenses.<sup>782</sup> Last, if a court reduces the amount of the arrears to a money judgment, a parent's bank accounts or other assets will be subject to seizure, further inhibiting reintegration into society.<sup>783</sup>

## **B. POSSIBILITIES FOR CHANGE**

Families with parents involved in the criminal justice system face a range of problems that place strain on the family and increase the likelihood that the family unit will become fractured. This risk becomes most stark when a family is separated due to the incarceration of a parent. Addressing barriers to family reunification for incarcerated parents will require a coordinated effort to achieve policy changes that overlap in a number of areas addressed by this Committee's report, such as policies in housing, benefits, immigration and employment. For example, even if timelines are extended to reduce the threat of termination of parental rights, parents upon release may ultimately find their rights terminated because they are not able to provide adequate housing for their children. Here, however, we address potential policy reform specifically governing parental rights and responsibilities as they apply to incarcerated parents.

### **1. Improve Data Collection and Coordination among the Criminal Justice System and Child Welfare Agencies**

The criminal justice system has little reliable data on an incarcerated person's parental status, and the child welfare system does not reliably know how many children in placement have an incarcerated parent.<sup>784</sup> The collection of such data would assist programming and

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<sup>782</sup> N.Y. F.C.A. §§ 458-a, 458-b, 458-c. This can place parents in a catch-22 when they are released from prison and seek employment that requires driving vehicles if their driver's license and occupational license have been suspended.

<sup>783</sup> See Greater Upstate Law Project, Inc. *Child Support Arrears* (May 2005).

<sup>784</sup> The Women's Prison Association & Home, Inc., *Family to Family, Partnerships Between Corrections and Child Welfare*, at 11 (2002).

coordination between these two different agencies and could enhance efforts to facilitate family reunification where appropriate.

Similarly, lack of coordination and communication between prison authorities, parole and probation officials, and child welfare workers and other service providers leads to ill-informed, inefficient and duplicative or sometimes contradictory programming and case planning.

Recommendations for improvement in this area are primarily administrative in nature, and include<sup>785</sup>:

- Regularly collect information that reveals the overlap between systems, such as how many children in foster care have parents in prison or under the control of the criminal justice system; how many individuals under correctional supervision have children; and with whom these children are residing.
- Designate a liaison person within each system to act as a facilitator to coordinate efforts such as locating a parent or child in the other system, assisting in arrangements for visitation, and informing staff on the rules and regulations of the other system. The liaison can also be responsible for helping parents request production in family court proceedings and helping department of corrections properly process production orders.
- Conduct regular collaborative case conferences, coordinate the delivery of services to the parent and children, and jointly participate in discharge planning.

## **2. Change ASFA Timelines for Incarcerated Parents**

A change in the Adoption and Safe Families Act may have the most significant impact on the ability of incarcerated parents to reunite with their children. Among potential changes are:

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<sup>785</sup> *Id.* at 18-19.

- Pass legislation that excludes incarcerated parents from the ASFA timeline for filing of termination of parental rights petitions. New York State’s ASFA allows for agencies to delay or forgo the filing of a termination of parental rights after 15 months for exceptional circumstances and “compelling reasons.”<sup>786</sup> Incarceration can be deemed such a compelling reason and an alternative approach outside ASFA could apply to incarcerated parents.

- Pass legislation or change child welfare regulations to provide incarcerated parents with an extension of the 15-month timeframe. The time period for filing a termination petition could be extended to 36-72 months for children with incarcerated parents who are making efforts toward reunification and will be released during that time. Although such a policy change would not protect the entire incarcerated parent population from termination of their parental rights, it may cover a large percentage, specifically incarcerated mothers whose average sentence according to the New York State Department of Correctional Services is 19.5 months. An average sentence of 19.5 months is just long enough for a termination proceeding to begin prior to or immediately upon release. This policy change could be modeled after similar regulations involving longer time periods to allow parents with drug addictions to show diligent efforts for the return of their children.

- Amend the ASFA legislation to allow for an automatic stay of termination proceedings for incarcerated parents who will be released within 18 months as was suggested by the Coalition for Women Prisoners.<sup>787</sup> An exception to this could exist for

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<sup>786</sup> See N.Y. SOC. SERV. LAW § 384-b (3)(1).

<sup>787</sup> Coalition for Women Prisoners, *Proposals for Reform* (Mar. 2004); see also Coalition for Women Prisoners, *Proposals for Reform*, at 8-10 (Apr. 2006), available at

cases where the parent is incarcerated for crimes committed against his or her child or any other child. Another option would be to require a hearing after the 15-month period of separation whereby a judge would have to consent to commencement of termination proceedings after hearing relevant testimony and arguments.

Related to the application of ASFA, reform could include:

- Keep assigned counsel for incarcerated parents past the dispositional phase of a case. Once a parent is incarcerated and her children are placed in foster care, a child welfare agency is responsible for monitoring the children's progress in foster care and making reasonable efforts for reunification. At this time, an attorney is not assigned to an incarcerated parent's case and a parent who is incarcerated is only assigned an attorney when a termination of parental rights proceeding begins. At this point, assignment of an advocate is often too late as the parent has run out of time to make diligent efforts to fight a termination proceeding.

- Provide training for assigned attorneys who often represent incarcerated parents. Short of keeping these attorneys assigned to the case post-disposition, the assigned counsel can help these parents be prepared to stay involved in their case and understand what is legally required of them while they are incarcerated. After a child is placed in foster care following the dispositional phase of an incarcerated parent's case, the parent's assigned counsel can provide their clients with tools to use to keep in contact with caseworkers and their children, to request that they are produced for family court cases, and to attend agency status conferences via conference call to stay involved in the decisions for their children.

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[http://www.correctionalassociation.org/WIPP/publications/Proposals\\_for\\_Reform\\_2006.pdf](http://www.correctionalassociation.org/WIPP/publications/Proposals_for_Reform_2006.pdf). (advocating exceptions to ASFA for incarcerated parents).

- Provide a complementary special training for foster care caseworkers that work with children of incarcerated parents. Such training does not currently exist to better enable caseworkers to handle cases of incarcerated parents, which result in special circumstances and different challenges than cases where parents are not incarcerated.
- Improve correctional regulations and administrative court rules to ensure that incarcerated parents attend Family Court proceedings to allow them to participate in the decisions about their children's cases, including proceedings leading up to termination hearings. Enable the production of parents even when parents are moved between facilities between court dates.
- Encourage parents' attorneys to ask judges on the record to adjourn cases when parents are not produced for court or produced after the time the case is called.

ASFA's goal to encourage adoption and prevent children from lingering in foster care is commendable and the legislation has strong political support. Some portions of the population may consider adoption a more stable alternative, especially for parents with long sentences. However, advocates for incarcerated parents argue that the impact on incarcerated parents was not contemplated by ASFA's strict timeline or that its exceptions were intended to apply to this unique population. In addition, the timeline could actually work to frustrate ASFA's goals. Termination proceedings begin 15 months after a parent is incarcerated. It can be two years or longer, depending on the age of the child, before a child in foster care is finally adopted. In 2003, the Adoption and Foster Care Analysis and Reporting System reported that children were in foster care for an average of 31 months.<sup>788</sup> After parental rights are terminated, the average length of stay for a child in foster care was 16 months in 2003. If parental rights are terminated

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<sup>788</sup> U.S. Dep't of Health and Human Servs., *Adoption and Foster Care Analysis and Reporting System Report* (Apr. 2005).

after 15 months, the average child will be in foster care for at least 31 months. This is substantially longer than the average prison sentence of 19.5 months for incarcerated mothers. Thus, the termination of parental rights of incarcerated parents who intend to and are fit to parent their children could cause children to remain in foster care longer than they otherwise would if termination proceedings did not automatically begin after 15 months.

Undoubtedly, legislative change in this area would require a compromise, which is why an extension of the current 15-month time period to 20 or 36 months may be the most reasonable alternative. A more conservative approach for changing this policy may be non-legislative change, such as changing child welfare regulations, which only involves administrative action. Such policy reform can be more politically feasible while having the same ultimate impact. For example, in New York City, The Coalition for Women Prisoners has proposed a modification of ACS' Permanency Review Guidelines as they apply to the timeframes for filing a termination of parental rights petition. The committee proposes amending the guidelines to allow caseworkers to find a compelling reason not to file a termination when "a parent is incarcerated but is scheduled to be released within the next 18 months."<sup>789</sup> Although this is not a dramatic increase from 15 months, it can help draw attention to the special circumstances of incarcerated parents and how ASFA exceptions should apply. One problem with such an approach, however, is that overseeing enforcement and uniformity of application of the policy would be more difficult.

A few states have made changes to protect the incarcerated parent from the full impact of ASFA. For example, in Colorado, an exception is made when the length of time a child is in

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<sup>789</sup> Coalition for Women Prisoners, *Proposals for Reform* (Mar. 2004).

foster care is due to circumstances beyond the control of parent, such as incarceration for reasonable time or court delays.<sup>790</sup>

There are also states that provide no exceptions for compelling circumstances. The argument is that on the basis of the conviction, the state should be relieved of any obligation to spend any resources trying to reunify incarcerated parents with their children. Thus, the conviction itself supports the contention that the parent is presumptively unfit and termination proceedings should begin as set forth in the statute.<sup>791</sup>

### **3. Facilitate Contact between Parents and Children during Period of Incarceration**

Whether children are in foster care or not, contact with incarcerated parents over the phone and through visits is a necessary precursor to successful family reunification. When children are in foster care, in addition to a parent's involvement in the case, such contact provides mitigation evidence for a parent faced with the threat of termination of parental rights. Furthermore, current state laws actually encourage visitation of incarcerated parents and their children. For example, parents have a right to visit with their children who are in foster care regardless of their incarceration, to be kept informed of their children's location and progress, and to stay involved in making decisions for their children.<sup>792</sup> Agencies are required to make reasonable efforts to enable this contact. Yet, the distance between the location of children's residence and their parents' facility create a legitimate barrier to realizing this policy goal given that travel is often prohibitively expensive for relatives and the child welfare system. Also, caseworkers lose contact with parents who are transferred between facilities.

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<sup>790</sup> See COL. REV. STAT. § 19-3-604.

<sup>791</sup> See, e.g., KY REV. STAT § 625.090 (no exceptions regarding termination proceedings).

<sup>792</sup> See N.Y. SOC. SERV. LAW § 384-b(7).

When children are not in foster care, and the custodial parent or other guardian is not inclined or financially able to maintain contact between the child(ren) and an incarcerated parent, visitation becomes more difficult because incarcerated parents need enforcement of court orders. Most incarcerated parents do not have the ability to file visitation petitions. There are few lawyers available to provide help doing this and producing parents in court is difficult. Even if an incarcerated parent receives such a court order, enforcement is problematic. The distance and expense of travel may be a legally permissible reason for not complying with court ordered visitation.

Some policy changes that have been recommended to address these issues include:

- Pass legislation that increases visitation for incarcerated parents. Current legislation provides limited funding for visitation between children and parents when travel is expensive. Such funding could be increased. A study could then commence to compare the cost of these programs that enable reunification to the cost of continued foster care placement for a child who is not reunified with their incarcerated parent. The study could also examine whether the increased contact leads to a decrease in termination of parental rights and in foster care subsidies.

- Increase summer visitation programs. Current legislation would provide increased funding for visitation programs. For example, a model program for extended visitation exists at Bedford Hills Correctional Facility, where children are with their mother all day, for a weekend or for a week during the summer. Children may stay overnight in host homes within the community or in more congregate settings like a church.<sup>793</sup> Such programs can be expanded for a larger number of children to participate

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<sup>793</sup> The Women's Prison Association & Home, Inc., *Partnerships Between Corrections and Child Welfare*, at 20 (2002), available at <http://www.aecf.org/initiatives/familyofamily/tools/16937.pdf>.



and can serve as a model for other facilities, including men's facilities. This would require legislation that increases funding for organizations willing to coordinate such a program between prison facilities and its neighboring communities.<sup>794</sup>

- The state child welfare administration, which has an obligation to enable contact between parents and their children, regardless of incarceration, could subsidize travel vouchers. Often neither foster parents nor caseworkers at welfare agencies have funds to bring children on costly bus rides upstate. The travel vouchers could be state funded and less costly than setting up visitation programs in every facility.

- Prioritize placement of parents in prison facilities that are closer to their children. Develop corrections regulations that require DOCS and NY DOC to make diligent efforts to place parents in facilities that are closest to their children's residence. If a greater number of parents are placed in a facility that would not make visitation expensive, the child welfare system can fulfill its duty to make sure visitation between children and parents occurs.

- Expand the Family Reunion Program to all maximum and some medium security prisons. As the Correctional Association report noted, "this model program strengthens family ties by allowing spouses and children to periodically unite with their incarcerated family member and should be available to all inmates serving long sentences."<sup>795</sup>

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<sup>794</sup> The Correctional Ass'n of New York, *State of the Prisons 2002-2003, Conditions of Confinement in 14 New York State Correctional Facilities*, at 48 (June 2005); *Partnerships Between Corrections and Child Welfare*, *supra* note 793, at 20.

<sup>795</sup> *State of the Prisons 2002-2003*, *supra* note 794, at 32-33.

- Increase visiting hours in medium-security prisons, and expand inadequate visiting room facilities. Unlike most maximum-security prisons, which have visiting hours seven days a week, in most medium security prisons, visitors are restricted to weekends. Some visiting room facilities are also inadequate in size, resulting in visits being cut short because of limited space. The Correctional Association of New York, in its June 2005 report *State of Prisons 2002-2003*, recommended that visiting hours be expanded and that in prisons where the size of the visiting room not only limits visitors but compromises security, that the room be expanded or additional space be found to accommodate visits.<sup>796</sup>
- Improve the conditions of visitation for children by making visiting rooms child friendly, standardizing and simplifying visiting policies and making visiting hours responsive to the schedules of child welfare workers and the caretakers responsible for the visits.<sup>797</sup>
- Reduce the cost of collect calls home. The current MCI plan has come under scrutiny for its unreasonably high cost given that it is an exclusive contract for collect calls from the state. If collect calls were not prohibitively expensive, incarcerated parents could have more contact with children who are placed with relatives willing to pay for calls.
- Provide state phone call vouchers for incarcerated parents to call their children. In general the high costs of collect calls simply exacerbate the obstacle for parents trying to communicate with their children because relatives or foster parents may

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<sup>796</sup> *Id.*

<sup>797</sup> *Partnerships Between Corrections and Child Welfare*, *supra* note 793, at 20.

be unwilling to pay for any collect calls. A call voucher also could allow parents to document the frequency of their contact with their children. It would be targeted at parents and not the general inmate population and the vouchers would not require a change to the current MCI contract making it more politically feasible, which may result in the best short-term solution.

- Among the recommendations in the Correctional Association of New York's most recent report is for the Department of Correctional Services to solicit bids for new telephone contracts that offer no kickbacks to the state and offer inmates the lowest phone rates possible.<sup>798</sup> This plan to alter the contract structure or allow for more competitive bidding for collect call providers would obviously have a wider impact on the incarcerated population.

One potential problem with such proposals is justifying the additional costs of programs or vouchers when states already have limited resources in their budgets for the criminal justice system.

#### **4. Amend Legislation Related to the Accrual of Child Support Arrears**

Child support arrears facing parents upon release create a huge hurdle to insuring financial stability. Allowing incarcerated parents to petition for downward modifications in the support orders to the minimum payment of \$25 when incarcerated would allow for more reasonable arrears, which may be paid while in prison.<sup>799</sup> These support orders can easily be readjusted once the parent is back to full employment. Accrued arrears simply place an unrealistic burden on a parent's ability to pay back their debt and detrimentally affect credit

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<sup>798</sup> *State of the Prisons 2002-2003*, *supra* note 794, at 48.

<sup>799</sup> N.Y.F.C.A. § 413(1)(d).

reports that can impede a released person's ability to secure housing, driver's and occupational licenses, and employment.

Specific actions recommended include:

- Amend the New York State Family Court Act to allow for modification of child support orders based on a parent's incarceration.
- Toll or suspend child support arrears during the period of incarceration.
- Make Family Court Act § 413(1)(g), which limits accrual of child support arrearages to \$500 where the non-custodial parent's income is less than or equal to poverty income guidelines, specifically applicable to incarcerated parents.

Allowing arrears to accrue against a low-income prisoner with no assets who earns minimal money while in prison is counterproductive. Legislation has been introduced in New York State that recognizes this problem.<sup>800</sup> Included in the Community Reentry Program Act is a provision that would amend the Family Court Act's child support section. First, it would permit a child support order to be extinguished during the time of an obligor's incarceration. Second, it would eliminate the accrual of child support arrears during a parent's sentence. This legislation takes major strides in changing the current dismal state of child support modification for incarcerated parents.

A number of states have already led the way recently by passing legislation or adopting administrative procedures that recognize a parent's incarceration as a legitimate factor to consider when assessing ability to pay a child support obligation mandated by the court.<sup>801</sup> For example, in 2000 Arizona approved legislation that allows the court, upon petition of the non-

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<sup>800</sup> See Senate Bill 11921-05-5, Section 11, at 5 (introduced in June 2005 and currently in committee in both the New York State Senate and the New York State Assembly).

<sup>801</sup> Jessica Pearson, *Building Debt While Doing Time*, 43 JUDGES' J. 5 (Winter 2004).

custodial parent, to suspend the imposition of interest on arrears of an obligor during time spent in prison.<sup>802</sup> In 2003, Connecticut adopted legislation that requires the court, for incarcerated or institutionalized parents, to establish initial and modified orders of support based on the obligor's present income.<sup>803</sup> Minnesota, in 2001, passed legislation allowing the court to retroactively modify a child support obligation, including interest accrued, if the party seeking modification was incarcerated for an offense other than nonsupport of a child and lacked the financial ability to pay the support ordered.<sup>804</sup> In 2000, Virginia approved an amendment exempting from the presumptive minimum child support obligation of \$65 parents who were unable to pay child support because they lacked sufficient assets and who in addition are imprisoned with no chance of parole.<sup>805</sup> In 2004, North Carolina became the only state in the nation to pass a law mandating the automatic suspension of child support payments during incarceration.<sup>806</sup>

States providing administrative remedies include Iowa, which follows an administrative directive that modification requests of incarcerated obligors are to be based on current income and assets rather than the notion that incarceration is a voluntary reduction of income. In 2002, Massachusetts developed a procedure for incarcerated non-custodial parents by which the child support agency assists parents with filing modification requests while in prison. In Oregon, when an incarcerated obligor is confined for at least six consecutive months with a monthly gross income of less than \$200 requests a modification, the Child Support Enforcement Agency

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<sup>802</sup> See ARIZ. REV. STAT. § 25-327.

<sup>803</sup> See CONN. GEN. STAT. § 46b-215e.

<sup>804</sup> See MINN. STAT. § 548.091.

<sup>805</sup> See VA CODE § 20-108.2

<sup>806</sup> See N.C.G.S.A. § 50-13.10(d)(4) (“For purposes of this section, a child support payment or the relevant portion thereof, is not past due, and no arrearage accrues...during any period when the supporting party is incarcerated, is not on work release, and has no resources with which to make the payment.”).

shall presume the obligor has zero ability to pay support and will modify the order to zero. The agency may also satisfy assigned arrears if the paying parent is experiencing substantial hardship.<sup>807</sup>

Administrative changes to facilitate these recommendations include:

- Provide information on child support obligations to non-custodial parents upon entry to prison or jail.
- Increase communication and collaboration between DOCS and child support agencies on behalf of non-custodial parents.
- Expedite modification requests filed by incarcerated parents.

In addition to removing the accrual of insurmountable debt, current New York law provides for additional impediments that result from the failure to pay child support obligations. Among them is the forfeiture of the parent's driver's license and/or occupational licenses after arrears of more than four months. Such forfeitures are counter-productive to the goal of ensuring that a greater number of parents meet their obligations of caring financially for their children because they inhibit the parent's ability to obtain gainful employment. Additional recommendations related to these disabilities include:

- Eliminate automatic license forfeitures based on the accrual of child support arrears. At the very least, the state should eliminate suspension of occupational licenses, which places non-custodial parents in a Catch-22. They are not paying child support because they are not working but they cannot find work without an occupational license.

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<sup>807</sup> Pearson, *supra* note 775, at 9.

- Design programs to offer formerly incarcerated parents assistance with employment and making reasonable child support payments. One such program was successfully implemented in Denver, Colorado. Denver's Work and Family Center is a voluntary, multi-service program that offers employment assistance and services in one setting. According to a report of a six-month evaluation of 350 paroled and released formerly incarcerated individuals who visited the program, rates of employment rose from 43% to 71%. Rates of payment of child support obligations increased as well, with 39% of parents paying what they owed compared to 17.5% paid during the six months before participating in the program.<sup>808</sup> Individuals paying no child support dropped from 60% to 25%.<sup>809</sup> The Center for Employment Opportunities, CEO, in New York City is a mandated program for individuals on parole that offers those recently release with job training and employment opportunities, while providing a one-stop shop to help with other post-release obstacles. CEO has child support advocates who go to Family Court with clients to walk them through the child support process including completing income executions and filing petitions for modification of support awards.

##### **5. Increase Number of Alternatives to Incarceration Programs for Parents and Children**

Mother-child programs exist for parents who are incarcerated for short periods and are low security risks. These programs could be increased for a larger number of parents and be expanded to include cities that do not have such alternative options for parents. Although these programs are resource intensive, it may not be as costly as keeping a child in foster care.

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<sup>808</sup> *Id.* at 10.

<sup>809</sup> *Id.*

In addition, legislation could be passed giving judges authority to take parental obligations into consideration and use them as a basis for limiting or commuting prison sentences. Although judges already have this discretion to some extent, certain federal and state mandated minimum sentences often make it difficult for judges to consider such external factors when making sentencing decisions.

#### **6. Increase Number of Parenting Programs Offered to Incarcerated Parents**

The state budget for programming in jails and prison from vocational training and schooling to counseling has sharply declined greatly impacting all incarcerated individuals. For parents to successfully engage with their children while incarcerated, however, they need to be actively planning for their children while they are incarcerated, and also thinking about steps for reunification upon release. It is difficult to do this planning without help. The state should restore and increase programs for incarcerated parents to help them achieve their parenting objectives.<sup>810</sup>

The state could allocate part of its federal grant from Temporary Assistance for Needy Families (“TANF”) to increase incarcerated parents’ programs. The 2000 Department of Health and Human Services (“HHS”) study found that 9-12% of child-only cases are due to a parent’s incarceration.<sup>811</sup> Although incarcerated parents cannot receive TANF, they are eligible for TANF related services. The Coalition for Women Prisoners advocates that TANF funds be used for parenting skills training, activities to promote visitation and parental contact, and job training and placement for non-custodial parents.<sup>812</sup> Parenting classes, especially, can enable parents to

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<sup>810</sup> The proposed Community Offender Program Act mandates that such services be available in all Department of Corrections facilities. See S. 11921-05-5, § 902(3).

<sup>811</sup> Coalition for Women Prisoners, *Proposals for Reform*, at 12 (Mar. 2004).

<sup>812</sup> *Id.*



learn to parent from a distance and prepare parents for the difficulty of reunification. These programs are more crucial given the enactment of ASFA.<sup>813</sup>

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*Id.*



## VIII. CIVIC PARTICIPATION

New Yorkers who have been convicted of felonies are punished in a multitude of ways. One of the most straightforward collateral consequences of conviction is the imposition of “civil death” – *i.e.*, restrictions on civic participation, such as restrictions on the right to vote and prohibitions on jury service. Unless they obtain a Certificate of Relief from Disabilities, people who serve a year or more in prison as a result of a felony conviction are prohibited from voting while in prison and on parole, and such persons are prohibited from serving on a jury for life. Besides adding another layer of separation between such persons and society while they are in prison, enforcing such restrictions upon release sends a message that their contributions to society are no longer welcome and that the consequences of their conviction will last far beyond their sentence.

The issue of “civil death” has received more public and media attention in the past decade partly because of the effect of a series of “tough on crime” measures. Incarceration is up 600% since 1974, and as a result, there has been a sharp increase in the population subject to such post-release restrictions.<sup>814</sup> In total, approximately 4.7 million people are ineligible to vote because of disenfranchisement laws (approximately 2.3% of the voting age population)<sup>815</sup> and approximately 500,000 of them are war veterans.<sup>816</sup> Largely because of widespread reform elsewhere, the United States is now alone among developed democracies in denying the franchise to large numbers of people who are not incarcerated.<sup>817</sup> The practice of jury service

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<sup>814</sup> Kevin Krajick, *Why Can't Ex-Felons Vote?*, WASH. POST, Aug. 18, 2004, at A19.

<sup>815</sup> Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, Perspectives on Politics, Sept. 2004, Vol. 2/No. 3, at 491.

<sup>816</sup> Kate Zernike, *Iowa Governor Will Give Felons the Right to Vote*, N.Y. TIMES, June 18, 2005, at 1.

<sup>817</sup> Manza & Uggen, *supra* note 815, at 491, 501.

exclusion casts an even broader net than disenfranchisement, affecting thirteen million people nationwide who have been convicted of felonies.<sup>818</sup>

## A. THE LAW AND ITS EFFECTS

### 1. Disenfranchisement

The federal Constitution largely delegates to the states the duty of determining the qualifications of voters for both state and federal elections. The Seventeenth Amendment and Section 2, Clause 1 of Article I, respectively, provide that U.S. senators and representatives are to be elected by the same electors that each state allows to vote for the most numerous branch of its legislature. Constitutional guidance with respect to the voting registration practices of the states is generally limited to prohibitions on the range of acceptable restrictions that a state may impose – *e.g.*, a state “shall not ... den[y] or abridge[.]” a person’s “right ... to vote” on the basis of gender<sup>819</sup> or race,<sup>820</sup> or alternatively, require voters to pay a poll tax.<sup>821</sup> Some commentators have interpreted these factors to mean that, because the federal government can only exercise its enumerated powers,<sup>822</sup> the lack of specific constitutional authorization to regulate voting means that the power lies in state hands.<sup>823</sup> With respect to restrictions on people who have been

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<sup>818</sup> Brian C. Kalt, *The Exclusion of Felons From Jury Service*, 53 AM. U. L. REV. 65, 67 (2003). Note that for purposes of the foregoing, the states which equate aggravated misdemeanors to felonies for purposes of restrictions on civil participation (New York is not one of them) are treated in the same manner as states which limit their restrictions only to those who have committed felonies.

<sup>819</sup> U.S. CONST. amend. XIX.

<sup>820</sup> U.S. CONST. amend. XV.

<sup>821</sup> U.S. CONST. amend. XXIV.

<sup>822</sup> *See United States v. Lopez*, 514 U.S. 549 (1995).

<sup>823</sup> Roger Clegg, *Felon Disenfranchisement is Constitutional, and Justified*, National Constitution Center, 2005, available at <http://www.constitutioncenter.org/education/ForEducators/Viewpoints/FelonDisenfranchisementIsConstitutional,AndJustified.shtml>, and Daily Policy Digest, *Stealing the Election: Democrats and Felon Voting*, NCPA Idea House, available at [http://www.ncpa.org/newdpd/pdarticle.php?article\\_id=1360&PHPSESSID=41d8bda914fd6dce70caed11bd1bb2ec](http://www.ncpa.org/newdpd/pdarticle.php?article_id=1360&PHPSESSID=41d8bda914fd6dce70caed11bd1bb2ec).

convicted of felonies, the Supreme Court found in *Richardson v. Ramirez*<sup>824</sup> that Section 2 of the Fourteenth Amendment contemplates and condones state-imposed disenfranchisement based on “participation in rebellion, or other crime.”<sup>825</sup>

In the course of exercising their prerogative to determine voter qualifications, every state but Maine and Vermont restricts people who have been convicted of felonies from voting in some manner. Forty-eight states’ prohibitions affect those in prison and thirty-five extend the restrictions to those on parole, with all but four of the latter group of states restricting people on probation from voting. Fourteen of those states have prohibitions which last effectively for life or for a set period following release, subject to the ability to be reinstated via petition to a clemency board or similar body.<sup>826</sup> The most difficult states in which to regain one’s vote, based on the process involved and the lack of automatic reinstatement, are Alabama, Kentucky, Florida and Virginia.<sup>827</sup> In Alabama, for instance, a person who seeks reinstatement must provide a DNA sample to the state, but only four counties (out of sixty-seven) in the entire state have the necessary systems to administer DNA testing.<sup>828</sup>

As shown by the variance in policies with respect to disenfranchisement, states have adopted a variety of postures as to when to restore the franchise to people convicted of felonies and the ease of such restoration (*e.g.*, automatic or via application). Prohibitions affecting people in prison go hand in hand with the general reduction in rights of those under custody. A state

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<sup>824</sup> 418 U.S. 24 (1974).

<sup>825</sup> Krajick, *supra* note 814, at A19.

<sup>826</sup> Mark Hamblett, *Full Circuit Weighs Felon Voting Rights*, N.Y.L.J., June 23, 2005, at 1, 7; Zernike, *supra* note 816, at 1.

<sup>827</sup> See Steve Bowers, *Coddling Criminals: Giving Felons the Vote*, June 20, 2005, available at <http://www.politicalgateway.com/main/columns/read.html?col=399>.

<sup>828</sup> Marc Mauer, *Disenfranchisement: The Modern-Day Voting Rights Challenge*, C.R.J., Winter 2004, at 42.

which extends the restrictions to persons on parole (but not those on probation), *i.e.*, time which would otherwise be spent in prison if not for good behavior, is one which equates sentence length to the time that one is prohibited from voting, even if it leads to an incongruence between being imprisoned and being disenfranchised. Such states may reason that the determination of the appropriate period of disenfranchisement should be made at sentencing by a judge rather than later on by a parole board. A state which extends the restriction further to probationers prefers to wait until the affected individual is completely out of state custody to restore such individual's right to vote. States which then impose a waiting period following the end of the custodial period may do so reasoning that an extra probationary-esque period is necessary to ensure that such individuals have suitably rehabilitated and earned their right to vote, and, in light of high recidivism rates, to show that their days of committing crimes have concluded. States which impose lifetime hurdles, subject to reinstatement procedures, clearly lump disenfranchisement in with other disabilities which last a lifetime for those convicted of a felony, such as restrictions on gun ownership or obtaining certain state professional licenses.

New York falls somewhere in the middle in that it prohibits people in prison or on parole from voting, but those on probation or those who have completed their prison sentences and are no longer under supervision are permitted to vote.<sup>829</sup> However, whether or not one is sentenced

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<sup>829</sup> N.Y. ELEC. LAW § 5-106. In the recent Second Circuit case, *Hayden v. Pataki*, Judge Cabranes traced the history of § 5-106: "Felon disenfranchisement has a long history in New York. The New York State Constitution of 1821 authorized the state legislature to enact laws disenfranchising those convicted of 'infamous crimes.' N.Y. Const. of 1821, art. II, § 2. The state legislature passed such a law the next year. Act for Regulating Elections, ch. 250, § 25, 1822 N.Y. Laws 280. This law, as revised, has been in effect in the State ever since. It was modified in 1971 to provide that those convicted of felonies would automatically regain the right to vote once their maximum sentence had been served or they had been discharged from parole. Act of May 25, 1971, ch. 310, § 2, 1971 N.Y. Laws 952-53. In 1973, New York again amended the statute to ensure that felons were only disenfranchised if they were sentenced to a term of imprisonment and not if they were sentenced to fines, probation, or conditional discharge. Act of June 11, 1973, ch. 679, §§ 2-5, 1973 N.Y. Laws 2247-48." *Hayden v. Pataki*, 2006 WL 1169674 (2d Cir. May 4, 2006) (*en banc*).

to prison is the determining factor, and not merely whether one is convicted of a felony.<sup>830</sup>

Supporters of reform claim that New York's restrictions affect approximately 126,800 people.<sup>831</sup>

Note that New York's prohibition affects juveniles who are convicted of felonies as well, thus disenfranchising those who are not eligible and those who committed a felony before they were eligible to vote.

Even if a person is otherwise subject to § 5-106, there are steps a New Yorker may take so that he is not disenfranchised. Specifically, a person who has been convicted of no more than one felony may apply for a Certificate of Relief from Disabilities. Such a certificate relieves disabilities such as disenfranchisement that are automatically imposed by law as a result of the conviction.<sup>832</sup> Although the sentencing court may issue such a certificate, it may only do so if the sentence does not result in imprisonment. Therefore, because the disenfranchisement bar becomes effective only upon a sentence resulting in imprisonment, one must seek relief from the state board of parole, the other entity with granting authority, in order to avoid the disenfranchisement bar.<sup>833</sup> Such relief may be significant for people who are serving an indeterminate sentence of a set period, *e.g.*, 7 years, to life, and are therefore on parole for life following their release from prison. The process of applying for a Certificate of Relief from Disabilities takes several months and certificates issued to persons on parole (*i.e.*, those released but nonetheless subject to disenfranchisement) may be revoked for violations of parole or the conditions of release.<sup>834</sup>

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<sup>830</sup> Hamblett, *supra* note 826, at 7.

<sup>831</sup> *Id.*

<sup>832</sup> The Bronx Defenders Civil Action Project, *The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records*, at 2 (Oct. 2004).

<sup>833</sup> *Id.* at 3.

<sup>834</sup> *Id.* at 4.

The reasons for disenfranchising those convicted of a felony and the reasons for eliminating the practice have evolved over time. As a general matter, they are related to race, the purpose of punishment and rehabilitation and public sentiment. Set forth below is a discussion of these issues.

**a. Race**

Disenfranchisement laws, especially in former Confederate states, were one arrow in a quiver of laws such as now-prohibited literacy tests and poll taxes, which were racially neutral on their face but which segregationists used to prohibit minorities (and to a large extent, poor whites) from voting.<sup>835</sup> Although the stated motives for keeping disenfranchisement laws in place have moved away from race, it is impossible to deny that the restrictions currently operate in a racially disparate manner. In short, because black males are six times as likely to have served time in prison as compared to white males, and Hispanic males three times as likely, minorities are disproportionately affected by disenfranchisement laws as compared to the general electorate.<sup>836</sup>

Those who seek abolition of such laws argue that abolition would eliminate one of the remaining legal barriers to racial equality in this country by allowing civic participation by a significant portion of the minorities in this country – *e.g.*, the 13% of all black men who are prohibited from voting by reason of previous felony conviction.<sup>837</sup> Reformers argue that such rules are an ugly vestige of Jim Crow laws and other attempts by the government to target minorities. Although the racially discriminatory rationales for erecting and keeping such barriers

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<sup>835</sup> *Voting While Incarcerated: A Tool Kit for Advocates Seeking to Register, and Facilitate Voting by, Eligible People in Jail*, ACLU/Right to Vote (New York, NY), Sept. 2005, at 1.

<sup>836</sup> Editorial, *Give ex-prisoners a voice*, USA TODAY, Aug. 26, 2003.

<sup>837</sup> Krajick, *supra* note 814, at A19.



in place may have changed, reformers note, the racially disparate impact has not. According to reformers, the cumulative voting power of minorities, “law-abiding” and otherwise, is unquestionably less than it would be if not for disenfranchisement laws.<sup>838</sup>

Opponents of change argue instead that the disparate impact of disenfranchisement is symptomatic of other problems in society, and easing restrictions on voting would not solve these problems. Although they acknowledge the original discriminatory intent behind certain disenfranchisement laws, they argue that such intent, and therefore, any constitutional infirmity of such restrictions, has been eradicated. They also argue that many of the disenfranchisement laws predate the racially-motivated laws which followed the Civil War – in fact, prior to the Civil War, 70% of the states then in existence had disenfranchisement laws,<sup>839</sup> and such laws were and still are motivated by legitimate beliefs about the forfeiture of rights following the commission of a felony. At least one commentator has argued that because many people who have been convicted of felonies live in neighborhoods with a high concentration of minorities, allowing such persons to vote would dilute the vote of their neighbors, *i.e.*, minorities who have not been convicted of felonies.<sup>840</sup>

#### **b. The Purpose of Punishment**

Proponents of reforming disenfranchisement laws note that if the purpose of such laws was to prevent crime in some manner, there is no evidence whatsoever that such restrictions reduce crime – in fact, states with such restrictions tend to have higher rates of crime.<sup>841</sup>

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<sup>838</sup> See *NAACP v. Harvey*, 381 N.J. Super. 155 (2005).

<sup>839</sup> Jack Dunphy, *Will Scott Peterson Get to Vote? The Supreme Court takes a pass (for now) on voting rights for felons*, NATIONAL REVIEW ONLINE, Nov. 15, 2004, available at <http://www.nationalreview.com/dunphy/dunphy200411150815.asp>.

<sup>840</sup> Clegg, *supra* note 823.

<sup>841</sup> Randall G. Shelden, *Local View: Republican states “tough on crime,” soft on results*, LAS VEGAS MERCURY, Oct. 14, 2004.

Furthermore, they reason that continuing to punish people who have been released from prison impedes such persons' rehabilitation. With respect to those still under supervision (including those in prison), reformers believe that encouraging voting among people who have been convicted of a felony should help their integration back into "regular" society and in turn, help reduce recidivism.<sup>842</sup> Notwithstanding the rehabilitative benefits, such reformers argue that people who have served out their sentences should be fully integrated into civic participation; it is simply unfair to continue to punish them.<sup>843</sup>

Those in favor of the status quo do not tend to argue that disenfranchisement laws assist in reducing crime. However, they note that there are numerous restrictions on people who have been convicted of felonies (gun ownership, prohibitions with respect to certain licensed occupations, etc.) to which the idea that they have "served their time" does not properly apply – and voting is one of them.<sup>844</sup> They fear that allowing people who were convicted of felonies to vote would "pollute" the ballot box and "dilute the vote of law-abiding citizens,"<sup>845</sup> and argue that, because many people who were convicted of felonies limited the freedom of their victims in some manner,<sup>846</sup> restrictions on voting even after sentences have been completed (and certainly while they are still under supervision) are reasonable. Furthermore, there is a process for restoring one's rights in every state which otherwise enforces a lifetime ban on voting and going

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<sup>842</sup> USA TODAY, *supra* note 836.

<sup>843</sup> *Id.*; Krajick, *supra* note 814, at A19.

<sup>844</sup> See Clegg, *supra* note 823; George Will, *Give Ballots to Felons? Do liberals oppose state laws denying felons the right to vote also oppose laws denying felons the right to own guns?* NEWSWEEK, Mar. 14, 2005.

<sup>845</sup> Clem Brooks, Jeff Manza & Christopher Uggen, "Civil Death" or Civil Rights? *Public Attitudes Towards Felon Disenfranchisement in the United States* (2004), available at [http://www.soc.umn.edu/~uggen/Manza\\_Brooks\\_Uggen\\_POQ\\_04.pdf](http://www.soc.umn.edu/~uggen/Manza_Brooks_Uggen_POQ_04.pdf), at 5.

<sup>846</sup> Peter Kirsanow, *The Felon Franchise*, NATIONAL REVIEW ONLINE, Jan. 8, 2004, available at <http://www.nationalreview.com/comment/kirsanow200401080830.asp>.

through the process demonstrates that the person is truly deserving of the voting privilege.<sup>847</sup>

Finally, those opposed to reform argue that disenfranchisement is an appropriate response to the individual's violation of the social contract – *i.e.*, violators are not, in the words of one commentator, “trustworthy and loyal to our republic”<sup>848</sup> and may in fact form an “anti-law-enforcement bloc”<sup>849</sup> if allowed to vote.

### **c. Partisanship**

Because of the racial and economic characteristics of those who have been convicted of felonies, both advocates and opponents of felon disenfranchisement laws have tried to point to the benefit or detriment to the competing national political parties as justifications for their opponents' positions. In addition, advocates of reform argue that the nature of the manner by which the census is conducted combines with disenfranchisement laws to distort the electorate in a second way by dilution the vote of either the incarcerated or the community surrounding the prison. Specifically, the census counts people in prison as living in the towns in which they are imprisoned rather than the towns in which they lived immediately prior to incarceration. As a result, towns in upstate New York with prisons are entitled to more representation in state and federal legislative bodies than they would have without the prisons at the expense of New York City.<sup>850</sup>

Supporters of the status quo argue that counting people in prison as residents of the towns in which the prisons are located is the right result because it rewards the towns who have taken on the burden of hosting state prisons. Furthermore, attempting to assign people in prison to the

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<sup>847</sup> Bowers, *supra* note 827.

<sup>848</sup> Clegg, *supra* note 823.

<sup>849</sup> Krajick, *supra* note 814, at A19 (quoting Todd Gaziano of the Heritage Foundation).

<sup>850</sup> Hamblett, *supra* note 826, at 7.

addresses they held immediately prior to incarceration may be impractical given their, as compared to the general population's, transient nature and the fact that they may not be able to (or even intend to) return home after they are released. And simply assigning such people to the town in which they are imprisoned while at the same time allowing them to vote could distort the political party strength of the local electorate.<sup>851</sup>

**d. Public Sentiment**

Public surveys tend to reflect support for reducing the punitive impact of disenfranchisement laws. In nationwide surveys, about 80% of the public supports restoration of voting rights for those who have completed their sentences while 64% and 62% support the right of people on probation and people on parole, respectively, to vote,<sup>852</sup> though the extent of majority support can differ depending on the type of crime for which the affected individual was convicted.<sup>853</sup> This is probably reflective of a belief that suffrage is a universal right, and restrictions on this right must be well-grounded, and not simply the continuation of historical practice.<sup>854</sup> Beyond disputing the survey methodology, supporters of the status quo may note that a majority of the public consistently supports limiting the rights of those in prison to vote.

**e. Administrative Difficulties**

Supporters of reform may also argue that § 5-106 has had a broader effect than originally intended. Technically, a New Yorker who has been convicted of a felony is able to vote automatically upon the completion of his prison sentence, but until recently such ability has not

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<sup>851</sup> The Second Circuit recently held that a vote dilution claim brought on behalf of incarcerated felons did not violate the Voting Rights Act, but did not address the merits of such a claim if brought on behalf of those who are neither incarcerated or on parole. *Hayden v. Pataki*, 2006 WL 1169674 (2d Cir. May 4, 2006) (*en banc*).

<sup>852</sup> Steven Kalogeras, *Legislative Changes On Felony Disenfranchisement, 1996-2003* (The Sentencing Project, Wash. D.C. Sept. 2003), available at <http://www.sentencingproject.org/pdfs/legchanges-report.pdf>.

<sup>853</sup> Brooks, *supra* note 845, at 14-15.

<sup>854</sup> *Id.* at 6.

been automatic in practice. Until recently, local registrars in more than half of the counties in New York state often asked for proof of eligibility to vote in the form of papers that do not exist or otherwise provided misinformation for those seeking to register to vote.<sup>855</sup> Even now, local boards of elections struggle to implement the law. In a recent study, 38% of New York's local boards stated that people on probation were ineligible to vote, or that they did not know whether such people could vote; and 32% of local boards request documentation that is not needed from people with criminal convictions, and many in this group admitted to being aware of guidance that set forth that documentations was not needed.<sup>856</sup> Problems were particularly acute in New York City because one-third of those sentenced to probation in New York State live in New York City. Recognizing that the problems in administration which result in harsher application of the laws only exacerbate the other problems associated with disenfranchisement, supporters of reform suggest that a restriction which affects only people in prison would relieve the serious problems with inaccurate and erratic application of the law. If such reform were passed, all that would be needed to prove eligibility to vote is the person's mere appearance in the registrar's office.

Even if the breadth of § 5-106 were cut back to affect only those in prison, people in jails who were awaiting trial (and are presumed to be innocent) or serving sentences for misdemeanors would seldom be afforded the opportunity to vote, partly due to the lack of state commitment to providing voting booths in jails and similar detention facilities, the difficulty in providing absentee ballots to people within such facilities (particularly if their detention occurred

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<sup>855</sup> Brennan Center, *Voting Rights Victory Secured Throughout New York State* (Nov. 3, 2003), available at [http://www.brennancenter.org/presscenter/releases\\_2003/pressrelease\\_2003\\_1103.html](http://www.brennancenter.org/presscenter/releases_2003/pressrelease_2003_1103.html); Krajick, *supra* note 814, at A19.

<sup>856</sup> Demos, The Brennan Center for Justice and Legal Action Center, *Boards of Elections Continue Illegally To Disfranchise Voters with Felony Convictions* (Mar. 15, 2006).

only recently) and the difficulty of supplying people with a ballot that corresponds with their actual residence (*i.e.*, people in temporary detention may not have relocated for purposes of voting, as opposed to people in prison, who may have arguably reestablished residence in the facility in which they are housed). Estimates of the population subject to this *de facto* disenfranchisement range from approximately 600,000<sup>857</sup> to 714,000<sup>858</sup> nationwide.

Supporters of the status quo may argue that the issues above are overstated and in any event, are the inevitable result of a finite amount of resources. As laudable a goal as moving voting booths to jails may be, such supporters state that there is nearly always a more deserving cause worthy of tax dollars.

#### **f. Practical Effect of Disenfranchisement**

Some supporters of the status quo rationalize the restrictions by claiming that disenfranchisement laws tend to only affect a segment of the population who seldom voted prior to their felony convictions. In other words, it is unlikely that someone who is engaged in criminal activity is also engaged in productive societal activities such as voting. A recent study which looked at New York, Connecticut and Ohio disputed this notion, concluding that people who had been convicted of felonies had voted at rates roughly equal to that of the general population prior to being convicted of a felony.<sup>859</sup> However, the rate of voting among people who have been released tends to lag in direct proportion to the amount of time the people were incarcerated, effectively doubling the amount of time in which the person does not vote as a result of his felony conviction, even in states where voting rights are restored upon release,

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<sup>857</sup> Manza & Uggen, *supra* note 815, at 495.

<sup>858</sup> ACLU/Right to Vote, *supra* note 835, at 1.

<sup>859</sup> Ernest Drucker & Ricardo Barreras, *Former Prisoners and the Franchise: "Those people don't vote anyway...do they?"*, THE BLACK COMMENTATOR, Nov. 4, 2004, available at [http://www.blackcommentator.com/112/112\\_prisoners\\_voting.html](http://www.blackcommentator.com/112/112_prisoners_voting.html).

completion of sentence or after a fixed period following completion of sentence.<sup>860</sup> The researchers found that the lag was due largely to a lack of information and in some cases, misinformation, concerning the person's voting rights – many people believed that they were not entitled to vote following their release from prison.<sup>861</sup> Efforts to educate people in prison about their rights upon release have shown promise, and supporters of reform may cite such efforts and studies in refuting the notion that disenfranchisement tends to affect only those who had already voluntarily opted out of voting.

## 2. Exclusion from Jury Service

Included with New York's juror qualification statute is a lifetime prohibition on people who have been convicted of a felony from serving on a jury (implicitly excepting only those who are pardoned or obtain a Certificate of Relief from Disability).<sup>862</sup> It is one of thirty-one states (along with the federal government) that prohibit people who have been convicted of felonies from serving on juries for life, unless their rights have been restored through clemency or another similar restoration process.<sup>863</sup> Only two states, Colorado (for petit juries) and Maine, have no prohibitions on jury service by people who have committed felonies.<sup>864</sup>

Although laws relating to jury service have not garnered the same attention as laws regarding disenfranchisement, the existing arguments for and against keeping the restrictions in place are similar. The principal arguments with respect to jury service are set forth below.

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<sup>860</sup> *Id.*

<sup>861</sup> *Id.*; Manza & Uggen, *supra* note 815, at 495.

<sup>862</sup> N.Y. JUD. § 510(3).

<sup>863</sup> Kalt, *supra* note 818, at 157.

<sup>864</sup> *Id.* at 158.

**a. Race**

The exclusion of African-Americans from the jury box has a history which predates the Civil War and lasted well into the twentieth century. Although these restrictions significantly affect the jury pool in areas in which there are a significant number of African-Americans, the restrictions are not usually included with the penumbra of burdensome discriminatory practices because people seldom think about the “right” of a citizen to serve on a jury. Nonetheless, it is impossible to argue that these restrictions do not impact the racial composition of the jury pool, given that approximately 30% of all black men nationwide are prohibited from serving.<sup>865</sup>

Opponents of the current restrictions on jury service, at least in criminal cases, often structure their arguments from the criminal defendant’s perspective rather than from a rights perspective of the juror himself or herself. This is largely because it is difficult to advance a colorable argument that there is some sort of constitutional infirmity inherent in preventing people who have been convicted of felonies from serving as jurors (either on the part of the defendant or on the potential juror),<sup>866</sup> especially because people who have been convicted of felonies do not collectively constitute a protected class and jury service is not a protected right.<sup>867</sup> However, because of the racially disparate impact that such restrictions create, excluding people who have been convicted of felonies often results in a jury pool that does not reflect the community from which it was drawn. Jury exclusion therefore makes it more difficult to ensure that the defendant in a criminal trial is judged by his or her peers.

Proponents of the status quo argue instead that, much like disenfranchisement, the race-related effects of exclusion from jury service are symptomatic of other problems in society, and

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<sup>865</sup> *Id.* at 67.

<sup>866</sup> *See id.* at 70-71.



allowing those who have been convicted of felonies to serve on juries would not solve these problems. Also, much like disenfranchisement, any racially discriminatory intent behind the laws has been eradicated and the rationales for such prohibitions today are legitimate law and order concerns similar to those which have been in place since the times of ancient Greece and Rome.<sup>868</sup> Those who had committed crimes in such times were deemed to have violated what is now thought of as the social contract, and as a result, and in most cases permanently, voided their rights vis-à-vis the government. Such rights, to the extent available, usually included voting and jury service. This practice of “civil death” later crossed the Atlantic along with numerous other aspects of the English criminal justice system.<sup>869</sup>

**b. Probity of the jury**

One of the traditional “law and order” motivations for restrictions on jury service is that people who have been convicted of a felony present a danger to the probity of the jury. In other words, such persons’ presumptively poor experience with the government poisons their ability to render impartial justice. Opponents of the status quo argue even if such a presumption were true, allowing people into the jury pool who have been punished by the government does not endanger the system, and introduces an appropriate check on prosecutorial power. Such opponents find it hard to believe that most people who have committed a felony at any point during their lives are forever incapable of fairly judging someone who is later charged with a crime or, in particular, exercising impartial judgment in a civil trial. They argue that former crime victims (along with their friends and relatives) undoubtedly bring their own experiences to jury service, and there is no desire, nor should there be, to exclude them as a class from jury service. Furthermore, the

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<sup>867</sup> *Id.* at 72.

<sup>868</sup> Clegg, *supra* note 823.

<sup>869</sup> *Id.*

reintegration of people who have been in prison into the justice system in a contributory rather than punitive manner would likely have a positive rehabilitative effect.

**c. Breadth of current restrictions**

Opponents of such restrictions have observed that a system for screening out supposedly harmful biases is already in place – *voir dire*. However, were modification of current practices preferable to outright elimination, many argue that the potential jury pool need not be limited in the same sweeping manner of the current restrictions. Restrictions could be tailored to affect only people who have committed certain types of crimes, people who have committed the crime with which the defendant in the instant case has been charged (or one substantially related to it) or crimes which may be used for impeachment purposes (presumably because the concerns over credibility in one’s testimony are related to the concerns over bias in fact-finding). Another possibility would be to adopt Oregon and Texas’s approach, both of which make a distinction between criminal and civil trials<sup>870</sup> – a reflection of reformers’ belief that there is little rational justification for keeping people who have committed felonies off of civil juries. Proponents of the status quo may argue that the current system, though perhaps overbroad in certain respects, helps to ease the administrative burden on an already taxed criminal justice system at the expense of a relatively minor infringement on the affected individual’s rights.

**d. Public Sentiment**

There has not been much attention paid by the media or by the public to restrictions on jury service with respect to those who have committed felonies, so supporters of reform could initiate and frame the debate, albeit to a possibly apathetic audience. Sentiment for reform could gain traction that by casting the restrictions as “exemptions” from jury service – *i.e.*, why should

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<sup>870</sup> Kalt, *supra* note 818, at 168-69.

people who have been convicted of felonies be exempt from serving on juries – based on the thought that it is unlikely that the general public would support the status quo. This notion finds support in the general trend both recently and over the past century towards eliminating such exemptions as they apply to other classes of citizens. For instance, although it took more than fifty years after the passage of the Nineteenth Amendment to resolve, the Supreme Court held in 1975 that the Sixth Amendment entitled the defendant to a jury drawn from a fair cross-section of the community and this fair cross-section requirement was violated by the systematic exclusion of women from jury service. Thus, the exclusion of women from jury service violated a defendant’s constitutional right to an impartial jury.<sup>871</sup> Other *de facto* or *de jure* exclusions of certain groups such as clergy, lawyers and celebrities have gradually been eliminated so as to expand the pool of those eligible to serve on a jury.<sup>872</sup>

Supporters of the current restrictions would likely disagree with the assertion that the public could be swayed by such arguments and argue that, if the reasons set forth *supra* are explained properly to the public, it is unlikely that there would be majority support for including people who have committed felonies into jury pools.

## **B. POSSIBILITIES FOR CHANGE**

### **1. Regarding Disenfranchisement**

Unlike some of the other issues that this Committee is considering, reform of the criminal justice system would not be the most direct or efficient way to alleviate the effects of

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<sup>871</sup> *Taylor v. Louisiana*, 419 U.S. 522 (1975). Jury exclusion based on one’s religion, on the other hand, is a relatively rare occurrence. “[T]he Court does not need to protect prospective jurors from being discriminated against based on their religion because there is no history of religious discrimination in jury selection that is comparable to the history of race-based and gender-based discrimination in jury selection.” Kelly Lina Kuljol, *Where Did Florida Go Wrong? Why Religion-based Peremptory Challenges Withstand Constitutional Scrutiny*, 32 STETSON L. REV. 171, 181 (2002).

<sup>872</sup> See, e.g., Michael Carey, *New York Mayor swaps campaign for courtroom duty*, THE WORLD TODAY ARCHIVE, Sept. 1, 1999, available at <http://www.abc.net.au/worldtoday/stories/s48420.htm>.

disenfranchisement (though of course, efforts which reduce crime and recidivism will result in fewer people subject to disenfranchisement laws). However, reform could be effected in the ways detailed below.

**a. Litigation**

The aforementioned language of Section 2 of the Fourteenth Amendment has frustrated attempts to declare such laws unconstitutional on the basis of race or otherwise in the absence of clear racial animus.<sup>873</sup> Recently, a federal challenge to § 5-106 on the basis of a violation of Section 1 of the Fourteenth Amendment's equal protection clause failed in *Hayden v. Pataki*.<sup>874</sup> In *Hayden*, the Southern District of New York found that the plaintiffs had not sufficiently alleged that New York's decision to disenfranchise people who are incarcerated or on parole was motivated by racially discriminatory intent. Without such intent, the court found that the facially neutral disenfranchisement law could not constitute an equal protection violation under federal law.<sup>875</sup>

The plaintiffs in *Hayden* also challenged New York's disenfranchisement law on the grounds that it violated the U.S. Voting Rights Act. The appeal of this issue was combined with a pending challenge in the Second Circuit case *Muntaqim v. Coombe*,<sup>876</sup> in which the Association of the Bar of the City of New York has filed an *amicus* brief. Sitting *en banc* the Second Circuit decided 5-4 on May 4, 2006 that the Voting Rights Act of 1965, as amended in 1982, does not encompass felon disenfranchisement provisions such as § 5-106 "because (a) Congress did not

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<sup>873</sup> George Will, *Give Ballots to Felons? Do liberals oppose state laws denying felons the right to vote also oppose laws denying felons the right to own guns?* NEWSWEEK, Mar. 14, 2005.

<sup>874</sup> 2004 U.S. Dist. Lexis 10863 (S.D.N.Y. June 14, 2004), *aff'd*, 2006 U.S. App. LEXIS 1187 (2d Cir. May 4, 2006).

<sup>875</sup> *Id.* at \*8-9.

<sup>876</sup> 396 F.3d 95 (2d Cir. 2004).

intend the Voting Rights Act to cover such provisions; and (b) Congress made no clear statement of an interest to modify the federal balance by applying the Voting Rights Act to these provisions.”<sup>877</sup> However, the Court recognized that the case poses “a complex and difficult question that, absent congressional clarification, will only be definitively resolved by the Supreme Court.”<sup>878</sup>

In the Eleventh Circuit case *Johnson v. Bush*, in which several of the 600,000 Floridians who have been convicted of felonies and are therefore subject to Florida’s lifetime ban on voting (subject to the right to petition for reinstatement) were unsuccessful in arguing that the ban was prohibited by the federal Voting Rights Act (“VRA”).<sup>879</sup> The court in *Johnson v. Bush* found that racial animus has not motivated the reauthorization (as opposed to the initial passage) of Florida’s disenfranchisement statute and that, as the Second Circuit later found in *Hayden v. Pataki*, Congress had not intended to reach felon disenfranchisement statutes when it enacted and later amended the VRA.<sup>880</sup>

Claims that a disenfranchisement statute violated the VRA survived a motion to dismiss for different reasons in *Farrakhan v. Washington*. Specifically, the Ninth Circuit found that allegations of discrimination within the criminal justice system which ultimately led to fewer minorities voting, rather than the disenfranchisement scheme, were sufficient to withstand a motion to dismiss a claim that a disenfranchisement statute violated the VRA.<sup>881</sup> The Ninth Circuit went on to state that the district court should consider how the challenged voting practice

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<sup>877</sup> *Hayden v. Pataki*, 2006 WL 1169674 (2d Cir. May 4, 2006) (*en banc*).

<sup>878</sup> *Id.*

<sup>879</sup> 405 F.3d 1214 (11th Cir.), *cert. denied*, 126 S. Ct. 650 (2005).

<sup>880</sup> *Id.* at 1232.

<sup>881</sup> 338 F.3d 1009 (9th Cir. 2003), *cert. denied*, 543 U.S. 984 (2004).

interacts with external factors such as social and historical conditions, including possible discrimination in the criminal justice system, to result in denial of the right to vote on account of race or color. The Ninth Circuit then denied *en banc* review,<sup>882</sup> and in November 2004 the Supreme Court denied certiorari,<sup>883</sup> thus remanding the case to proceed to trial in the Eastern District of Washington.<sup>884</sup>

A different constitution-based challenge to state disenfranchisement laws has been mounted in New Jersey. The plaintiffs in *NAACP v. Harvey*<sup>885</sup> have challenged New Jersey's law prohibiting voting by people on probation and on parole (in addition to those in prison), alleging that the law violates the New Jersey state constitution's equal protection clause, a clause which has been interpreted more broadly than the federal constitution's equal protection clause. The plaintiffs seek to have the law modified so that only those in prison are prohibited from voting.<sup>886</sup>

A similar challenge based on New York's state constitution has not been brought. However, the *Hayden* case is instructive because New York courts have held that the state constitution's equal protection clause is no broader than that of the federal constitution.<sup>887</sup> Further, analysis of equal protection claims under the New York constitution operates under the same framework as does equal protection analysis under the federal constitution with respect to

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<sup>882</sup> 359 F.3d 1116 (9th Cir. 2004).

<sup>883</sup> 543 U.S. 984 (2004).

<sup>884</sup> The court in *Johnson v. Bush* considered but rejected the analysis in *Farrakhan v. Washington*. 405 F.3d 1214 at n. 36.

<sup>885</sup> 381 N.J. Super 155 (2005).

<sup>886</sup> Note that there are two classes of plaintiffs in this case – (1) African-Americans and Hispanics who are prohibited from voting because they are on probation or parole and (2) African-Americans and Hispanics who are eligible, but whose collective voting power is diminished as a result of the prohibitions on the first group.

disenfranchisement.<sup>888</sup> Thus, the *Hayden* court's dismissal of the equal protection claims under the federal constitution portends a dismissal of a claim brought under the state constitution. Of course, New York courts' interpretation of the state constitution need not proceed in lockstep with federal courts' interpretation of the federal constitution.<sup>889</sup> However, in light of the decision in *Hayden* and New York state court precedent in this area, the likelihood of success of a challenge to the disenfranchisement law brought under New York's constitution seems doubtful at best.

### **b. Lobbying for legislative action**

Given that the source of disenfranchisement is a state statute and the hurdles to litigation presented so far by the federal and state constitutions, lobbying for such statute's repeal and/or amendment would be the most direct means of effecting reform. A bill sponsored by Sen. Parker and co-sponsored by seven other senators, S01355, would repeal the disenfranchisement provisions entirely and re-enfranchise any voters previously affected. More modest proposals could include allowing people on parole to vote (while keeping restrictions in place for those in prison) or alternatively, prohibiting only those who have been convicted of certain types of crimes – such as violent felonies or election-related offenses – from voting.

There is also legislation regarding reform of disenfranchisement laws in Congress. Companion bills H.R. 939 (Rep. Jones, 76 cosponsors) and S. 450 (Sen. Clinton, 6 cosponsors) would lift disenfranchisement bars with respect to federal elections for people who had been convicted of felonies who have completed their sentence and are not on parole or probation.

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<sup>887</sup> *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 530 (1949), *cert. denied*, 339 US 981 (1950); *Esler v. Walters*, 56 N.Y.2d 306, 313-14 (1982).

<sup>888</sup> *Under 21, Catholic Home Bureau for Dependent Children v. New York*, 65 N.Y.2d 344, 360 (1985).

<sup>889</sup> Stewart F. Hancock, Jr. et al, *Race, Unbridled Discretion, and the State Constitutional Validity of New York's Death Penalty Statute – Two Questions*, 59 ALB. L. REV. 1545, 1574-75 (1996).

This legislation would help people in the states with restrictions that last beyond completion of sentence (albeit only with respect to federal elections), but it would not enhance the rights of people who had been convicted of felonies in New York.<sup>890</sup> Beyond its uncertain constitutionality (due to its extra-Constitutional interference with the state prerogative to regulate voting), its chances of legislative success are remote. A similar Senate measure was soundly defeated in 2002 by a 63-31 vote.<sup>891</sup>

Several other states have taken steps in recent years to restore rights to people convicted of felonies, though usually in small steps, such as scaling back lifetime bans – as what Delaware, Maryland, New Mexico and Nevada did – or lifting what were comparatively mild bans – such as Connecticut’s lifting of restrictions with respect to people on probation,<sup>892</sup> Florida’s modification of its reinstatement practices,<sup>893</sup> and Texas’s elimination of a two-year post-sentence waiting period.<sup>894</sup> However, at least two states, Massachusetts and Utah, have recently imposed new restrictions on people in prison, Colorado and Oregon disenfranchised people in federal prison (and for Colorado, people in the federal parole system)<sup>895</sup> and Kansas explained its

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<sup>890</sup> It is unclear exactly how elections would be administered in certain states if the bills became law. One could easily imagine a scenario where polling places would be forced to maintain booths marked “Ex-Felons Only” that allowed their users to vote only in federal elections.

<sup>891</sup> Manza & Uggen, *supra* note 815, at 499.

<sup>892</sup> Brooks, *supra* note 845, at 2.

<sup>893</sup> *Florida Changes Rules on Ex-Felons’ Rights*, ASSOCIATED PRESS, Dec. 9, 2004; USA TODAY, *supra* note 836.

<sup>894</sup> Steven Kalogeras, *Legislative Changes On Felony Disenfranchisement, 1996-2003*, at 2 (The Sentencing Project, Wash. D.C. Sept. 2003), available at <http://www.sentencingproject.org/pdfs/legchanges-report.pdf>.

<sup>895</sup> Manza & Uggen, *Summary of Changes to State Felon Disenfranchisement Law 1865-2003* (The Sentencing Project, Wash. D.C. Apr. 2003), available at <http://www.sentencingproject.org/pdfs/UggenManzaSummary.pdf>.



statute to clarify that the more restrictive interpretation of its previous statute, *i.e.*, people on probation were not allowed to vote, was indeed the intent of its legislature.<sup>896</sup>

Most recently, in March 2005, the Nebraska legislature, over the governor's veto, repealed the lifetime ban (and the associated ten-year wait on applying for a pardon) on voting. Now the right to vote is automatically restored to Nebraskans who have been convicted of felonies two years after they complete their sentences.<sup>897</sup> Faced with pressure to reform since Nebraska's action made Iowa the only non-Southern state among the group with severe restrictions, Iowa's governor signed an executive order restoring voting rights following completion of sentence effective July 4 to approximately 80,000 Iowans who had been convicted of felonies or aggravated misdemeanors following the completion of their sentence.<sup>898</sup> Previously, such persons were required to petition the governor's office for reinstatement, a process involving two other state entities which took about six months.<sup>899</sup>

The executive order was possible in Iowa because one of the governor's own agencies was charged with reviewing reinstatement petitions from those who had completed their sentences – a process that its governor could circumvent via executive order. Note that the only manner by which New Yorkers who have been convicted of felonies could have their voting privileges restored via executive order would be if the governor actually commuted their sentence or granted pardons so that people in prison or on parole could vote.

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<sup>896</sup> Kalogeras, *supra* note 894, at 5.

<sup>897</sup> Nate Jenkins, *Lawmakers Override Felon Voting Veto*, LINCOLN J. STAR, Mar. 11, 2005, at B1.

<sup>898</sup> Zernike, *supra* note 816, at 1.

<sup>899</sup> *Id.*

**c. Improving administration of disenfranchisement laws**

The Brennan Center, the Legal Action Center and the Community Service Society have worked hard in recent years to ensure that New York's disenfranchisement law is applied fairly, so that its application is not harsher than what the law contemplates. County boards are now required to consult with the Department of Correctional Services if they have questions concerning an individual's parole status rather than force the individual to collect and produce documents that do not exist.<sup>900</sup> Although much of the needed work has been accomplished by the aforementioned groups, one possibility for the state bar would be to assist these organizations to keep those on the front lines, *i.e.*, registrars, poll officials and others, fully informed of the minimal requirements associated with voting. Furthermore, no matter whether one supports the current state of law or not, one can support efforts to ensure lists of eligible voters are accurate and that registrars do not restrict those persons who are no longer on parole or those who are on parole but have fulfilled the obligations required in order to be reinstated (*e.g.*, obtaining a Certificate of Relief from Disability).

Also under consideration are companion bills S1529 (Sen. Montgomery, 13 cosponsors) and A1418 (Assemblyman Perry, 6 other sponsors), which would require the state board of parole to notify people of their right to vote upon completion of their sentence. This would help overcome one of the major problems with the status quo – people who have been released from prison often assume that they are not entitled to vote, even if they are not on parole. A second possibility would be to provide for automatic issuance of a Certificate of Relief from Disability at sentencing or upon release to eligible individuals, rather than require that the person

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<sup>900</sup> Demos, The Brennan Center for Justice and Legal Action Center, *Boards of Elections Continue Illegally To Disfranchise Voters with Felony Convictions* (Mar. 15, 2006).

proactively apply for such a Certificate, or at a minimum, educate affected individuals about the procedures for obtaining such a Certificate.

Another possibility for action by the state bar would be to take steps to facilitate voting by those who are allowed to vote under the law but by reason of being in jail cannot as a practical matter. Although this does not directly address the issues caused by *de jure* disenfranchisement, it would help alleviate the issues caused by *de facto* disenfranchisement. In New York, groups such as the League of Women Voters and the Center for Law and Justice are seeking to expand voting in jails.<sup>901</sup> Providing greater access to absentee ballots and/or voting booths within such facilities would enable those within who are eligible to vote to continue to participate in society in accordance with the rights the law affords them.

## **2. Regarding Exclusion from Jury Service**

Because court challenges to these exclusions have historically failed (whether if brought by someone who was excluded from the jury pool or a defendant whose case was heard by a jury drawn from such a pool), reform is likely possible only through legislative revision of NY Jud. § 510(3). The possibilities range from piecemeal reform that would distinguish between civil and criminal trials or between different felonies as grounds for automatic disqualification to outright elimination of the restrictions. This Committee's options for recommendations are wide open at this point, as there are currently no proposals at either the New York state or federal levels regarding this matter. However, reform in this area which lifts all restrictions on jury service will not as a practical matter automatically result in full inclusion of people who have committed felonies on New York's juries. *Voir dire* will surely (and in some cases, for good reason) exclude some from participating while other people who have been convicted of felonies

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<sup>901</sup> Kate Gurnett, *The right not to remain silent*, ALBANY TIMES-UNION, Oct. 13, 2005, at 1.

will be excluded from the outset because they do not appear on the lists from which juries are drawn, whether by reason of not being registered to vote, licensed to drive, or simply in possession of a permanent address.

Very few other states have looked at this issue in recent years so there is little experience to draw on. Combining jury service reform with disenfranchisement reform may make sense because of the overlap in rationales for reform, though such a strategy would tie, for better or worse, the fate of jury service reform to that of disenfranchisement.

## IX. IMMIGRATION

The immigration-related consequences of a criminal conviction in New York have increased significantly in the past ten years due to several amendments to federal immigration laws, most notably the 1996 enactment of the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRAIRA”). These Acts greatly expanded the criminal grounds under which an individual may be subject to “removal” (formerly called deportation) from the United States. Furthermore, since September 11, 2001, the federal government has greatly increased the enforcement of these laws, leading to a dramatic rise in detention and removal of New York residents for crime-related reasons. In fiscal year 2003, the Department of Homeland Security (formerly known as the INS)<sup>902</sup> reported that 79,395 non-citizens were removed based on criminal activity and 115,000 non-citizens with criminal records were detained.<sup>903</sup> This reflects an over 10% increase in the number of individuals who were removed in fiscal year 2002.<sup>904</sup>

Today, many of New York’s non-citizen residents who plead guilty to or are convicted of either misdemeanor or felony crimes are at risk of detention and removal from the US. Defendants, judges and lawyers in the criminal justice system are often not aware of the severe immigration consequences of pleas and convictions for non-citizen criminal defendants.

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<sup>902</sup> On March 1, 2003, services formerly provided by the Immigration and Naturalization Service (INS) transitioned into the Department of Homeland Security (DHS) under U.S. Citizenship & Immigration Services (USCIS).

<sup>903</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, 2003 YEARBOOK OF IMMIGRATION STATISTICS (2004), at <http://uscis.gov/graphics/shared/statistics/yearbook/2003/2003Yearbook.pdf>. (hereinafter *DHS Yearbook*). According to the *DHS Yearbook*, in 2003, a total of 186,151 non-citizens were removed from the U.S. and a total of 231,500 non-citizens were detained.

<sup>904</sup> *Id.* In 2002, 71,530 non-citizens with criminal convictions were removed from the U.S. The overall number of deportations rose 24% between 2002 and 2003.

The following story, which appeared in *The New York Times* in November 2004, illustrates the plight of many of New York's non-citizen residents with criminal convictions:

Andre Venant, a New York chef who had fallen ill and on hard times, sometimes made ends meet last winter with a doctored MetroCard, evading subway fares or selling turnstile swipes to others. He was arrested a few times but never sentenced to more than seven days in jail. So he was shocked when his third jail term opened a trapdoor to deportation... Instead of being freed after a week at Rikers Island, Mr. Venant, 52, a legal permanent resident of the United States who had worked at well-known Manhattan restaurants for most of two decades, was transferred to a New Jersey jail by immigration agents... He soon found himself in shackles on a predawn flight to rural Louisiana. There, in the 1,000-bed Federal Detention Center in Oakdale, he learned that he could be jailed indefinitely, without legal counsel, while the government sought to deport him to his native Madagascar for "crimes involving moral turpitude" - that is, three convictions for MetroCard offenses that are commonplace in New York... Mr. Venant was luckier than most. An immigrant friend in New York, despite her own fears of crossing the government, raised \$1,750 to hire a Louisiana lawyer. A Louisiana immigration judge, hearing Mr. Venant's long history of crime-free work, was persuaded to grant him a rare one-time cancellation of deportation... But he spent six months behind bars, and he returned to New York to find his identity in tatters: Rikers Island officials had destroyed his green card, driver's license and Social Security card, documents he needed to get work and medical care for diabetes...<sup>905</sup>

Non-citizen defendants with criminal convictions face much graver consequences as a result of their criminal records than their US citizen counterparts, giving rise to a dual system of justice. As illustrated above by the case of Mr. Venant, non-citizens who are placed in detention and later released have difficulty reintegrating into their old life and society because many times they have lost their jobs, their homes and in the case of Mr. Venant, their identities, while in detention.

Section A of this chapter will provide an overview of the breadth of immigration-related consequences that result from criminal convictions, highlighting 1) the nature and enforcement of immigration law; 2) the separation of families as a result of deportation; 3) the expansion of

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<sup>905</sup> Nina Bernstein, *Post-9/11, Even Evading Subway Fares Can Raise the Prospect of Deportation*, N.Y. TIMES, Oct. 11, 2004, at B1.

immigration detention; 4) the treatment of deportees in the countries to which they are removed; and 5) the interaction of federal immigration law and New York's criminal justice system.

Section B discusses suggestions for reforms to minimize or mitigate the extent of the consequences of criminal convictions.

## **A. THE LAW AND ITS EFFECTS**

### **1. Removal from the United States**

In recent years, many non-citizens who have been deemed “convicted” of a crime, under immigration law, have been removed from the US, including lawful permanent residents (green card holders), who have resided in this country for decades.<sup>906</sup>

#### **a. Defining a conviction under immigration law**

Prior to the 1996 amendments to the Immigration and Nationality Act (“INA”), the definition of conviction for immigration purposes mirrored the definition of conviction in criminal law.<sup>907</sup> Subsequent to the enactment of IIRAIRA, the scope of the definition of conviction was greatly expanded for immigration purposes to include not only formal judgments of guilt entered by the court, but also situations in which the following two conditions are met:

- (i) a judge or jury finds the non-citizen guilty, the non-citizen enters a plea of guilty or nolo contendere, or the non-citizen admits sufficient facts to warrant a finding of guilt, and
- (ii) the judge orders some form of punishment, penalty, or restraint to be imposed on the non-citizen's liberty.<sup>908</sup>

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<sup>906</sup> As defined by the Department of Homeland Security, removal is the expulsion of a non-citizen from the United States. This expulsion may be based on grounds of inadmissibility or deportability. Definition of removal *at* <http://uscis.gov/graphics/glossary3.htm#R>.

<sup>907</sup> See *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988).

<sup>908</sup> INA § 101(a)(48)(A), as amended by IIRAIRA § 322.

Essentially, this new expansive definition includes a number of dispositions that are not considered convictions under criminal law, including deferred adjudications and offenses that have been expunged or vacated under state and federal rehabilitative statutes.<sup>909</sup> Therefore, even if the criminal justice system has erased a defendant's record through an alternative sentencing arrangement, a non-citizen may still be deported for that offense because the definition of conviction is broader under immigration law than under criminal law.

**b. Deportability versus inadmissibility**

Non-citizens with criminal convictions, as defined by immigration law, are subject to removal if their crimes render them either “deportable” or “inadmissible.”<sup>910</sup> The statutory language that governs deportability and inadmissibility is not identical. The “deportability” grounds apply to individuals who have been lawfully admitted (*i.e.*, properly inspected by an immigration officer) to and have remained in the United States, such as a lawful permanent resident (“LPR”) or an individual in the United States in Temporary Worker Status. The “inadmissibility” grounds apply to individuals who have not been lawfully admitted before entering the United States.<sup>911</sup> This includes non-citizens who travel abroad as LPRs and are stopped by immigration officers upon re-entry, and non-citizens who are in the United States, but

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<sup>909</sup> *In re Roldan-Santoyo*, 22 I&N Dec. 512, 523 (BIA 1999) (giving no effect to vacatur of drug guilty plea under Idaho withholding of adjudication statute and stating in pertinent part “[w]e therefore interpret the new definition [of conviction] to provide that an alien is considered convicted for immigration purposes upon the initial satisfaction of the requirements of section 101(a)(48)(A) of the Act, and that he remains convicted notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure”). *But see Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (reversing *In re Roldan-Santoyo*, as it applies to a conviction of first offense, simple possession of a controlled substance).

<sup>910</sup> Inadmissibility is defined in INA § 212(a). Most of the criminal grounds of inadmissibility do not require a conviction. *Id.* Deportability is defined in INA § 237(a). Most of the criminal grounds of deportability require a conviction. *Id.*

<sup>911</sup> Pursuant to INA § 101(a)(13)(A), the terms “admission” and “admitted” mean, with respect to a non-citizen, the lawful entry of an individual into the United States after inspection and authorization by an immigration officer.



entered the United States without being inspected by an immigration officer and obtaining authorization to enter this country.

**c. Criminal grounds for deportability**

A non-citizen may be subject to removal on deportability grounds if she has been lawfully admitted into the United States and has been convicted of one of the following categories of crimes<sup>912</sup>:

- *Crimes Involving Moral Turpitude* (“*CIMT*”): Generally includes criminal activity that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between persons or to society in general.<sup>913</sup> Crimes of moral turpitude most often fall into the following categories: i) crimes in which an intent to steal or defraud is an element;<sup>914</sup> ii) crimes in which bodily harm is caused or threatened, by an intentional or willful act;<sup>915</sup> iii) crimes in which serious bodily harm is caused or threatened by a reckless act;<sup>916</sup> and iv) sex offenses.<sup>917</sup> *CIMT*’s encompass both misdemeanors and felonies and are deportable offenses if committed within five years of admission to the United States and punishable by a year in prison.<sup>918</sup>

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<sup>912</sup> This list is not exhaustive, but merely demonstrates the most common forms of deportable crimes.

<sup>913</sup> See *In re Franklin*, 20 I&N Dec. 867, 868 (BIA 1994), *review denied*, 72 F.3d 571 (8th Cir. 1995), *cert. denied*, 519 U.S. 834 (1996); *In re Short*, 20 I&N Dec. 136, 139 (BIA 1989); *In re Danesh*, 19 I&N Dec. 669, 670 (BIA 1988); *In re Flores*, 17 I&N Dec. 225, 227 (BIA 1980).

<sup>914</sup> See *In re McNaughton*, 16 I&N Dec. 569, 574 (BIA 1978) (stating that “whenever a crime has involved intent to defraud, it has been found to involve moral turpitude”).

<sup>915</sup> See *In re B-*, 6 I&N Dec. 98 (BIA 1954) (involving usury by intimidation and threats of bodily harm).

<sup>916</sup> *Id.*

<sup>917</sup> See *Matter of Mende-Moralez*, 21 I&N Dec. 296 (BIA 1996).

<sup>918</sup> INA § 237(a)(2)(A)(i)(a)(I).

- *Conviction of two crimes involving moral turpitude:* Includes either felonies or misdemeanors, committed at any time, regardless of actual or potential sentence.<sup>919</sup>
- *Controlled Substances Offenses:* Consists of any conviction for sale of a controlled substance, possession of a controlled substance with intent to sell, or simple possession, other than a single offense involving possession for one's own use of 30 grams or less of marijuana.<sup>920</sup> Drug abuse or addiction even without an actual conviction will also render a non-citizen removable.<sup>921</sup>
- *Firearm Offenses:* Includes any conviction for purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying of a firearm (or conviction for conspiring to do the same), including a class A misdemeanor.<sup>922</sup>
- *Domestic Violence & Stalking:* Consists of crimes involving domestic violence, stalking, or child abuse, neglect or abandonment.<sup>923</sup> This category also renders convictions for violating an Order of Protection (whether issued by civil or criminal court) a deportable offense, irrespective of the actual sentence.<sup>924</sup>
- *Aggravated Felony Convictions:* Comprises many of the aforementioned crimes, in addition to many other crimes.<sup>925</sup> A conviction for an aggravated felony, or an attempt or a conspiracy to commit an act defined as an aggravated felony, has the most serious immigration

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<sup>919</sup> *Id.* § 237(a)(2)(A)(ii).

<sup>920</sup> *Id.* § 237(a)(2)(B)(i).

<sup>921</sup> *Id.* § 237(a)(2)(B)(ii).

<sup>922</sup> *Id.* § 237(a)(2)(C).

<sup>923</sup> *Id.* § 237(a)(2)(E)(i).

<sup>924</sup> *Id.* § 237(a)(2)(E)(ii).

<sup>925</sup> *Id.* § 237(a)(2)(A)(iii).

consequences of any kind of conviction. An aggravated felony conviction will not only make a non-citizen removable it will also bar a non-citizen from most forms of relief from removal. The term “aggravated felony” as used here is an immigration term and has no connection to the definition of a felony in state criminal law. A crime can be considered an aggravated felony, with all the severe consequences of that definition, even if it is a misdemeanor under state penal law.

Aggravated felonies include not only crimes such as murder, rape, and sexual abuse of a minor, but also many drug or firearm offenses, regardless of sentence. This category of removable offenses also includes any crime of violence<sup>926</sup> for which the penalty imposed is at least one year, theft or burglary offense, or obstruction of justice offense for which an individual is sentenced to one year or more. Fraud or deceit offenses where the loss to the victim(s) exceeds \$10,000, as well as an expanding list of other specific offenses are also considered aggravated felonies.<sup>927</sup> The following case study illustrates the severe ramifications of an aggravated felony conviction.

MAG, a German citizen, was adopted by an American family before her second birthday. She was raised in Georgia and is now married with two children. MAG applied for US citizenship in 1999, 33 years after residing legally in the US. She truthfully completed the application for citizenship, stating that she had previously been convicted of a crime of a misdemeanor, simple assault. MAG had pled guilty, after consulting counsel, to pulling another woman’s hair in an argument over her child’s father. The misdemeanor was categorized as an aggravated felony under immigration law and MAG received a notice to appear for a deportation

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<sup>926</sup> Defined as an offense that has as an element the use, attempted use, or threatened use of physical force against a person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. 18 U.S.C. § 16.

<sup>927</sup> INA § 101(a)(43)(A)-(U).

hearing. As stated earlier, there is no longer statutory relief from removal for an aggravated felony. Fortunately for MAG, the news media reported her story and employees of the Georgia Board of Pardons watched in disbelief along with many others in her community. The Board issued her a pardon, a rare occurrence and limited avenue of relief from deportation.<sup>928</sup>

**d. Criminal grounds for inadmissibility**

The criminal grounds for inadmissibility partly overlap with those of deportability. Both categories include controlled substances offenses and crimes involving moral turpitude.

However, the provisions are slightly different. They include the following:

- *Controlled Substances Offenses*: Unlike the controlled substance ground of deportability there is no exception for a single conviction for possession of less than 30 grams of marijuana.<sup>929</sup>

- *Crimes Involving Moral Turpitude (“CIMT”)*: There are two exceptions to inadmissibility that apply to CIMTs:

- Crime Committed When Under the Age of 18: This applies to non-citizens with only one CIMT, committed more than five years before the date of the application for admission.<sup>930</sup>

- Petty Offense Exception: There is an exception that bars removability based on a CIMT if a non-citizen has been convicted of only one CIMT. To fall within this exception the maximum penalty possible for the crime cannot exceed one year in

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<sup>928</sup> Anthony Lewis, *Abroad at Home*; ‘Measure of Justice’, N.Y. TIMES, July 15, 2000, at A13.

<sup>929</sup> INA § 212(a)(2)(C).

<sup>930</sup> *Id.* § 212(a)(2)(A)(ii)(I).

prison and the non-citizen must not have been sentenced to a term of imprisonment of more than 6 months.<sup>931</sup>

- *Multiple Convictions*: Conviction of two or more offenses of any type with aggregate sentences amounting to imprisonment of at least five years will trigger this provision.<sup>932</sup>
- Prostitution and commercialized vice.<sup>933</sup>

**e. Lawful permanent residents (“LPR”) seeking admission**

Prior to the 1996 changes in immigration law, Supreme Court precedent held that a returning LPR is not subject to admissibility review upon return from an “innocent, casual, and brief” trip abroad that was not meant to be “meaningfully interruptive” of his or her lawful admission status.<sup>934</sup> However, subsequent to the enactment of IIRAIRA on September 30, 1996, the law was amended to read that if a non-citizen was considered “inadmissible” based on criminal activity, she would lose the benefit of the presumptive entitlement to admission and retention of status.<sup>935</sup> The following case study illustrates the repercussions of this law:

HM, was a LPR from Guyana who immigrated to the US in 1991. He married a US citizen with whom he had a son. HM attended Apex Technical School and had a good job as a heating/air-conditioning technician. He paid his taxes. In 1996, he was convicted of possession of \$5 worth of cocaine for which a criminal judge ordered that he pay a \$250 fine. The judge did not sentence him to jail time. In 2002, HM made a brief trip to Guyana to visit his ill mother. Upon his return to New York, he was detained, put in removal proceedings, and ordered deported. He had no avenue of relief and subsequently spent two years in a New

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<sup>931</sup> *Id.* § 212(a)(2)(A)(ii)(II).

<sup>932</sup> *Id.* § 212(a)(2)(B).

<sup>933</sup> *Id.* § 212(a)(2)(D).

<sup>934</sup> *See Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963); INA § 101(13)(A).

<sup>935</sup> INA § 101(13)(C)(v) as amended by IIRAIRA § 301(a)(13).

Jersey jail before he was actually removed to Guyana in 2004. HM's wife and child remain in the US.<sup>936</sup>

## **2. Relief from removal**

In most circumstances, non-citizens are afforded an opportunity to appear before an Immigration Judge and challenge the government's claim that they are removable. They may offer evidence that the offense committed is not a basis for removal. If the court determines that a non-citizen is indeed removable, then that individual may make an application to the court to determine whether s/he is eligible for relief from removal.

### **a. Judicial discretion in immigration court**

In many situations, removal is automatic regardless of the nature of the non-citizen's offense or their ties to the United States. Prior to the implementation of IIRIARA, permanent residents in deportation proceedings could apply for a form of discretionary relief called the "212(c) waiver."<sup>937</sup> To qualify for the statutory waiver, the individual needed to have seven years of residence in the US and could not have been sentenced to more than five years for an aggravated felony.<sup>938</sup>

When reviewing the evidentiary materials for this type of waiver, immigration judges had the discretion to evaluate all of the relevant factors in favor of and against an individual's deportation. The determination involved a balancing of the "adverse factors evidencing the [non-citizen's] undesirability as a permanent resident with the social and humane considerations presented in his (or her) behalf to determine whether the granting of . . . relief appears in the best

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<sup>936</sup> Statement by Bryan Lonagan, Staff Attorney, Immigration Law Unit Legal Aid Society, New York, NY.

<sup>937</sup> INA § 212(c), repealed by Sec. 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208. 110 Stat. 3009.

<sup>938</sup> The term of "aggravated felony" was introduced into immigration law in 1988 pursuant to the Anti-Drug Abuse Act of 1988 (ADAA). At that time, the term only encompassed very serious crimes, such as murder, drug trafficking or illegal trafficking of firearms or destructive devices.

interest of this country.”<sup>939</sup> In reviewing a 212(c) case, judges requested evidence pertaining to all the aspects of a person’s life, including their childhood and education, family life and relationships with children, employment history, tax paying history, substance abuse history and evidence of rehabilitation. In the period between 1989 and 1995, approximately half of all applicants for 212(c) relief, over 10,000 people, were granted waivers.<sup>940</sup>

The 1996 laws, in repealing Immigration and Nationality Act (“INA”) 212(c), eliminated judicial review for aggravated felons. The new law abolished individual determinations and implemented mandatory removal for many aggravated felons. Therefore, many immigrants with criminal convictions no longer have any avenue of relief from deportation.

**b. Available relief from removal**

Despite the elimination of relief for aggravated felons, there are several different types of relief available to other non-citizens.

- *Cancellation of Removal for LPRs:* The 1996 legislation eliminated 212(c) relief and replaced it with the much more restrictive Cancellation of Removal.<sup>941</sup> To be granted Cancellation of Removal, an LPR respondent must show the following: 1) he has been an LPR for at least five years; 2) he has resided in the United States continuously for seven years after having been admitted in any status; 3) he has not been convicted of an aggravated felony.<sup>942</sup> Additionally, any conviction for a “crime involving moral turpitude” – including jumping a turnstile – within seven years of a person’s arrival in the United States may disqualify a person

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<sup>939</sup> *In re C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998).

<sup>940</sup> *INS v. St. Cyr*, 533 U.S. 289, 296, n.6 (2001).

<sup>941</sup> *See* INA § 240A(a).

<sup>942</sup> *Id.*

from receiving this discretionary relief from removal. A conviction for an aggravated felony is a bar to Cancellation for Removal.

- *Cancellation of Removal for Foreign Nationals who are not LPRs:* For those individuals who are not LPRs such as refugees, asylees, or unauthorized/*undocumented* non-citizens, avenues of relief are extremely uncommon. However, if the individual has 1) resided in the United States for 10 years, without leaving the country for more than 90 days on one trip or more than 180 days in combined trips; 2) exhibits “good moral character” during the ten years prior to the application; *and* 3) has a United States citizen or LPR spouse, child or parent who would suffer *exceptional and extremely unusual hardship* if the individual was deported, then the non-citizen would be eligible for relief.<sup>943</sup> The BIA has defined this standard as “hardship that is substantially beyond that which would ordinarily be expected to result from the alien’s deportation.”<sup>944</sup> A conviction for an aggravated felony is a bar to Cancellation for Removal for non-LPRs.

- *Adjustment of Status:* Non-citizens in removal proceedings are eligible to apply for adjustment of status to lawful permanent residence as a form of relief from removal, if the non-citizen has a qualifying relative or employer to petition for an immigrant status on his/her behalf.<sup>945</sup> If the person has been convicted of a removable offense that is a ground of inadmissibility, they will also need a 212(h) waiver which is discussed below.

- *212(h) Waiver:* A conviction for a crime involving moral turpitude, prostitution, or possession of under 30 grams of marijuana, may be waived pursuant to Section 212(h).<sup>946</sup>

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<sup>943</sup> See *id.* § 240A(b).

<sup>944</sup> See *In re Monreal-Aguinaga*, 23 I&N Dec. 56 (BIA 2001).

<sup>945</sup> See INA § 245.

<sup>946</sup> See *id.* § 212(h).



This waiver is *unavailable*, however, to anyone convicted of an aggravated felony or any drug crime other than a one time possession of 30 grams or less of marijuana. A non-citizen is eligible for a waiver under Section 212(h)(1)(A) if the crime was committed more than 15 years prior to the date of application for admission, the admission would not be contrary to the national welfare and the non-citizen can demonstrate his rehabilitation. Section 212(h)(1)(B) provides another waiver if the non-citizen is a spouse, parent or child of a United States citizen or LPR and if denial of admission would cause extreme hardship to the United States citizen or LPR.

- *Asylum*: Individuals who have a reasonable fear of persecution in their home country on account of their race, religion, nationality, ethnic, or social group may be able to apply for asylum as a defense to removal based on a criminal conviction.<sup>947</sup> Asylum is not available to anyone *convicted* of an aggravated felony or “particularly serious crime.”<sup>948</sup> Drug trafficking has been deemed to be a particularly serious crime.<sup>949</sup>

- *Withholding of Removal*: Individuals who cannot meet the requirements for asylum but who are more likely than not to suffer persecution in their home country on account of their race, religion, nationality, ethnic, or social group may be able to apply for withholding of removal as a defense to criminal charge removal.<sup>950</sup> Withholding of removal is not available to an individual convicted of a “particularly serious crime.”<sup>951</sup> For withholding of removal purposes, an individual convicted of an aggravated felony or felonies is deemed by statute to

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<sup>947</sup> See *id.* § 208.

<sup>948</sup> See *id.* § 208(b)(2)(A)(ii).

<sup>949</sup> See *In re Y.L.*, 23 I&N Dec. 270 (BIA 2002).

<sup>950</sup> See INA § 241(b)(3).

<sup>951</sup> See *id.* § 241(b)(3)(B)(ii).

have been convicted of a particularly serious crime only if he or she has been sentenced to an aggregate term of imprisonment of at least five years.<sup>952</sup>

- *Temporary Protected Status:* The President of the United States occasionally grants temporary protected status to eligible nationals of designated countries who are temporarily unable to safely return to their home country because of ongoing armed conflict, the temporary effects of an environmental disaster, or other extraordinary and temporary conditions.<sup>953</sup> As is the case with other forms of relief, non-citizens who are inadmissible due to a criminal conviction, or who have been convicted of certain crimes, may not be eligible for TPS.

**c. Enforcement of removal**

In recent years, the federal government has vastly increased its ability to identify non-citizens with criminal records and to subject them to formal removal from the United States.

Removals based on criminal grounds have steadily increased in the United States:

<b>Fiscal Year</b>	<b>Number of Removals based on Criminal Grounds</b>
1993	27,827
1994	30,158
1995	31,631
1996	38,015
1997	53,214
1998	60,965
1999	70,372
2000	72,041
2001	72,329
2002	71,530
2003	79,385 <sup>954</sup>

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<sup>952</sup> See *id.* § 241(b)(3)(B)(iv).

<sup>953</sup> See *id.* § 244.

<sup>954</sup> DHS Yearbook; U.S. IMMIGRATION AND NATURALIZATION SERVICE, 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (2002), available at <http://uscis.gov/graphics/shared/statistics/yearbook/2001/yearbook2001.pdf>; and U.S. IMMIGRATION AND

A key component in the Department of Homeland Security's overall strategy to improve immigration enforcement is the Institutional Hearing Program ("IHP") which insures that incarcerated criminal non-citizens are placed in removal proceedings as quickly and efficiently as possible. The IHP is a cooperative effort between the Department of Justice's ("DOJ") Executive Office for Immigration Review ("EOIR"), the DHS, and participating federal and state correctional agencies to complete immigration proceedings for non-citizens with criminal convictions while they are still serving their sentences for criminal convictions. The program provides for streamlined procedures and special agreements with state and federal prison systems for consolidated prisoner intake sites, centralized immigration hearing locations, and consolidated prisoner release sites. These procedures enable DHS to more efficiently remove non-citizens from the United States when they complete their sentences in order to minimize detention stays. DHS has targeted resources for IHP implementation in the seven states that account for the majority of non-citizen inmates nationwide, including Arizona, California, Florida, Illinois, New Jersey, New York and Texas.<sup>955</sup> In 2003, the DHS removed 27,905 non-citizens with criminal convictions using the IHP program.<sup>956</sup> However, some attorneys and immigrant advocates have criticized the IHP program for lacking fairness and putting non-citizen inmates at a disadvantage, as the IHP program design and purpose make it extremely difficult for a non-citizen inmate to adequately defend against his removal while remaining in custody.<sup>957</sup>

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NATURALIZATION SERVICE, 1998 YEARBOOK OF IMMIGRATION STATISTICS (1999), *available at* <http://uscis.gov/graphics/shared/statistics/yearbook/1998/1998yb.pdf>.

<sup>955</sup> See United States Citizenship and Immigration Services Fact Sheet, *available at* <http://uscis.gov/graphics/publicaffairs/factsheets/removal.htm>.

<sup>956</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, *supra* note 903.

<sup>957</sup> Telephone interview with Deborah Schneer, Defense Attorney in Rosendale, New York (June 27, 2005).

**d. Right to assigned counsel**

Exacerbating this increased enforcement is a non-citizen's inability to secure counsel in removal proceedings. Although non-citizens facing removal have a right to counsel in immigration proceedings, this right does not include counsel at the expense of the government.<sup>958</sup> Because access to free immigration counsel is very limited, many accused non-citizens who are facing deportation are left unrepresented, unprotected, and uninformed in immigration proceedings. In 2003, 52% of those people facing removal (130,730 individuals) did not have counsel.<sup>959</sup> Many of these unrepresented people, including indigent and detained immigrants, had "viable claims to remain in the United States based on their fear of persecution, likelihood of torture, long-term lawful permanent residency, and family ties."<sup>960</sup> If represented, these individuals could have had a greater chance to avoid removal and remain in the United States. Indeed, in 2003, represented detainees received relief in 24% of their cases compared to 15% for unrepresented detainees.<sup>961</sup> A recent report by the Board of Immigration Appeals also revealed that non-citizen respondents represented on appeal were "three-to-four times more likely to win a favorable decision than those who represent themselves during the appellate process."<sup>962</sup>

In New York state, it is particularly difficult for inmates placed in removal proceedings to secure lawyers for their cases.<sup>963</sup> With the exception of Buffalo, the immigration bar is

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<sup>958</sup> INA § 292.

<sup>959</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, *supra* note 903.

<sup>960</sup> Donald Kerwin, *Revisiting the Need for Appointed Counsel*, Migration Policy Institute, Insight No. 4 (Apr. 2005), available at [http://www.migrationpolicy.org/insight/Insight\\_Kerwin.pdf](http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf).

<sup>961</sup> *Id.* at 6.

<sup>962</sup> Board of Immigration Appeals, *The BIA Pro Bono Project is Successful* (Oct. 2004), at <http://www.usdoj.gov/eoir/reports/BIAProBonoProjectEvaluation.pdf>.

<sup>963</sup> Stanley Mailman, *Early Parole for Deportation and the Right to a Lawyer*, 214 N.Y.L.J. 78 (Oct. 23, 1996).

located almost exclusively in the New York City area. For New York residents who are detained in Ulster or Downstate Correctional Facilities and are also facing deportation, there is only one local attorney who provides legal services, and this is on a fee basis.<sup>964</sup> Considering the seriousness of deportation and the fact that in New York, unlike, for instance, in California, most non-citizen inmates are not “illegal immigrants,” but are typically LPRs of the United States, the lack of counsel is particularly striking.<sup>965</sup>

### **3. Separation of American Families**

Removal from the US also gives rise to another dilemma: permanent separation from family and community. For every non-citizen who is removed, there are spouses, children, parents, and siblings who are often US citizens. Although there are no official statistics, immigration experts say that there are tens of thousands of children every year who lose a parent to removal.<sup>966</sup> One study, however, found that more than half of the deportees to the Dominican Republic left behind at least one relative who was a United States citizen behind.<sup>967</sup> The fragmentation and separation of families is significantly impacting children and immigrant communities. Removal causes the family unit to suffer psychologically, socially, and economically.

The Clinical Director at the Caribbean Community Mental Health Program at Kingsbrook Jewish Medical Center in Brooklyn, Birdette Gardiner-Parkinson, has witnessed first hand the effects of deportation on children. She described in one instance, how a vibrant, academically gifted 12-year old began failing classes, mutilating herself and having suicidal

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<sup>964</sup> Schneer, *supra* note 957.

<sup>965</sup> Mailman, *supra* note 963.

<sup>966</sup> Nina Bernstein, *A Mother Deported, and a Child Left Behind*, N.Y. TIMES, Nov. 24, 2004, at A1.

thoughts after her Colombian father entered removal proceedings.<sup>968</sup> Ms. Gardiner-Parkinson describes the impact as very devastating: “When children lose a family member this way, even though they may have a phone conversation with them, the physical separation feels like death.”<sup>969</sup>

Psychologists and social workers have reported that the children of deportees experience a great feeling of loss akin to the death of a parent resulting in anxiety, sleeplessness, nightmares and fear for the parent and of the future. When the deportee is the primary bread winner, many families suffer extreme financial hardship with the loss of an income. These financial difficulties can lead to business closings, the inability of children to go to college, and families having to resort to public assistance. In some instances, the loss of child care and support have caused children to be placed in foster care.<sup>970</sup>

Families for Freedom (“FFF”), a New York-based immigrant advocacy group, has documented many stories of families in New York City who have been devastated when a family member has been deported or detained. The following FFF case studies represent the hardship suffered by New York families as a result of a family member’s deportation.

The Corrica family in Brooklyn, New York has confronted numerous financial and emotional struggles while Linden Corrica, the family’s father, husband, and primary breadwinner, is detained in Louisiana on a deportation order based on a New York misdemeanor conviction for possession of marijuana. Although Linden only served 15 days in prison for his

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<sup>967</sup> Nina Siulc, *Unwelcome Citizens: Criminal Deportees and Civic Life in the Dominican Republic*, Forthcoming Ph.D. thesis, New York University Department of Anthropology (2005).

<sup>968</sup> *Id.*

<sup>969</sup> *Id.*

<sup>970</sup> Breakthrough: Building Human Rights Culture, *The Impact of Detention and Deportation on Families*, available at [http://www.breakthrough.tv/campaign\\_detail.asp?cid=13&id=2](http://www.breakthrough.tv/campaign_detail.asp?cid=13&id=2).

underlying crime, he has been detained in Louisiana for over 9 months. With the loss of Linden's income, Linden's wife and daughter struggle to pay rent and avoid eviction. Linden's daughter, tormented by the separation from her father, often cries and fears that her mother will leave her also.<sup>971</sup>

In another case study, Agatha Joseph ("Agatha") and her youngest daughter ("Joseph"), faced lengthy periods of separation and much heartache as a result of Joseph's detention based on a minor criminal violation. In 1997, when Joseph was 16-years old, she was charged with a New York violation for possession of a marijuana joint and received community service as a consequence. In 2000, after returning from a family visit to St. Lucia, Joseph was detained by JFK immigration authorities for her 1997 violation. For three years, Joseph was detained in different detention facilities across the country and away from her family. In 2003, with the help of a pro-bono attorney, Joseph was finally released from detention. However, she remains in deportation proceedings at the risk of being separated from her family at any moment.<sup>972</sup>

#### **4. Mandatory Detention**

The Immigration and Nationality Act mandates that any non-citizen convicted of a crime for which they went to jail after 1998 must be detained without bond until their removal proceedings are resolved, even if they do not present a flight risk or danger to the community.<sup>973</sup> In 2003, the United States Supreme Court upheld the constitutionality of the mandatory detention provisions of the Illegal Immigration Reform and Individual Responsibility Act of 1996 ("IIRIRA").<sup>974</sup> The Supreme Court decision means that most non-citizens convicted of crimes

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<sup>971</sup> Families For Freedom, *Truth Commission*, at <http://www.familiesforfreedom.org/truth.htm>.

<sup>972</sup> *Id.*

<sup>973</sup> INA § 236(c).

<sup>974</sup> *See Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003).

that subject them to removal will now be detained by the federal government upon release from criminal custody.

Consequently, the population of persons detained by immigration authorities has gone from 5,000 on any given day in 1995, to 25,000 on any given day in 2003.<sup>975</sup> DHS reports that over 200,000 people were detained by immigration authorities in 2003.<sup>976</sup> Approximately, 115,000 of these non-citizens had criminal records.<sup>977</sup> Although 52% of all detainees were non-citizens from Mexico, other leading countries included Cuba, Honduras, El Salvador, Guatemala, People's Republic of China, Haiti, Jamaica, the Dominican Republic, and Brazil.<sup>978</sup> The average stay in a detention facility is approximately 29.5 days, although stays of one month and those of several years also regularly occur.<sup>979</sup>

The annual cost of immigration detention to the taxpayer is nearly a billion dollars. It is estimated that it costs on average \$85 to detain a single person in immigration detention per day.<sup>980</sup> The cost of immigration detention is expected to increase. When Congress enacted the recommendations of the 9/11 Commission, it included a provision not recommended by the commission for the purchase of 45,000 additional bed spaces over the next five years.

United States Immigration and Customs Enforcement ("ICE"), an agency within DHS, operates or has contracts with detention facilities all over the country. Most detainees are held in

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<sup>975</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, *supra* note 903.

<sup>976</sup> *Id.*

<sup>977</sup> *Id.*

<sup>978</sup> *Id.*

<sup>979</sup> *Id.*

<sup>980</sup> Human Rights First, *In Liberty's Shadow: US Detention of Asylum Seekers in the Era of Homeland Security*, (2004).



local jails that are paid a fee by the government for holding detainees.<sup>981</sup> At this time, there is no facility for holding detainees in New York City. New York City residents who are detained and placed in removal proceedings are initially taken to the Passaic or Bergen County jails in New Jersey pending conclusion of their removal proceedings at the Varick Street immigration court in New York City. The Passaic and Bergen county jails house approximately 400 detainees.<sup>982</sup> In addition, upstate residents with pending immigration cases in the Buffalo Immigration Court are held in a facility in Batavia. When those facilities have reached capacity, however, New York residents are usually sent to the federal government's immigration detention facility in Oakdale, Louisiana.<sup>983</sup> Detention in Louisiana poses an extreme hardship to non-citizens from New York. Not only are the detainees located far away from their families, but they are less capable of defending their cases because they have little or no access to their lawyers and evidence that could help their case.

Immigration detention, even where an individual avoids removal, is itself a very serious consequence of a criminal conviction. Because of mandatory detention provisions in the INA, anyone convicted of a removable offense must be taken into custody upon release no matter how short the sentence.<sup>984</sup> The breath of this statute has lead to the incongruous result that many non-citizens will spend much more time in immigration detention then they did for the sentence on

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<sup>981</sup> See MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS*, (University of California Press 2004).

<sup>982</sup> AMERICAN FRIENDS SERVICE COMMITTEE, *MAPPING IMMIGRATION DETENTION IN THE NY/NJ METROPOLITAN AREA* (2005).

<sup>983</sup> Bryan Lonagan & Immigration Law Unit of the Legal Aid Society, *Immigration Detention and Removal: A Guide for Detainees and Their Families* (Oct. 2004), available at <http://www.legal-aid.org/Uploads/IMMIGRATIONDETENTIONREMOVAL.pdf>.

<sup>984</sup> INA § 236(c)(1)(D).

their underlying crime. As mentioned earlier, a lengthy period of detention can have a far-reaching impact on the individual and his family.

In addition, detainees have regularly and repeatedly reported incidents of physical and verbal abuse, overcrowding, interference with religious practices, lack of access to legal materials, and overcrowding in immigration detention facilities.<sup>985</sup> Detainees in the Passaic County Jail with chronic illnesses such as HIV, diabetes, or heart disease and those with psychiatric issues have reported to the Legal Aid Society that they do not receive adequate medical attention. In early 2005, a mentally ill detainee in the Passaic Jail committed suicide after a month of detention.<sup>986</sup>

In 2004, National Public Radio (“NPR”) exposed the use of dogs at the Passaic County Jail as a means of controlling and intimidating immigration detainees, NPR documented how one individual detained for almost two years at Passaic County Jail was physically terrorized by eight guards and a dog during the night. NPR’s report led to a 2004 directive from DHS that ordered the termination of the use of dogs in jails holding immigrant detainees.<sup>987</sup> NPR also reported a brutal beating at the Hudson County Jail in Kearney, New Jersey. Several guards are currently under investigation.<sup>988</sup>

## **5. Return of Deportees to Home Countries**

Once a non-citizen is ordered removed, the struggle is not over. Many deportees are forced to return to countries they have not been to in many years or since they were babies.

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<sup>985</sup> See Dow, *supra* note 981.

<sup>986</sup> New Jersey Civil Rights Defense Committee, NJCRDC *Statement on Suicide at Passaic County Jail* – Feb. 17, 2005, available at <http://www.nj-civilrights.org>.

<sup>987</sup> See Daniel Zwerdling, *Government Halts Use of Dogs Around Detainees* (NPR radio broadcast, Nov. 30, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=4193030>.

<sup>988</sup> Brian Donohue and Tom Feeney, *Federal detainees, county headaches – Jersey jails’ troubles increasing*, STAR LEDGER, June 3, 2004, at 1.

Unless they have family to assist them, there are few programs for re-entry. Moreover, deportation results in the loss of U.S. Social Security entitlements.

For people with chronic illnesses, particularly HIV/AIDS, deportation has life threatening consequences. HIV care in the Caribbean is woefully inadequate despite the infusion of assistance from the United States.<sup>989</sup> In addition, people suffering from HIV/AIDS are subjected to widespread discrimination. HIV/AIDS is widely seen as a disease of homosexuals and many people, both gay and straight, have been the targets of violence.<sup>990</sup>

The countries to which people are removed, predominately in Latin America and the Caribbean, are steeped in poverty and have been overwhelmed by the wave of deportees who are viewed with suspicion and fear. Caribbean newspapers regularly report the arrival of new deportees and the claims of government officials that the deportees are the cause of rampant crime. Although a 2004 report by the University of the West Indies found no link between deportees and the rise of crime in Jamaica, many governments have complained that the mass deportation of people to countries already struggling with destabilizing poverty is unfair to the receiving nations.<sup>991</sup> Guyana's Ambassador to the United States has complained that "[b]y sending the criminal deportees back to the Caribbean countries where there are almost no rehabilitative programs to assist them, these countries are being penalized by a State in whose social environment the criminalizing of these persons developed. Indeed, these persons have already served their time in prisons, but they are now sent back by a country where rehabilitation programs exist, to countries which do not have resources to operate such facilities. I am of the

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<sup>989</sup> Interview with Dr. Farley R. Cleghorn, MD, MPH, Asst. Professor of Medicine, University of Maryland, Deputy Director of the Division of Epidemiology, and Senior Scientist at the Institute of Human Virology.

<sup>990</sup> See Human Rights Watch, *Hated to Death: Homophobia, Violence, and Jamaica's HIV/AIDS Epidemic*, (Nov. 16, 2004), available at <http://www.hrw.org/reports/2004/jamaica1104/>.

<sup>991</sup> See Vernon Davidson, *Study Shatters Deportee 'Myth'*, THE JAMAICA OBSERVER, Sept. 28, 2004.

opinion that the United States has the moral responsibility to rehabilitate these persons who have completed their sentences, because their deviant behavior is a product of the US environment in which they have resided.”<sup>992</sup>

Many countries greet the newly arrived deportees with periods of detention or close police scrutiny. In Haiti, for example, criminal deportees from the United States are placed in indefinite preventive detention, without food, water or sanitation, in cells so crowded that they cannot lie down.<sup>993</sup> According to reports by the Department of State (“DOS”) and United States Citizenship and Immigration Services (“USCIS”), prison conditions for these deportees are extremely poor and beneath international standards fixed by law.<sup>994</sup> The deportees in Haiti are subjected to police beatings, and sometimes are burned with cigarettes, choked, hooded and given electric shocks. Some have even died in custody.<sup>995</sup> The United States Court of Appeals for the Third Circuit, however, recently held that as deplorable and inhumane these conditions were, they did not rise to the level of “torture” as defined by law.

When people are deported to Guyana they are routinely detained for at least 24 hours while the police evaluate their situation and open a dossier. Photographs of the deportees, the reasons for their deportation, and their home addresses are then published in the national paper making the ability of deportees to secure work that much harder. In El Salvador, the government passed tough legislation aimed at deported gang members which allowed the police to arrest

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<sup>992</sup> Ambassador Odeen Ishmael of Guyana, Address at the Prince George’s Community College Caribbean Festival, Largo, Maryland (May 7, 2000).

<sup>993</sup> U.S. Citizenship and Immigration Services, *Haiti: Information on Conditions in Haitian Prisons and Treatment of Criminal Deportees (2d Response) Feb. 12, 2002*, available at <http://uscis.gov/graphics/services/asylum/ric/documentation/HTI02001.htm>.

<sup>994</sup> *Id.*; U.S. Department of State, *Haiti, Country Reports on Human Rights Practices – 2004* (Feb. 2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41764.htm>.

<sup>995</sup> *Id.*; see also Nina Bernstein, *Deportation Case Focuses on Definition of Torture*, N.Y. TIMES, Mar. 11, 2005 at B2.

them simply for having tattoos.<sup>996</sup> What is worse, death squads have re-emerged to execute deported gang members.<sup>997</sup>

## **6. Ineligibility For US Citizenship**

Many non-citizens with criminal convictions, who are granted relief from removal, suffer another consequence to their immigration status: They are ineligible to become United States citizens. To be eligible for citizenship, an individual must demonstrate good moral character.<sup>998</sup> Conviction for a crime designated as an aggravated felony permanently bars a non-citizen from applying for US citizenship.<sup>999</sup> Although some individuals live their entire lives as LPRs of the United States without ever becoming US citizens, ineligibility for US citizenship is a serious consequence, as various federal and state government benefits are only available to citizens. Moreover, the individual will never be fully secure from deportation.

## **7. Increased Involvement of the NYPD in Immigration Enforcement Efforts**

Since September 11, 2001, the federal government has increasingly used local police in the enforcement of civil immigration laws. In 2001, the federal government announced that the former INS would begin entering civil immigration information into the FBI's National Crime Information Center ("NCIC") database, a massive computerized archive connecting the databases of various federal, state, and local agencies of criminal justice information. The NCIC

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<sup>996</sup> Edgardo Ayala, *Declaring War on Gangs* (Oct. 14, 2003), available at [http://insidecostarica.com/specialreports/central\\_america\\_declaring\\_war\\_on\\_gangs.htm](http://insidecostarica.com/specialreports/central_america_declaring_war_on_gangs.htm); *Ley Antimaras*, EL DIARIO DE HOY, July 25, 2003, available at <http://www.elsalvador.com/noticias/2003/07/25/nacional/nacio19.html>.

<sup>997</sup> Douglas Payne, *Questions & Answers Series El Salvador: Re-emergence of "Social Cleansing" Death Squads*, FREE REPUBLIC, Mar. 1999, available at <http://www.freerepublic.com/focus/f-news/1421308/posts>; Edward Hegstrom, *Death Squads Return to Make War on Gangs: Teens turn up Dead on Streets of El Salvador*, HOUSTON CHRONICLE, Mar. 9, 1999 at § A, at 8.

<sup>998</sup> See INA § 316(a).

<sup>999</sup> See *id.* § 101(f)(8).

database contains over 50 million records which are used by police departments nationwide.<sup>1000</sup>

Among other things, it contains information on a person's criminal record and immigration status.

The inclusion of this information in the database reflects the federal government's effort since September 11<sup>th</sup> to involve local law enforcement in immigration enforcement.<sup>1001</sup>

According to *The New York Times*, between June 2002 and December 2003, the names of 300,000 non-citizens with deportation orders were entered into the NCIC database.<sup>1002</sup> *The New York Times* has reported that several hundred New York residents have been arrested by local police for immigration violations through routine computer checks.<sup>1003</sup>

Notwithstanding the NCIC database, Mayor Bloomberg has issued Executive Order 41, guaranteeing that the personal information, including immigration status, of New York residents seeking city services shall remain confidential.<sup>1004</sup> In response to the Order, the New York City Police Department issued an interim order declaring: "Police Officers shall not inquire about a

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<sup>1000</sup> See Testimony of Michael D. Kirkpatrick, Federal Bureau of Investigation, before the Subcommittee on Immigration, Border Security, and Citizenship, Senate Committee on the Judiciary (Nov. 13, 2003), available at [www.fbi.gov/congress/congress03/ncic111303.htm](http://www.fbi.gov/congress/congress03/ncic111303.htm).

<sup>1001</sup> In April 2002, the Office of Legal Council drafted an unpublished memorandum for the Department of State, taking the position that state and local law enforcement could lawfully enforce the civil provisions of Immigration law. *Nat'l Council of La Raza v. Dep't of Justice*, 411 3d. 350, 353 (2d Cir. 2005).

<sup>1002</sup> See Nina Bernstein, *Crime Database Misused for Civil Issues, Suit Says*, N.Y. TIMES, Dec. 17, 2003, at A34. According to the New York Immigration Coalition, information on more than 400,000 persons has been entered into NCIC. See The New York Immigration Coalition, *NYPD's Policy of Making Immigration Arrests Undermines the Trust and Cooperation of New York's Immigrant Communities*, available at <http://www.thenyc.org/templates/documentFinder.asp?did=366>.

<sup>1003</sup> See Nina Bernstein, *Two Girls Held as U.S. Fears Suicide Bomb*, N.Y. TIMES, Apr. 7, 2005, at B1; see also Nina Bernstein, *Girl Called Would-Be Bomber was Drawn to Islam*, N.Y. TIMES, Apr. 8, 2005, at B1.

<sup>1004</sup> See City of New York, Executive Order No. 41, *City-wide Privacy Policy and Amendment of Executive Order No. 34 Relating to City Policy Concerning Immigrant Access to City Services*, available at [http://www.nyc.gov/html/imm/downloads/pdf/exe\\_order\\_41.pdf](http://www.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf).

person's immigration status unless investigating illegal activity other than mere status as an undocumented alien.<sup>1005</sup>

Despite the Executive and Interim Orders, NYPD officials have testified that the police enter immigration information of criminal suspects into the NCIC data base.<sup>1006</sup>

The primary concern with this trend toward local police enforcement of immigration laws is the effect such policies will have on the effectiveness of the police to serve their communities.<sup>1007</sup> The concern here is that by turning local law enforcement into federal immigration police, the government will discourage immigrant communities from interacting with local law enforcement. Non-citizens will not come forward with crime-related information or seek help on other matters out of fear that the police will arrest them for their immigration status.<sup>1008</sup>

One example of how the mission of local law enforcement agencies can be mired by cooperating with federal immigration authorities was an operation in the summer of 2004, involving the New York State Division of Parole and Immigration and Customs Enforcement ("ICE").<sup>1009</sup> In one day, 150 non-citizens were arrested by ICE agents when they reported to

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<sup>1005</sup> See Jacqueline D. Sherman & Sean Robin, Briefing Paper of the Governmental Affairs Div., New York City Council, *Oversight: Impact of the National Crime Information Center Database of New York City's Immigrant Communities* (Apr. 22, 2005), available at <http://webdocs.nycouncil.info/attachments/65941.htm?CFID=668604&CFTOKEN=89261300>.

<sup>1006</sup> See Nina Bernstein, *Police Report Non-citizens to U.S., Official Says*, N.Y. TIMES, Apr. 23, 2005, at B3.

<sup>1007</sup> See Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1085 (May 2004).

<sup>1008</sup> To better understand the impact that the NCIC database may have on the New York immigrant community, it is important to note that in 2000, approximately 36% of New Yorkers were foreign-born, 55% of New Yorkers were immigrants or children of immigrants, and 59% of children born in New York City had at least one foreign-born parent. See New York City Dep't of City Planning, *The Newest New Yorkers 2000* (Jan. 2005), available at <http://www.nyc.gov/html/dcp/html/census/nny.html>. Furthermore, the foreign-born population of New York City has increased 38% in the decade between 1990-2000.

<sup>1009</sup> Igor Gonzalez, *El estado tiende trampas a los inmigrantes*, HOY, May 15, 2005.

their parole officers.<sup>1010</sup> Although ICE stated that through this program, "dangerous fugitives" had been taken off the street, this claim was belied by the fact that New York residents were apprehended precisely because they were complying with the terms of their parole by reporting to their parole officer. More importantly, as a result of this initiative, non-citizen parolees and their communities believed that complying with parole would lead to deportation.

## 8. Impact of Guilty Plea

Given that a criminal conviction could result in a non-citizen being detained or removed from the United States, it is reasonable to expect that non-citizen criminal defendants, particularly when considering a plea bargain, be fully aware that their criminal conviction could have dire immigration consequences.<sup>1011</sup> Yet, many defendants, judges and lawyers are unaware of these consequences. To address this concern, a number of states have statutes requiring judicial warning of the immigration consequences of a guilty plea. Among these statutes, New York's statute is one of the least effective in the country.

The statute, as it currently stands, requires criminal trial courts to advise defendants of the possibility of deportation, exclusion, or denial of naturalization, prior to accepting a defendant's plea of guilty to a felony.<sup>1012</sup> However, the judicial warning does not extend to guilty pleas to misdemeanors or violations, which may also have serious negative immigration consequences. Another deficiency is that the warning is not given to defendants until plea allocution, which does not provide non-citizen defendants and their counsel adequate time to fully consider the

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<sup>1010</sup> *Id.*

<sup>1011</sup> Many criminal cases are resolved out of court by having both sides come to an agreement. This process is known as negotiating a plea or plea bargaining. In most jurisdictions it resolves most of the criminal cases filed. From American Bar Association *available at* <http://www.abanet.org/publiced/courts/pleabargaining.html>.

<sup>1012</sup> *See* N.Y. CRIM. PROC. LAW § 220.50(7).



impact of a guilty plea.<sup>1013</sup> In addition, if a trial court judge fails to make the proper warning, the statute has no enforceability provision. Instead, the New York statute provides that a court’s “failure to advise” a defendant of the immigration consequences of guilty plea does not affect the voluntariness of the guilty plea so as to provide a basis for later withdrawal or vacatur of the plea.<sup>1014</sup>

Additionally, the American Bar Association Standard 14\_3.2(f) states that “to the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.” The commentary notes that “it may well be that many clients’ greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client.”<sup>1015</sup>

New York State law, however, provides only a limited legal remedy when defense counsel fails to advise a non-citizen defendant of the potential immigration consequences of a guilty plea. The New York State Court of Appeals held in 1995 that a defense counsel’s failure to advise a defendant of the possibility of deportation does not constitute ineffective assistance of counsel warranting a vacatur of the plea.<sup>1016</sup> However, the Court subsequently held that a defense counsel’s erroneous advice as to the deportation consequences of a plea agreement *may*

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<sup>1013</sup> Manuel Vargas, *Working Paper on Immigration Consequences of Guilty Pleas or Convictions in New York Courts*, N.Y. State Judicial Institute (May 9, 2005), available at <http://www.courts.state.ny.us/ip/partnersinjustice/immigration-consequences.pdf>.

<sup>1014</sup> *Id.*

<sup>1015</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (3d ed. 1999).

<sup>1016</sup> *People v. Ford*, 86 N.Y.2d 397, 403 (1995).

constitute ineffective assistance of counsel under the federal Constitution, provided there is a reasonable probability that, but for counsel's error, the defendant would not have pleaded guilty.<sup>1017</sup>

## **B. POSSIBILITIES FOR CHANGE**

This section outlines suggested changes to federal immigration laws and offers statewide reforms aimed at mitigating the severe immigration consequences of a conviction. The proposed federal changes include offering new definitions for key immigration terms to avoid automatic deportation for relatively insignificant crimes; suggesting the restoration of judicial discretion and review as a way to better ensure that the immigration consequences of crimes are commensurate with the offense; proposing effective alternatives to mandatory detention that preserve family unification and diminish the cost of detention to the federal government. The suggested federal changes also include a right to assigned counsel for non-citizens facing removal so that they may have access to the professional legal advice necessary to present their cases in immigration proceedings. The proposed statewide reforms predominantly focus on New York's criminal justice system and the unforeseen immigration consequences of a conviction.

### **1. Federal Immigration Reforms**

Because criminal deportation is deemed to be merely an act of administrative enforcement and not punishment, the constitutional protections taken for granted in criminal proceedings do not apply in immigration proceedings. For example, non-citizens in removal proceedings do not enjoy the Sixth Amendment right to assigned counsel or the Eighth Amendment prohibition against cruel and unusual punishment.<sup>1018</sup> With the dramatic increase in

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<sup>1017</sup> *People v. McDonald*, 1 N.Y.3d 109, 115 (2003).

<sup>1018</sup> *Immigration and Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (Fourth Amendment does not apply); *Johannessen v. United States*, 225 U.S. 227, 242 (1912) (Ex post facto clause); *United States v.*

the past quarter century in the number of people removed annually due to criminal convictions, some legal scholars have questioned the continued validity of the notion that deportation is not punishment.<sup>1019</sup> After the 1996 amendments to the Immigration and Nationality Act (“INA”) the convergence between the criminal justice and deportation systems was fairly complete. Removal now serves all the purposes of punishment traditionally accepted as part of the criminal justice system – incapacitation, deterrence, and retribution.<sup>1020</sup> Moreover, most people clearly see removal as punishment. “When the government deports a person on the basis of a prior conviction, and when it does so without regard to whether the person is rehabilitated and without consideration for whether the person provides a benefit to family members residing in the United States, it looks as if the person is simply being punished for the prior offense.”<sup>1021</sup>

## 2. Proposed Legislation to Repeal Provisions of IIRAIRA and AEDPA<sup>1022</sup>

Due to the severe nature of deportation, several members of Congress have in recent years proposed bills to amend current provisions of the immigration statute. Bipartisan members of Congress have supported legislation to repeal sections of IIRAIRA and the AEDPA so as to mitigate the immigration consequences of criminal convictions. These bills have been

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*Yacoubian*, 24 F.3d 1, 10 (9th Cir. 1994) (Double Jeopardy); *Oliver v. United States Dep’t of Justice, Immigration and Naturalization Serv.*, 517 F.2d 426, 428 (2d Cir. 1975) (Eighth Amendment).

<sup>1019</sup> Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 COLUM. HUM. RTS. L. REV. 713 (Spring 1995); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (Winter 2000); Daniel Kanstrom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (June 2000).

<sup>1020</sup> Kanstrom, *supra* note 1019, at 1894.

<sup>1021</sup> Pauw, *supra* note 1019, at 313.

<sup>1022</sup> As this report goes to press in May 2006, Congress is considering critical legislation that could further impact the interplay between immigration law and the criminal justice system. While it is premature to analyze the effect of bills that are still strongly contested, it appears at this point that the outcome of the congressional debate will not affect the primary issues and recommendations raised in the Immigration section of this report.

introduced in the House of Representatives and the Senate, to minimize the severe immigration consequences of the 1996 immigration laws. For example, during the 107<sup>th</sup> Congress in 2001, Senator Edward Kennedy, Representative John LaFalce, and Representative Barney Frank introduced *A Bill to Amend the Immigration and Nationality Act, Immigrant Fairness Restoration Act*, and *the Family Reunification Act* respectively.<sup>1023</sup> These bills recommended, inter alia, the reintroduction of judicial review for immigration decisions, the adoption of detention standards for immigration detainees and the restoration of discretion to grant deportation relief to long-term permanent residents when appropriate.<sup>1024</sup> In 2002, the House Judiciary Committee approved the *Family Reunification Act of 2001*.<sup>1025</sup>

During the 108<sup>th</sup> Congress, the following bills were introduced:

- On January 7, 2003, Representative John Conyers introduced a bill containing expansive revisions to the immigration detention provisions.<sup>1026</sup> The bill allowed for judicial review of bond and detention determinations and gave the Attorney General discretion to release non-citizens with criminal convictions who do “not pose a danger to the safety of other persons or of property and [are] likely to appear for any scheduled proceeding.”<sup>1027</sup> The bill would also have eliminated mandatory detention for those in expedited removal proceedings (explained below).

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<sup>1023</sup> See S. 955, 107th Cong. (2001) (Last action: May 23, 2001, Referred to the Committee on the Judiciary); H.R. 2772, 107th Cong. (2001) (Last action: Sept. 9, 2001, Referred to the Subcommittee on Immigration and Claims); H.R. 1452, 107th Cong. (2001) (Last action: Nov. 14, 2002, Placed on the Union Calendar No. 487).

<sup>1024</sup> *Id.*

<sup>1025</sup> American Immigration Lawyers Association, *Issue Paper: Restore Fairness and Due Process: 1996 Immigration Laws Go Too Far*, (2005), available at <http://www.aila.org/content/default.aspx?docid=8381>.

<sup>1026</sup> H.R. 47, 108th Cong. (2003) (Last action: Mar. 6, 2003, Referred to the Subcommittee on Immigration, Border Security, and Claims).

<sup>1027</sup> *Id.*

- On February 13, 2003, Representative Ed Pastor sponsored legislation entitled, the *Restoration of Pre-IIRAIRA Avenues of Relief Act* to restore relief provisions such as § 212(c) of the INA.<sup>1028</sup> The purpose of the bill was to keep US families together, by offering relief from removal for LPRs.

- On October 15 2003, Representative Bob Filner introduced the *Keeping Families Together Act of 2003*, which called for repealing many of IIRAIRA's amendments to the INA.<sup>1029</sup> For instance, the bill called for restoring the definition of aggravated felony and the detention policies to their pre-IIRAIRA state. The bill also introduced a provision restoring § 212(c) of the INA, as well as mandating judicial review for immigration decisions.<sup>1030</sup>

Most recently, during the 109<sup>th</sup> Congress, Representative Sheila Jackson-Lee of Texas sponsored *The Save America Comprehensive Immigration Act*, which like other proposed legislation, included narrowing the broad definition of aggravated felony, as well as amending the meaning of conviction under immigration law. Furthermore, the proposed bill contains a provision, restoring discretionary relief for certain non-citizens in removal proceedings.<sup>1031</sup>

Although none of these bills have been enacted, they demonstrate the inherent weakness of the current statutory framework of immigration law. Our suggestions below speak directly to some of the same weaknesses that members of Congress have underscored in proposed legislation.

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<sup>1028</sup> H.R. 836, 108th Cong. (2003) (Last Action: May 4, 2003, Referred to the Subcommittee on Immigration, Border Security, and Claims).

<sup>1029</sup> H.R. 3309, 108th Cong. (2003) (Last action: Dec. 10, 2003, Referred to the Subcommittee on Immigration, Border Security, and Claims).

<sup>1030</sup> *Id.*

<sup>1031</sup> H.R. 2092, 109th Cong. (2005) (Last Action: May 24, 2005, Introductory remarks on measure).

### 3. Amend the Statutory Definitions of “Conviction” and “Aggravated Felony”

Under the current INA definition of “conviction,” a criminal judge’s decision to suspend or withhold sentencing is given no consideration and an invalidated conviction is still treated as a conviction under the INA. Likewise, state rehabilitation programs do not erase convictions for immigration purposes. Thus, although the criminal justice system may not incarcerate a non-citizen for a crime or continue to recognize a non-citizen’s conviction, for immigration purposes that individual’s conviction is still valid and renders the individual deportable.

A more fair, consistent, and proportionate approach would be to narrow the definition of “conviction” in immigration law so that it mirrors the criminal justice system’s definition of this term. Accordingly, adjudications or judgments of guilt that have been expunged, deferred, annulled, invalidated, withheld or vacated would not be considered a conviction for immigration law purposes.

The definition of aggravated felony also creates an inconsistent result, treating a person who has never been incarcerated the same as a person who has spent years in prison. A conviction for shoplifting, for example, though a misdemeanor under state law, may qualify as an aggravated felony and carry the same penalty under immigration law as a murder conviction: mandatory deportation.<sup>1032</sup> Moreover, many non-citizens, categorized as “aggravated felons,” may never have actually served a jail sentence. Given the disparate treatment of non-citizens as a result of the overly broad definition of “aggravated felony” and the resulting dissonance between the punishment and the crime, another approach would be to narrow the scope of what constitutes an “aggravated felony” for immigration purposes. Amending the immigration law

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<sup>1032</sup> See INA § 101(a)(43)(G) (defining any theft offense where a sentence of one year or more is imposed). In New York, shoplifting (petit larceny) is a Class A misdemeanor, which can carry a one year sentence and therefore, be classified as an aggravated felony. See N.Y. PENAL LAW § 155.25 and § 70.15.

definition of an aggravated felony to reflect that of a felony in criminal law would create consistency with accepted criminal justice terminology and a more proportionate relationship between the punishment and the crime. Moreover, by amending the definition in this respect, many more non-citizens would be eligible for relief from deportation.

#### **4. Restore Judicial Discretion to Immigration Judges to Make Appropriate Decisions**

As mentioned earlier, prior to 1996, most LPRs who were found deportable because of a criminal conviction could apply for a waiver of deportation pursuant to Section 212(c) of the INA.<sup>1033</sup> In reviewing applications for relief, immigration judges would use their discretion to “balance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on his behalf to determine whether the granting of . . . relief appears in the best interests of this country.”<sup>1034</sup>

The current law has eliminated the judge’s discretionary review for anyone convicted of an aggravated felony or a crime involving moral turpitude, within seven years of a person’s arrival in the United States.<sup>1035</sup> As the Second Circuit has noted, anyone who falls into these categories is “automatically subject to removal and no one – not the judge, the INS, nor even the United States Attorney General – has any discretion to stop the deportation.”<sup>1036</sup>

An amendment to the INA restoring immigration judges’ authority to make appropriate reasoned decisions based on all of the relevant factors in an individual case would provide long-time US residents with a chance at remaining in the US with their families. Judicial discretion

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<sup>1033</sup> INA § 212(c); 2 U.S.C. § 1182, repealed by Sec. § 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208. 110 Stat. 3009.

<sup>1034</sup> *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978); *Matter of C-V-T*, 22 I&N Dec. 7, 11 (BIA 1998).

<sup>1035</sup> See INA § 240A.

<sup>1036</sup> *United States v. Couto*, 311 F.3d 179, 190 (2d Cir. 2002).

would limit the social, economic and psychological consequences of mandatory deportation for both non-citizens and their families. Notably, this type of relief would not undermine the purpose of current immigration law, as judges would decide whether the deportation of an individual was in the best interest of the US on a case- by -case basis.

### **5. Restore Judicial Review for Expedited Removal**

Since the passage of IIRAIRA in 1996, immigration officers at ports of entry (air, land, or sea) are authorized to refuse admission to arriving non-citizens who may be subject to a ground of inadmissibility.<sup>1037</sup> The officers have the authority to order that such persons be immediately returned to their country of presumed nationality or of last embarkation without a formal hearing or opportunity for appeal.<sup>1038</sup> LPRs are not subject to this “expedited removal,” but if they are also subject to a ground of inadmissibility they may be placed in detention upon arrival and denied bond pending their hearing.<sup>1039</sup>

Evidence suggests that due to the rapid, streamlined process of expedited removals, non-citizens including LPRs have been erroneously removed.<sup>1040</sup> One method of lessening the risk of erroneous removal would be to restore the pre-IIRAIRA procedure of judicial review for arriving non-citizens suspected of being inadmissible. Restoring this procedure would ensure that a judge, well versed in the provisions of the law, would be the one to decide whether the individual is 1) subject to expedited removal and 2) eligible for relief from removal. Erroneously removing

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<sup>1037</sup> INA § 235(b)(1)(A)(i).

<sup>1038</sup> *Id.*

<sup>1039</sup> *Id.* § 238(b)(1).

<sup>1040</sup> See Karen Musalo, *Human Rights; Expedited Removal*, American Bar Association Section of Individual Rights and Responsibilities (2001), at <http://www.abanet.org/irr/hr/winter01/musalo.html>.



individuals from the United States is contrary to the intent of the legislation and may cause economic hardship to U.S. families relying on the returning non-citizen for financial support.

## **6. Mandatory Detention**

Mandatory detention for anyone convicted of certain removable offenses was instituted in response to a high rate of absconders who failed to appear for their immigration hearings.<sup>1041</sup> As with the overly broad definition of aggravated felony, the scope of mandatory detention, which carries a high price tag for taxpayers, has affected not only the lives of would be absconders, but also the lives of those non-citizens with deep ties to their communities who do not pose a flight risk. Many immigration detainees are sent to detention facilities around the country, regardless of where the detainee actually resided, often far away from their families, their legal resources and the evidence they need to defend themselves.

### **a. Pre-hearing release**

Recent evidence suggests that there may be a more cost efficient and less harmful way to ensure that non-citizens are present for their hearings. Pre-hearing release, as an alternative to mandatory detention, has proven to be a viable and effective way to conduct immigration proceedings, reduce government expenses and increase individual compliance with court proceedings. Supervised release is already an integral part of the US criminal justice system. Most criminal defendants who are released are subject to supervision pending trial.

In 1996, the Vera Institute of Justice,<sup>1042</sup> was commissioned by the former Immigration and Naturalization Service to evaluate supervised release as a cost effective alternative to

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<sup>1041</sup> See INA § 236(c).

<sup>1042</sup> The Vera Institute of Justice works closely with leaders in government and civil society to improve the services people rely on for safety and justice. Vera develops programs and studies social problems, providing practical advice and assistance to government officials in New York and around the world.

detention.<sup>1043</sup> In its evaluation of the Appearance Assistance Program (“AAP”), the Vera Institute found that the daily cost of supervision, \$12 per day, was significantly less than the INS average daily cost of detention at the time, \$61 per day.<sup>1044</sup> Detention now costs approximately \$85 per day.<sup>1045</sup>

The AAP provided participants with information regarding their proceedings, the consequences of noncompliance, reminders of court hearings, and referrals to legal service providers. The study’s participants reported to supervision officers in person and by phone and were subject to home visits. In addition to being a cost-effective alternative to detention, the AAP had excellent results. The project found that 91% of supervised non-citizens appeared in court. Non-citizens with criminal convictions attended the hearings at the highest rates even though many of them were ultimately ordered to leave the country. This is significant when considering that the former INS estimated that only 50% of non-citizens released into the community appeared in court for their proceedings.<sup>1046</sup> AAP supervision also doubled the rate of compliance with final orders of removal.<sup>1047</sup>

The study amply demonstrated that mandatory detention is not essential to ensure the court appearances of immigration detainees and that pre-hearing supervised release would ensure a satisfactory rate of court appearances at a much lower cost. Supervised release would also alleviate the hardship of separating individuals from their families and attorneys. In addition, it

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<sup>1043</sup> Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program* (Aug. 1, 2000), at [http://www.vera.org/publication\\_pdf/aapfinal.pdf](http://www.vera.org/publication_pdf/aapfinal.pdf).

<sup>1044</sup> *Id.*

<sup>1045</sup> See DEPARTMENT OF JUSTICE, OFFICE OF THE FEDERAL DETENTION TRUSTEE, STATISTICS (2002), at <http://www.usdoj.gov/ofdt/statistics.htm>.

<sup>1046</sup> *Id.*

<sup>1047</sup> Vera Institute of Justice, *The Appearance Assistance Program: Attaining Compliance with Immigration Laws Through Community Supervision*, (1998), at [http://www.vera.org/publication\\_pdf/aap.pdf](http://www.vera.org/publication_pdf/aap.pdf).

would also allow non-citizens to remain employed, which is critical to many families where a non-citizen is the breadwinner of the family.

**b. Adoption of immigration detention standards**

With the increase of immigration detainees, there has been a corresponding increase in reports of abuse and mistreatment. In 2004, the Department of Homeland Security banned all of its contract facilities from using dogs after an immigration detainee in the Passaic County Jail in New Jersey was hospitalized following an attack by a guard dog.<sup>1048</sup> In another incident a detainee at the Hudson County Jail in Kearny, New Jersey was severely beaten by a dozen guards.<sup>1049</sup>

Moreover, community activists and lawyers who work in these jails have reported that immigration detainees do not receive proper medical care. Detainees with chronic illnesses, such as HIV, diabetes, or heart disease, have reported that they have been denied medications and/or given the wrong medications.<sup>1050</sup>

In 2000, the Department of Justice released a series of detention standards for immigration detention centers throughout the US.<sup>1051</sup> Unfortunately, the 36 standards, which are supposed to govern matters such as the use of force, detainee grievance procedures, and access to counsel have no force of law and are frequently ignored.<sup>1052</sup> In fact, the Sheriff of Passaic

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<sup>1048</sup> Brian Donohue, *Detainees Gain Shield from Dogs*, STAR LEDGER, Dec. 7, 2004, at 7.

<sup>1049</sup> Donohue, *supra* note 988. One officer was already suspended and the other eleven have pending disciplinary charges. Hudson county is expanding its facilities so that it can hold more detainees from New York.

<sup>1050</sup> Asjlyln Loder, *Ex-detainees Rip Treatment, AIDS-Infected Men Get Sicker in Jail*, HERALD NEWS, Aug. 24, 2005, at A1.

<sup>1051</sup> United States Citizenship and Immigration Services, *INS to Adopt New Detention Standards* (Nov. 13, 2000), available at <http://uscis.gov/text/publicaffairs/newsrels/detainee.htm>.

<sup>1052</sup> *Id.* The detention standards pertain to the following issues: Access to Legal Material; Classification System; Correspondence and other mail; Detainee Handbook; Food Service Policy; Funds and Personal Property; Detainee Grievance Procedures; Group Presentations on Legal Rights; Issuance and Exchange of Clothing; Bedding and Towels; Marriage Requests; Non-Medical Emergency Escorted Trips; Recreation; Religious Practices;

County expelled auditors from the DHS Office of the Inspector General who were investigating allegations of abuse at the county jail.<sup>1053</sup> Consequently, the adoption of these standards as enforceable regulations is critical. By doing so, the federal government would create a more uniform and legitimate detention regime.

**c. Discharge planning program**

Not all immigration detainees subject to mandatory detention are deported. Those who are granted relief from deportation are released from detention after months of separation from families, jobs and daily routines. For many detainees, release from detention is the beginning of another form of hardship. Some have lost their jobs, their homes and for those detainees who were the main breadwinners, their families have also suffered extreme socio-economic hardship. Furthermore, as in the case of Mr. Venant described above, some detainees are released only to find that they have lost their identities while incarcerated because their identification documents were discarded once they entered detention.

Currently, discharge planning programs are available for certain inmates in state and federal detention centers. These programs support the successful reintegration of formerly incarcerated individuals into society. Such a program designed to connect former immigration detainees to services and programs in their communities would be a welcome step and would significantly aid the former detainee's transition back into their daily lives.

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Telephone Access; Visitation; Voluntary Work Program; Medical Care; Hunger Strikes; Suicide Prevention and Intervention; Terminal Illness, Advanced Directives and Death; Admission and Release; Contraband; Detention Files; Disciplinary Policy; Emergency Plans; Environmental Health and Safety; Hold Rooms in Detention Facilities; Key and Lock Control; Population Counts; Post Orders; Security Inspections; Special Management Unit (Administrative Segregation); Special Management Unit (Disciplinary Segregation); Tool Control; Transportation; and Use of Force.

<sup>1053</sup> Asjlynn Loder, *Sheriff Boots Feds Out of Jail; Calls Investigators Arrogant and Inept*, HERALD NEWS, Aug. 17, 2005.

## 7. Right to Court Appointed Counsel in Removal Proceedings

Although non-citizens, including longtime LPRs, have a right to counsel in removal proceedings pursuant to the Sixth Amendment of the United States Constitution, they do not have the same right to court appointed counsel as do criminal defendants.<sup>1054</sup> As even federal judges have decried the “labyrinthine character of modern immigration law - a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike,” it is almost impossible for non-citizens who frequently have only a limited understanding of English to successfully negotiate through the removal process.<sup>1055</sup> Yet approximately 80% of the people facing removal have no counsel and, according to one of the immigration judges who hears detained cases in New York, 40% of those detainees who appear in front of him and are eligible to remain in the United States go without representation.<sup>1056</sup>

New York City is fortunate to have a cadre of very fine private immigration attorneys. But for those facing deportation because of criminal convictions who cannot afford private counsel there are limited resources. The primary provider of free representation in criminal removal cases is the Legal Aid Society. For those non-citizens detained because of criminal convictions, Legal Aid has only one lawyer.<sup>1057</sup> The Bronx Defenders also provides its clients

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<sup>1054</sup> 8 C.F.R. § 246.1; *see also* 5 USC § 555(b).

<sup>1055</sup> *Drax v. Reno*, 338 F.3d 98, 99-100 (2d Cir. 2003).

<sup>1056</sup> New York Immigration Judge Alan Vomaka, Remarks at the 2004 New York State Judicial College (Oct. 1, 2004).

<sup>1057</sup> An attorney from the Legal Aid Society goes to the Passaic and Bergen Jails once a month with students from Seton Hall Law School to conduct Know-Your-Rights sessions - group legal presentations attended by as few as six and as many as 70 detainees. The Society also operates a hotline with the assistance of students from the Columbia University School of Law three afternoons a week for detainees or their families to call for advice. In this way, the Society was able to advise over 500 individuals and their families in 2004. In 2005, the Society began a pilot program with the law firms of Coudert Brothers, LLP and Kronish, Lieb, Weiner & Hellman, LLP whereby associates of those firms represented detainees in immigration court under the supervision of a Legal Aid Society attorney.

with representation in immigration court.<sup>1058</sup> The immigration clinics at New York University, Fordham University, and CUNY Law Schools represent a limited number of people facing removal because of criminal convictions. The New York State Defenders Association's ("NYSDA") Immigrant Rights Project also provides advice to both attorneys and immigrants, but not representation. These resources are not nearly enough to meet the demand.<sup>1059</sup>

The situation upstate is worse. There is no free counsel available to state inmates who are in removal proceedings at the Ulster Correctional Facility.<sup>1060</sup> In Buffalo, the only source of free counsel is the Legal Aid Society of Rochester and the International Institute of Buffalo. However, these organizations are short staffed and cannot meet the demands of the numerous immigration detainees incarcerated in the local facility.

The denial of assigned counsel has particularly tragic consequences. As one legal scholar has noted it makes little sense that "parents have a right to counsel if the state seeks to take their children, but no such right if they or their children face separation as a result of one or the other's deportation."<sup>1061</sup>

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<sup>1058</sup> At The Bronx Defenders, the immigration attorney works with criminal defense attorneys and non-citizen clients to structure pleas to avoid immigration consequences and represents individual clients in removal proceedings. The Bronx Defenders counseled approximately 130 clients and their families on immigration issues and represented 16 in court. These services simply do not begin to meet the overwhelming need.

<sup>1059</sup> Since 1997, the NYSDA has operated the Immigrant Defense Project in New York City. The Immigrant Defense Project provides immigration law backup support and counseling to New York criminal defense lawyers and others who represent or assist immigrants in criminal justice and immigration systems, as well as to immigrants themselves. The Project also conducts extensive training programs and produces written resource materials on interrelated criminal/immigration law issues, including a chart of the immigration consequences of convictions for most offenses in New York State. The Immigrant Defense Project also publishes one of the central resources on these issues in New York, "Representing Non-citizen Criminal Defendants in New York State" (3d ed. 2003), by Manuel D. Vargas.

<sup>1060</sup> Telephone interview with Deborah Schmeer, Defense Attorney in Rosendale, New York (June 27, 2005).

<sup>1061</sup> Daniel Kanstrom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1934 (June 2000).

To address the need for immigration counsel to represent the non-citizen residents of New York, the State Bar Association could establish a pro bono program to offer legal representation and informational sessions to non-citizens in removal proceedings. Priority should be given to non-citizens in immigration detention because they have limited access to free or low-cost legal services.

## **8. Statewide Reforms**

### **a. Informing Non-Citizens of the Consequences of a Guilty Plea**

Although removal proceedings are governed by federal law, state criminal convictions through plea bargaining are usually what gives rise to the removal proceeding. Consequently, it is important to address the state criminal proceedings impacting removal.

### **b. The role of the state trial court**

When a plea of guilty is entered in a criminal case, it must be made knowingly and voluntarily.<sup>1062</sup> A defendant in a criminal proceeding must make the decision to plead guilty with knowledge of the “relevant circumstances and likely consequences” of that plea.<sup>1063</sup> Yet, in New York many non-citizens who plead guilty in criminal proceedings are never notified that they may be subject to deportation.

Despite the potentially and often certain immigration consequences of a criminal conviction, federal courts have held that immigration consequences are collateral rather than direct and, accordingly, do not mandate trial courts warn defendants of the negative implications

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<sup>1062</sup> See *Brady v. United States*, 397 U.S. 742 (1970).

<sup>1063</sup> *Id.* at 748.

of pleading guilty.<sup>1064</sup> However, 19 states, recognizing the seriousness of immigration consequences,<sup>1065</sup> have adopted laws which require courts to advise defendants of potential immigration consequences before accepting a guilty plea, and some provide that defendants may withdraw their guilty plea if they did not receive the proper advisement.<sup>1066</sup> Statutes that require courts to advise criminal defendants of immigration consequences generally provide a combination of the following elements:

- The court's duty to advise defendants of specific immigration consequences such as deportation, exclusion from admission to the United States, and the denial of naturalization.<sup>1067</sup>
- The allocation of a reasonable amount of *additional time* to consider the appropriateness of a guilty plea in light of the advisement.<sup>1068</sup>
- A provision stating that the court's failure to advise the defendant on the record that if the defendant is a non-citizen, he or she may be subject to the immigration consequences of a conviction, coupled with the defendant's ability to show that the conviction will lead to a

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<sup>1064</sup> See *Fruchtman v. Kenton*, 531 F.2d 946, 949 (9th Cir. 1976); *United States v. Parrino*, 212 F.2d 919, 921 (2d Cir. 1954); *United States v. Quin*, 836 F.2d 654, 657 (1st Cir. 1988); see also *People v. Ford*, 86 N.Y.2d 397, 403 (1995); *United States v. Couto*, 311 F.3d 179 (2d Cir. 2005).

<sup>1065</sup> In the post-1996 era, IIRIARA and AEDPA render deportation a near certainty for convictions of a broad class of offenses.

<sup>1066</sup> See ARIZ. R. OF CRIM. PROC., Rule 17.2; CAL. PENAL CODE ANN. § 1016.5; CONN. GEN. STAT. § 54-1j; D.C. CODE ANN. § 16-713; FLA. R. CRIM. PROC. 3.172(c)(8); GA. CODE ANN. § 17-7-93; HAW. REV. STAT. ANN. § 802E-1,2,3; 725 ILL. COMP. STAT. 5/113-8; MASS. GEN. LAWS ch. 278, § 29D; MINN. R. CRIM. PROC. 15.01; MONT. CODE ANN. § 46-12-210; N.Y. CRIM. PROC. LAW § 220.50(7); N.C. GEN. STAT. § 15A-1022; OHIO REV. CODE ANN. § 2943.031; OR. REV. STAT. § 135.385; R.I. GEN. LAWS § 12-12-22; TEX. CRIM. PROC. CODE ANN., art. 26.13(a)(4); WASH. REV. CODE ANN. § 10.40.200; WIS. STAT. ANN. § 971.08; See also Jennifer Welch, 92 CAL. L. REV. 541, *Defending Against Deportation: Equipping Public Defenders to Represent Non-citizens Effectively* (Mar. 2004).

<sup>1067</sup> See, e.g., CAL. PENAL CODE ANN. § 1016.5.

<sup>1068</sup> See, e.g., D.C. CODE ANN. § 16-713.



specific immigration consequence, should allow the non-citizen defendant to make a motion to vacate the judgment, withdraw the plea of guilty and enter a plea of not guilty.<sup>1069</sup>

- A provision that indicates that a defendant is not required to disclose to the court his or her legal status in the United States.<sup>1070</sup>
- A provision that the defendant shall be presumed not to have received the required advisement of immigration consequences absent an official record that the court provided the required advisement.<sup>1071</sup>

The most effective court advisory statutes include most or all of these elements, particularly the enforceability provision that would allow a defendant to be granted post-conviction relief if the court failed to properly advise a non-citizen defendant of the immigration consequences of a guilty plea.<sup>1072</sup> Violations of these statutes are especially significant because they often provide post-conviction bases to move for a new trial or to vacate a conviction. For instance, California, Connecticut, District of Columbia, Hawaii, Massachusetts, Ohio, and Rhode Island have strong and exemplary statutes providing for most of the elements described above. The trend in recent years is for states, most recently Arizona and Massachusetts, to add to or strengthen a state's judicial warning provisions.<sup>1073</sup>

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<sup>1069</sup> See, e.g., OHIO REV. CODE ANN. § 2943.031.

<sup>1070</sup> See, e.g., R.I. GEN. LAWS § 12-12-22.

<sup>1071</sup> See, e.g., MASS. GEN. LAWS ch. 278, § 29D.

<sup>1072</sup> See Welch, *supra* note 1066.

<sup>1073</sup> For one example of a model statute, see Mass. Gen. Laws ch. 278, § 29D, Conviction upon plea of guilty, nolo contendere or an admission to sufficient facts; motion to vacate:

The court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts from any defendant in any criminal proceeding unless the court advises such defendant of the following: "If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States." The court shall advise such defendant during every plea colloquy at which the defendant is proffering a plea of guilty, a plea of nolo contendere, or an admission to

Although among the five highest immigrant population states, New York State has the weakest statute.<sup>1074</sup> New York's statute is ineffective for three primary reasons.<sup>1075</sup> First, the judicial warning provision only applies to felony pleas and does not extend to misdemeanors or violations. Second, the statute does not provide defendants additional time to fully consider the impact and weight of the warning. Third, and most importantly, New York's statute is unenforceable. The New York statute explicitly states that the court's failure to advise a defendant of potential immigration consequences will *not affect the voluntariness of a plea of guilty* or afford a defendant any rights in subsequent immigration proceedings. The New York

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sufficient facts. The defendant shall not be required at the time of the plea to disclose to the court his legal status in the United States.

If the court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have or has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty, plea of nolo contendere, or admission of sufficient facts, and enter a plea of not guilty. Absent an official record or a contemporaneously written record kept in the court file that the court provided the advisement as prescribed in this section, including but not limited to a docket sheet that accurately reflects that the warning was given as required by this section, the defendant shall be presumed not to have received advisement. An advisement previously or subsequently provided the defendant during another plea colloquy shall not satisfy the advisement required by this section, nor shall it be used to presume the defendant understood the plea of guilty, or admission to sufficient facts he seeks to vacate would have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization.

<sup>1074</sup> Manuel D. Vargas, *Working Paper on Immigration Consequences of Guilty Pleas or Convictions in New York Courts* (May 9, 2005) available at <http://www.courts.state.ny.us/ip/partnersinjustice/immigration-consequences.pdf>.

<sup>1075</sup> See N.Y. CRIM. PROC. LAW § 220.50 Plea; entry of plea:

Prior to accepting a defendant's plea of guilty to a count or counts of an indictment or a superior court information charging a felony offense, the court must advise the defendant on the record, that if the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States. Where the plea of guilty is to a count or counts of an indictment charging a felony offense other than a violent felony offense as defined in section 70.02 of the penal law or an A-I felony offense other than an A-I felony as defined in article two hundred twenty of the penal law, the court must also, prior to accepting such plea, advise the defendant that, if the defendant is not a citizen of the United States and is or becomes the subject of a final order of deportation issued by the United States Immigration and Naturalization Service, the defendant may be paroled to the custody of the Immigration and Naturalization Service for deportation purposes at any time subsequent to the commencement of any indeterminate or determinate prison sentence imposed as a result of the defendant's plea. The failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction, nor shall it afford a defendant any rights in a subsequent proceeding relating to such defendant's deportation, exclusion or denial of naturalization.

Court of Appeals has also held that the statute is unenforceable.<sup>1076</sup> Therefore, if a New York trial court judge fails to properly advise a non-citizen defendant of the immigration consequences of a guilty plea, the defendant has no ability to withdraw his/her guilty plea and seek post-conviction relief as a defendant may be able to do in another state.

**c. Recent legislative changes and proposals**

New York's immigration advisory statute, Criminal Procedure Law Section 220.50(7), is scheduled to expire in 2005 and there are already several proposals before the legislature for re-enactment. In order for any advisory statute to be effective, it must be mandatory and enforceable. It must require that the defendant be made aware of the possible immigration consequences of the plea and be allowed to withdraw that plea if s/he was not properly advised and was placed in proceedings.

An example of an effective advisory statute is that of Massachusetts which states that “[i]f you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.”<sup>1077</sup> The statute goes on to state that if the court fails to advise the defendant that his plea has immigration consequences and those consequences occur, the court, on the defendant's motion, shall vacate the judgment. Similarly, the Arizona Supreme Court amended its court rules along the same lines.<sup>1078</sup> The intention of these and similar statutes is “to promote fairness” to defendants who unknowingly accept a plea

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<sup>1076</sup> *People v. Ford*, 86 N.Y.2d 397, 404 (1995).

<sup>1077</sup> *See* MASS. GEN. LAWS CH. 278, § 29D.

<sup>1078</sup> *See* ARIZ. R. OF CRIM. PROC., Rule 17.2.

agreement that could subject them to deportation, exclusion, and/or denial of naturalization.<sup>1079</sup>

These statutes help ensure that all individuals, including non-citizens, receive fair and adequate warnings, and the judicial systems of these states have not collapsed or suffered because individuals have the ability to withdraw their pleas.

Recently, one district court has held that though a court is not required to advise a defendant of the immigration consequences of a plea, to the extent that it does so, the court must be careful not to misadvise or mislead the defendant so as to render the plea involuntary.<sup>1080</sup> In that case of *Zhang v. United States*, the trial court had advised the defendant that he was subject to “possible” deportation and that he “could” be deported based on his conviction for mail fraud. In granting the defendant’s motion to vacate the conviction, the District Court noted that because the defendant’s conviction was for an aggravated felony, it rendered his deportation “automatic” and that the more tentative language that he could “possibly” be deported was an affirmative misrepresentation that rendered the defendant’s plea involuntary. To avoid this dilemma, New York’s statute may be amended to read “[i]f you are not a citizen of the United States, you are hereby advised that the acceptance by this court of a plea of guilty, plea of nolo contendere, or admission to sufficient facts may have immigration consequences including mandatory deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.”

Currently, there are numerous proposed bills before the New York State legislature – Assembly Bill A5285 sponsored by Assemblyman Lopez, Assembly Bill A4100 sponsored by Assemblyman Espaillat and its Senate counterpart, Senate Bill S3191 sponsored by Senator

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<sup>1079</sup> See e.g., HAW. REV. STAT. ANN. § 802E-1,2,3; WASH. REV. CODE ANN. § 10.40.200.

<sup>1080</sup> *Zhang v. United States*, 401 F. Supp. 2d 233 (E.D.N.Y. 2005).

Schneiderman, and Senate Bill S829 sponsored by Senator Diaz – that would make significant improvements to New York’s current judicial warning statute.<sup>1081</sup> First, the proposed bills would require that the advisory be provided not just in felony cases, but misdemeanor cases as well. As noted earlier, convictions for even one misdemeanor can result in mandatory removal and such an advisory to first time criminal defendants in misdemeanor cases may prevent unnecessary immigration consequences.

In addition and most significantly, the proposed bills provide non-citizen defendants the opportunity for post-conviction relief if a court fails to provide the advisement as required.

Specifically, the proposed provision states in pertinent part:

If the court fails to make the advisement prior to accepting a defendant’s plea of guilty..., and the defendant shows that acceptance of the plea of guilty or conviction of the offense to which defendant pleaded guilty may have the consequences for the defendant of deportation, immigration detention, exclusion from admission to the United States, or denial of citizenship pursuant to the laws of the United States, the court, upon request of the defendant, shall permit the defendant to withdraw the plea of guilty and enter a plea of not guilty at any time before the imposition of sentence...<sup>1082</sup>

These proposed bills would be even stronger if they made the advisory unwaivable.

Currently, particularly in pleas to misdemeanors, defense counsel will waive formal allocution of the defendant’s rights. The justification for allowing this shortened colloquy with the court is the presumption that defense counsel has fully advised the client of all his rights prior to the plea.

However, as is demonstrated below, this is often not the case with regard to immigration consequences.

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<sup>1081</sup> Assemb. B. 4100, 2005 Leg., Reg. Sess. (N.Y. 2005); Assemb. B. 5285, 2005 Leg., Reg. Sess. (N.Y. 2005); S. B. 829, 2005 Leg., Reg. Sess. (N.Y. 2005); S. B. 3191, 2005 Leg., Reg. Sess. (N.Y. 2005).

<sup>1082</sup> Assemb. B. 5285, 2005 Leg., Reg. Sess. (N.Y. 2005).

**d. The role of defense counsel**

Although a trial court’s warning to a defendant about the immigration consequences of a guilty plea is important, it is well-accepted that it is no substitute for the “specific, timely advice of counsel.”<sup>1083</sup> More than 90% of convictions result from guilty pleas.<sup>1084</sup> Accordingly, it is critical that defense lawyers properly advise and inform their clients of the potential immigration consequences at the guilty plea stage to avoid possible removal from the United States.

It is axiomatic that a defendant has a right to effective assistance of counsel when pleading guilty.<sup>1085</sup> However, most state and federal courts have declined to find ineffective assistance of counsel where the defendant’s attorney has failed to inform or advise his/her client of the immigration consequences of a guilty plea on the grounds that immigration consequences are collateral.<sup>1086</sup>

However, some courts have found ineffectiveness where counsel misrepresented the immigration consequences of a guilty plea or pleas.<sup>1087</sup> Other courts have reasoned that when defense counsel in a criminal case is aware that his client is a non-citizen, he may reasonably be

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<sup>1083</sup> Welch, *supra* note 1066.

<sup>1084</sup> See, e.g., Bureau of Justice Statistics, U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics 1999* (Ann L. Pastore & Kathleen Maguire, eds. 2000).

<sup>1085</sup> *Hill v. Lockhart*, 474 U.S. 52 (1985).

<sup>1086</sup> Lea McDermid, 89 CAL L. REV. 741, *Deportation is Different: Non-citizens and Ineffective Assistance of Counsel* (May 2001); Gregory G. Sarno, *Ineffective Assistance of Counsel: Misrepresentation, or Failure to Advise, of Immigration Consequences of Guilty Plea – State Cases*, 65 A.L.R. 4th 719 (2001); see also *Tafoya v. State*, 500 P.2d 247, 252 (Ala. 1972), *cert. denied*, 410 U.S. 945 (1973) (failure to inform a non-citizen defendant of the possibility of deportation does not constitute ineffective assistance); *State v. Malik*, 37 Wn. App. 414, 416-417, 680 P.2d 770, 772 (1984) (it is not incumbent upon defense counsel to explain the collateral consequence of deportation to criminal defendant); *State v. Chung*, 210 N.J. Super. 427 (N.J. Super. Ct. 1986) (defense counsel need only advise a criminal defendant of the direct consequences of pleading guilty).

<sup>1087</sup> *People v. Correa*, 108 Ill. 2d 541(1985) (where defense counsel advised the defendant that his guilty plea would likely not result in his deportation, due to his wife’s status as American citizen. The court held that this advice fell below the required constitutional range of attorney competence, and rendered the defendant’s guilty plea involuntary. The court reasoned that this case involved the affirmative, erroneous representations of defense counsel in response to a client’s inquiry.)

required to investigate relevant immigration law.<sup>1088</sup> Courts have also found that a non-citizen defendant may be entitled to withdraw his guilty plea.<sup>1089</sup> Courts in California and Oregon have also reasoned that, even in situations where the court has provided proper advisement to the non-citizen defendant, a non-citizen may not have received effective assistance of counsel in evaluating or responding to the advisement of potential immigration issues.<sup>1090</sup>

Additionally, in 1999, the ABA revised its Standards for Criminal Justice, Pleas of Guilty to include a new standard that specifically states that defense counsel “should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.”<sup>1091</sup> The commentary to the new ABA standard specifically notes deportation as an example of a collateral consequences with which defense counsel needs to be familiar.<sup>1092</sup> Currently, the New York State Assembly is reviewing a separate bill, Bill A6992, which would require defense attorneys to advise non-citizen clients of the deportation consequences of a guilty plea, and allow defendants to withdraw guilty pleas where defense counsel has failed to do so.<sup>1093</sup> By elevating and defining the standards for effective assistance of counsel, this bill is a step in the right direction for New York

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<sup>1088</sup> *People v. Pozo*, 746 P.2d 523 (Colo. 1987) (court found that defense counsel has a duty to inform themselves of material legal principles that may significantly impact the particular circumstances of their clients. This case was returned to trial court for further proceedings to determine whether the defense counsel was aware that his client was a non-citizen.)

<sup>1089</sup> *People v. Soriano*, 194 Cal. App. 3d 1470 (1st Dist. 1987) (court held that that defendant was denied effective assistance of counsel in entering his guilty plea by counsel’s failure to adequately advise of immigration consequences of the plea and by counsel’s inadequate investigation of federal immigration law. Thus, the defendant was entitled to withdraw his guilty plea.)

<sup>1090</sup> *See id*; *see also Gonzalez v. State*, 191 Ore. App. 587 (2004) (court vacated defendant’s guilty plea to drug charges where the trial court advised defendant of possible immigration consequences, but where defense counsel failed to inform defendant of the likelihood of deportation).

<sup>1091</sup> ABA Standards for Criminal Justice, *Pleas of Guilty*, Standard 14-3.2(f) (3d ed. 1999), *available at* [http://www.abanet.org/crimjust/standards/guiltypleas\\_toc.html](http://www.abanet.org/crimjust/standards/guiltypleas_toc.html).

<sup>1092</sup> *Id.* Commentary to ABA *Pleas of Guilty*, Standard 14-3.2(f).

State to ensure that all individuals receive appropriate and fair counsel while facing criminal charges.

**e. Education and training for judges and defense counsel**

Mandatory immigration training should be implemented by the prosecutors office, the public defender agencies, as well as the 18-B panel. Furthermore, criminal court judges should be required to attend classes on the immigration consequences of convictions.

Presently, the NYSDA's Immigrant Rights Project conducts training sessions for judges and defense counsel throughout the State. NYSDA produces *Representing Non-citizen Criminal Defendants in New York State*, which should be on every defense lawyers bookshelf.<sup>1094</sup>

**9. Separating Local Law Enforcement and Immigration Enforcement**

Over the past few years, there has been a trend towards increasing the role of local police in immigration enforcement. This trend has not been without controversy. Some law enforcement personal have voiced concern that utilization of local law enforcement personnel in immigration enforcement may have adverse consequences to their relationship with immigrant communities. For example, a domestic violence victim may be reluctant to report a crime to the police out of fear that s/he may be detained or deported. Indeed, President Bush recently expressed his concern that when undocumented immigrants "are victimized by crime, they are afraid to call the police, or seek recourse in the legal system."<sup>1095</sup>

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<sup>1093</sup> Assemb. B. 6992, 2005 Leg., Reg. Sess. (N.Y. 2005).

<sup>1094</sup> Manuel D. Vargas, N.Y. State Defenders Association, Criminal Defense Immigration Project, *Representing Non-citizen Criminal Defendants in New York State* (2001).

<sup>1095</sup> Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. Const. L. 1084, 1115 (2004), citing President George W. Bush, New Temporary Worker Program: Remarks on Immigration Policy (Jan. 7, 2004).



This problem may be resolved by limiting the role of local police in federal immigration enforcement. There is currently a proposal before the New York Assembly, which advocates prohibiting, unless authorized by state law, municipalities from authorizing or requiring local law enforcement to enforce any provision of federal immigration law.<sup>1096</sup> The bill, which was proposed in May 2005 and at the time of this writing has no Senate counterpart, advocates for the establishment of a civilian review board in each municipality authorized to enforce federal immigration law to review actions and report on actions relating to such enforcement. The adoption of this bill into law would create a constitutional check and balance system, where local law enforcement would be accountable to the State for their conduct while working with federal immigration authorities. The bill does not oppose the necessity of information sharing between federal and state authorities. However, its adoption would ensure that the actions of New York officers comply with their actual duties and that the non-citizen residents of New York feel protected by local law enforcement.

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<sup>1096</sup> See Assemb. B. 7855, 2005 Leg., Reg. Sess. (N.Y. 2005).



## RECOMMENDATIONS

### I. INTRODUCTION

The preceding report details the collateral sanctions of criminal proceedings for people charged with crimes and their families. Some of these sanctions are the result of intentional policy choices by legislators and regulators, and others are the practical but predictable results of the stigma and disruption flowing from criminal proceedings. Most were intended to be either deterrents to unlawful conduct or further punishment for criminal actions. Most were intended to increase public safety.

As this report demonstrates, however, these all too often have the opposite result of what was intended. These sanctions work together to trap families touched by the criminal justice system in a punitive web from which many never escape. The long-term unintended results of these policies contribute significantly to creating or maintaining a cycle of crime, particularly for those living in poverty. Complications such as loss of benefits, jobs, or housing – along with deeper problems such as homelessness, addiction, unemployment, or mental illness – often serve as catalysts for entry into the criminal justice system.<sup>1097</sup> In turn, the significant legal and practical disabilities detailed in this report only exacerbate these social problems that often contributed to criminal behavior in the first place.<sup>1098</sup> Collateral consequences are critical factors in (or impediments to) the process of re-entry from jail or prison or from any involvement in the criminal justice system. Instead of deterring unlawful conduct, the sandtrap of collateral

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<sup>1097</sup> See, e.g., McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, 37 CLEARINGHOUSE REV., J. POVERTY L. & POL'Y, at 56 (May-June 2003), available at <http://www.reentry.net>.

<sup>1098</sup> *Id.* at 57.

sanctions actually makes it more difficult to escape the cycle of crime – more difficult to find a job, maintain stable housing, or obtain further education.<sup>1099</sup>

In this way, collateral sanctions can actually have the perverse effect of increasing recidivism and escalating related costs.<sup>1100</sup> Despite the rationale for any one sanction standing alone, together these consequences are simply counter-productive. Accordingly, a strong policy argument can be made that reducing these punishments in appropriate ways can help reduce crime, increase public safety, and reduce costs.

In making its recommendations, the Committee carefully considered the principles that should drive policymaking around re-entry and criminal justice such as public safety, appropriate punishment, fairness, rehabilitation, and transparency. After studying these collateral sanctions as they affect individuals and communities, bringing them fully to light for the first time in New York, we make our recommendations for changes that would best reflect these principles.

#### **A. COMMON THEMES OF COLLATERAL SANCTIONS**

In collecting and analyzing information about these collateral sanctions that affect nearly 6 million New Yorkers,<sup>1101</sup> we have identified a number of underlying themes.

##### **1. These Punishments Are Not Limited to Felony Convictions**

As noted in the report, less than one-third of new arrests in New York are for felonies – and only 8% are violent felonies.<sup>1102</sup> In 2004, only 12.7% of all convictions were for felony

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<sup>1099</sup> “The impact of collateral consequences is especially disturbing since such consequences frequently lack penological justification. They merely add to the overall severity of the sentence without being grounded in theories of retribution, prevention, deterrence, or rehabilitation.” Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 154 (1999).

<sup>1100</sup> These costs include corrections, health care, law enforcement, court systems, homeless shelters, and more. *See supra* Report.

<sup>1101</sup> This number includes only those with a criminal record in New York; the total affected population of family members and communities is much larger. Note that there was an increase of 656,000 people with criminal histories in New York from 2001 to 2003. *See* BUREAU OF JUSTICE STATISTICS NCJ 210297, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2003, at 15 (Feb. 2006).

offenses.<sup>1103</sup> However, some of the most draconian consequences follow from misdemeanors and non-criminal violations:<sup>1104</sup>

- A plea to disorderly conduct, defined by New York law as a non-criminal offense, makes a person presumptively ineligible for New York City public housing for three years.<sup>1105</sup>
- Two convictions for turnstile jumping make a lawful permanent resident non-citizen deportable.<sup>1106</sup>
- A conviction for any crime bars a person from being a barber, boxer, or bingo operator.<sup>1107</sup>
- Simple possession of a marijuana cigarette cuts off federal student loans for a year.<sup>1108</sup>

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<sup>1102</sup> New York State Division of Criminal Justice Services, *Adult Arrests, New York State by County and Region - 2005*, available at <http://criminaljustice.state.ny.us>.

<sup>1103</sup> *Id.*

<sup>1104</sup> Examples from McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments As an Advocacy Strategy*, 36 UNIV. OF TOLEDO L. REV. 479, 481-82 (2005). Michael Pinard correctly notes the disproportionate focus in the media and in academic literature on the hidden consequences of felony convictions, despite the far greater proportion of misdemeanor convictions and comparable invisible sanctions. See Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1076 n.8 (2004).

<sup>1105</sup> The period of ineligibility runs two years from the expiration of any sentence; the standard sentence for a Disorderly Conduct plea is a one-year conditional discharge. See N.Y. PENAL LAW § 240.20 (defining disorderly conduct); N.Y. PENAL LAW § 10.00(6) (defining crime as misdemeanor or felony); N.Y. CRIM. PROC. LAW § 1.20(39) (defining petty offense as violation); New York City Housing Authority Applications Manual, "Standards for Admission: Conviction Factors and End of Ineligibility Periods – Public Housing Program," Ex. F. The Supreme Court's decision in *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 136 (2002), permits public housing authorities to evict entire families for criminal activity even if the tenant did not know of, could not foresee, or could not control the behavior of other occupants or guests. As Michael Barbosa notes, exclusion from low-income housing can be the equivalent to a sentence of homelessness. See Michael Barbosa, *Lawyering at the Margins*, 11 AM. U. J. GENDER SOC. POL'Y & L. 135, 139 (2002).

<sup>1106</sup> INA § 237(a)(2)(A)(ii), 8 USC § 1227(a)(2)(A)(ii); see also Nina Bernstein, *When a Metrocard Led Far Out of Town*, N.Y. TIMES, Oct. 11, 2004, at B1.

<sup>1107</sup> N.Y. GEN. BUS. LAW § 441; N.Y. UNCONSOL. LAW Ch. 7, § 17; N.Y. EXEC. LAW § 435(2)(c)(1).

<sup>1108</sup> N.Y. PENAL LAW § 221.05; 20 U.S.C. § 1091(r)(1). On February 8, 2006, this provision was amended to bar student loan eligibility only when the drug conviction occurred during receipt of student loans. See Pub. L. No. 109-171, § 8021, 120 Stat 4 (Feb. 8, 2006).

## 2. These Punishments Are Not Even Limited to Convictions

Significant consequences flow simply from arrest. In New York, more than one in three people arrested are never convicted of any crime or offense,<sup>1109</sup> but they still suffer drastic consequences from their arrest alone. For example, New York has over 100 licensing regimes for a variety of occupations, from barber and security guard to cosmetologist and nurse. These licenses are routinely suspended at the moment of arrest after DCJS notifies the licensing agency.<sup>1110</sup> An arrest can also lead to eviction from publicly subsidized housing, without regard to the eventual criminal disposition.<sup>1111</sup>

## 3. Collateral Sanctions Are Not Collateral in Effect

These “collateral” sanctions simply are not collateral in any meaningful way. Courts have labeled them as such as a way to remove them from the realm of constitutional protections in criminal law, including effective assistance of counsel, voluntariness of pleas, proportionality of punishment, adequacy of notice, and retroactivity of application.<sup>1112</sup> In reality, these consequences are the predictable, but often hidden, results of criminal proceedings. Most are effectively hidden from practitioners, criminal defendants, and the public, scattered across dozens of sections of state statutes, local laws, and state and local agency regulations and policy. Many different terms have been used to describe these sanctions, including invisible

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<sup>1109</sup> New York State Division of Criminal Justice Services, Computerized Criminal History System (as of 1/26/2006). In 2004, 36.7% of people arrested were never convicted.

<sup>1110</sup> See *supra* Chapter II, Employment; Smyth, *Holistic is Not a Bad Word*, 36 U. TOL. L. REV. at 481.

<sup>1111</sup> See *supra* Chapter VI, Housing; see, e.g., 24 C.F.R. § 966.4(l)5(iii)(A) (2004) (stating that in conventional public housing, a PHA may terminate assistance “regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction”); 24 C.F.R. § 982.553(c) (2004) (analogous provision for Section 8 voucher).

<sup>1112</sup> See, e.g., Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002).

punishments,<sup>1113</sup> secret sentences,<sup>1114</sup> and civil disabilities, and other commentators have concluded that these consequences in the aggregate create “civil death”<sup>1115</sup> or “internal exile.”<sup>1116</sup> Often these sanctions are much more severe in their impact than the “direct” criminal punishment.<sup>1117</sup> Policy makers and practitioners must recognize that they can no longer ignore these very real costs of the criminal justice system.

Recent national studies of collateral sanctions have drawn a sharp line between sanctions required by law and disqualifications that require the exercise of discretion. Both the ABA, in its “Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons,” and the National Conference of Commissioners on Uniform State Laws, in its draft Uniform Collateral Sanctions and Disqualifications Act, formulate different policies for “collateral sanctions” imposed automatically upon conviction, and “discretionary disqualifications,” which are not. Actual experience shows, however, that there is little practical distinction between “automatic” and “discretionary” consequences. Most immigration, public housing, and employment decisions technically require the intervening decision of an independent court, agency, or official.<sup>1118</sup> The actual impact on families touched by the criminal justice system, and the larger consequences for the community and the public, are the same. Accordingly, this Committee has adopted a broader definition of “collateral sanction” – one that

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<sup>1113</sup> Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 16 (Marc Mauer & Meda Chesney-Lind eds., 2002).

<sup>1114</sup> See Chin & Holmes, *supra* 1112, at 700.

<sup>1115</sup> Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 *FORDHAM URB. L.J.* 1705, 1727 (2003).

<sup>1116</sup> See Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 *STAN. L. & POL’Y REV.* 153, 157 (1999).

<sup>1117</sup> “[I]n cases like these, traditional sanctions such as fine or imprisonment are comparatively insignificant. The real work of the conviction is performed by the collateral consequences.” Chin & Holmes, *supra* note 1112, at 700.

<sup>1118</sup> See Smyth, *Holistic is Not a Bad Word*, 36 *U. TOL. L. REV.* at 493.

encompasses both automatic and discretionary sanctions, and consequences flowing from arrest as well as conviction.

#### **4. The “Perfect Storm” Created by the Steady Accretion of Collateral Sanctions and the Exponential Increase in Criminal History Data Availability**

As many commentators have noted, the last twenty years has witnessed an unprecedented accumulation of collateral sanctions that restrict a person’s ability to meet even basic needs.<sup>1119</sup> Many explanations for this accumulation have been offered. The mid-1980’s witnessed a surge in their popularity as part of seemingly cost-free “tough on crime” policies.<sup>1120</sup> Also, legislators tend to pass new sanctions in isolation, with little or no knowledge of the overall web of legal disabilities. The sanctions are often attached as riders to other, major bills and are given “scant attention in the public debate over the main event.”<sup>1121</sup>

In addition, technology has provided unparalleled access to an ever-increasing range of criminal history data. Data sharing among government agencies has increased exponentially, and there is widespread availability of criminal history data. For example, in 2002, for the first time, the FBI performed more fingerprint-based background checks for civil purposes than for criminal investigations.<sup>1122</sup>

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<sup>1119</sup> See, e.g., Marc Mauer, *Introduction: The Collateral Consequences of Imprisonment*, 30 FORDHAM URBAN L.J. 1494 (2003); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 16 (Marc Mauer & Meda Chesney-Lind eds., 2002); BUREAU OF JUSTICE STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY AND CRIMINAL JUSTICE INFORMATION (Aug. 2001).

<sup>1120</sup> Jeremy Travis, INVISIBLE PUNISHMENT, *supra* note 1119, at 18.

<sup>1121</sup> *Id.* at 16, 18, 22; see also Travis, BUT THEY ALL COME BACK 63; Joan Petersilia, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 9 (2003).

<sup>1122</sup> There were over 9 million “civil” inquiries in 2004 alone. See Maurice Ensellem, *Employment Screening for Criminal Records: Attorney General’s Recommendations to Congress* (Comments of the National Employment Law Project to the U.S. Attorney General, Office of Legal Policy, Aug. 5, 2005) (*available at* <http://www.reentry.net>).



In New York State, dozens of agencies maintain their own computerized records of arrests and prosecutions, including the Division of Criminal Justice Services, the Office of Court Administration, the New York State Police, and local law enforcement. Despite various sealing regimes for certain criminal prosecutions in New York, employers, landlords, and the public routinely gain access to these records. For example, defense attorneys and *judges* routinely advise hundreds of defendants each day in New York courts that their guilty plea to a violation – a non-criminal offense – will be sealed and not available to anyone. This advice is patently false. Under CPL § 160.55, the prosecutor, police, and DCJS records are sealed, but the court records remain public. Because OCA sells access to its records in a statewide Criminal History Record Search based on name and date of birth, the records of all violations convictions – and the original charges – are readily available to anyone with \$52 and the desire to find out about their neighbor, employee, or tenant.

In addition, hundreds of private, commercial background screening businesses access these data sources and create their own repositories.<sup>1123</sup> A recent report by SEARCH found that “several companies compile and manage criminal history databases with well in excess of 100 million criminal history records.”<sup>1124</sup> The market for these services is tremendous. For example, 80% of large corporations perform background checks on job applicants, and 69% of small businesses do. Eight years ago, only 51% of large corporations did.<sup>1125</sup> Landlords increasingly

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<sup>1123</sup> SEARCH, The National Consortium for Justice Information and Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (Dec. 2005).

<sup>1124</sup> *Id.*

<sup>1125</sup> See Susan Llewelyn Leach, *Bosses Peek into Job-Seekers' Pasts*, CHRISTIAN SCI. MONITOR, Oct. 13, 2004, at 15.

run background checks as well, and criminal convictions appear more frequently on routine credit histories.<sup>1126</sup>

The problems arising from increased availability of criminal history data are only compounded by serious questions about reliability. The most recent study in New York found that 87% of DCJS rap sheets, the official state repository, contained some kind of error.<sup>1127</sup> A recent report conducted for the National Association of Professional Background Screeners found a litany of serious problems with FBI reports, including failure to report dispositions of arrests, lack of timeliness in reporting dispositions, and ineffective linking of the proper individual and case. Perhaps the most damning finding was that of 174 million arrests on file, only 45% have dispositions.<sup>1128</sup> Other significant problems include criminal identity theft leading to improperly attributed convictions,<sup>1129</sup> false positives and mismatches based on non-biometric background checks,<sup>1130</sup> and negligence by commercial vendors.<sup>1131</sup>

## **B. BREAKING THE CYCLE**

The hidden punishments analyzed in this report plot a useful outline of the structure that traps many people in recurring encounters with the criminal justice system.<sup>1132</sup> A coordinated

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<sup>1126</sup> Research has proven the stigma attached to having a criminal record. For example, despite the protections afforded by the law, there is a demonstrated preference for hiring people without a record. In a research study conducted by Professor Devah Pager of Princeton University, matched pair testing demonstrated that a criminal record reduced the likelihood of a callback by 50%. The continuing effects of racism are also startling: a white man with a criminal record was more likely to get a callback than a similarly-situated African-American male without one. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 5, 937-75 (Mar. 2003).

<sup>1127</sup> Legal Action Center, *Study of Rap Sheet Accuracy and Recommendations to Improve Criminal Justice Recordkeeping* (1995).

<sup>1128</sup> Craig N. Winston, *The National Crime Information Center: A Review and Evaluation* (Aug. 3, 2005) (available at <http://www.reentry.net>).

<sup>1129</sup> Sharon Dietrich, *Expanded Use of Criminal Records and Its Impact on Reentry*, at 8, (Mar. 3, 2006) Presented to the American Bar Association Commission on Effective Criminal Sanctions, available at <http://www.reentry.net>.

<sup>1130</sup> *Id.* at 9-10.

<sup>1131</sup> *Id.* at 11.

<sup>1132</sup> Smyth, *Holistic is Not a Bad Word*, 36 U. TOL. L. REV. at 487.

policy approach, and coordinated or integrated provision of direct services, could help dismantle this structure that prevents successful re-entry. These sanctions illustrate that re-entry is a process that begins at arrest, and each stakeholder in the criminal justice system – prosecutor, judge, defense attorney, and more – has an important role to play.<sup>1133</sup>

One commentator has noted that a focusing on the reality of re-entry and on the goal of reintegration creates a new common ground for developing criminal justice policy. “Reentry is not a goal, like rehabilitation or reintegration. Re-entry is not an option. Re-entry reflects the iron law of imprisonment: they all come back.”<sup>1134</sup> This new paradigm can cut through the various and often conflicting sentencing policies that drive the criminal justice system to reorient the system to support successful re-entry. Collateral consequences are a critical piece of this puzzle. Policy makers, lawyers, and practitioners can no longer afford to avoid them.

### **C. THE COMMITTEE’S RECOMMENDATIONS**

With the foregoing as a basis, the Committee offers the following specific recommendations. Some of these recommendations have direct impact on more than one of the subject areas discussed in the report and so are set out in an initial “Overarching” section. Thereafter follows the remaining recommendations as to specific subject areas.

Note, too, that different stakeholders control the ability to implement any given recommendation; for example, the legislature, the judiciary, the organized bar, and the various executive and administrative bodies that oversee the criminal justice system.

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<sup>1133</sup> *Id.* at 501.

<sup>1134</sup> Jeremy Travis, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* xxi (Urban Institute Press 2004).



## II. OVERARCHING

### A. FACILITATE THE PROCESS FOR OBTAINING CERTIFICATES OF RELIEF FROM DISABILITY AND CERTIFICATES OF GOOD CONDUCT

Certificates of Relief (“CRD”) are underutilized tools to help with various problems identified throughout the report. Obtaining a CRD is an involved and complicated process if it is not granted at sentencing.<sup>1135</sup> Because they have such far-reaching consequences, it is important they be granted whenever available.

Currently, under Part 200 of the Uniform Rules for Courts Exercising Criminal Jurisdiction, Section 200.9, “in all criminal causes, whenever a defendant who is eligible to receive a certificate of relief from disabilities under article 23 of the Correction Law is sentenced, the court, in pronouncing sentence, unless it grants such certificate at that time, *shall advise the defendant of his or her eligibility to make application at a later time for such relief...* [and] the court, in pronouncing sentence, unless it grants such certificate at that time, *shall advise the defendant of his or her eligibility to make application at a later time for such relief.*” However, it is the case that the above rule is not uniformly enforced by the Office of Court Administration (“OCA”). The Committee recommends that New York State adopt and undertake measures to facilitate compliance with the above regulation.

Specifically, we recommend the following actions be taken.

- Judges should be further educated about their duty to inform the offender about the proper method for obtaining a certificate of relief, and should be mandated to document or otherwise place in the record their compliance with Rule 200.9. Judges should be trained that

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<sup>1135</sup> See McGregor Smyth, The Bronx Defenders, *The Consequences of Criminal Proceedings in New York State*, at 3-4 (Mar. 2005).

they can grant CRDs for convictions of petty offenses and that a CRD is, by law, temporary until a revocable sentence, such as a conditional discharge, expires.<sup>1136</sup>

- In connection with educating the judiciary, OCA should institute a rule that requires judges to consider issuing a CRD at sentencing. In this way, CRDs would be part of their normal process and become routine.

- CRDs should automatically be granted at sentencing to eligible individuals.<sup>1137</sup> There should be a presumption that the certificates be issued unless there are specific findings against issuing them, such as a risk to public safety. Judges should be required to list reasons why the request is being denied.

- A standard needs to be defined for an appellate process regarding denial of a CRD/CGC. The current process is incredibly discretionary.

- Attorneys should be trained in helping clients obtain CRDs and CGCs, and the New York State government should make the process clearer and easier for individuals to navigate on their own.

- The existence, procedures, and availability of Certificates of Relief should be further publicized. For instance, when an individual who has been incarcerated is released, he or she should be made aware of the procedures for applying for the applicable certificate. The formerly incarcerated person should further be reminded during follow-up visits with his or her parole board officer, in addition to the mandatory explanation the individual receives (or should receive) during sentencing. Moreover, applications for Certificates of Relief should be available on the internet to facilitate ease of applying.

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<sup>1136</sup> N.Y. CORRECT. LAW § 702(4).

<sup>1137</sup> Individuals with more than one felony conviction, or those being sentenced to imprisonment at a state correctional facility (terms over a year), are ineligible to receive CRDs at sentencing. N.Y. CORRECT. LAW § 702(4).

The facilitation and education suggested, as well as the immediate granting of Certificates in certain circumstances carries very low costs. Nonetheless, facilitating the CRD and CGC process would be an important piece of the overall effort to relieve people with criminal records of disproportionate punishment.

**B. COLLECT OR REFERENCE ALL COLLATERAL SANCTIONS IN ONE CHAPTER OR SECTION OF THE NEW YORK LAW TO IMPROVE ACCESS TO INFORMATION AND AWARENESS OF THESE CONSEQUENCES<sup>1138</sup>**

The various statutes discussed throughout this report are often difficult to find individually and nearly impossible to view comprehensively. Affected individuals, practitioners and judges cannot point to all the consequences stemming from the critical point of contact with the criminal justice system. Consolidating collateral sanctions would not be costly, but would enable legal practitioners easier access to information that would greatly improve the ways in which they counsel their clients.

**C. PROVIDE COMPREHENSIVE TRAINING FOR DEFENSE ATTORNEYS, PROSECUTORS, AND JUDGES ABOUT THE CIVIL CONSEQUENCES OF CRIMINAL CONVICTIONS AND GUILTY PLEAS**

Often the civil consequences of guilty pleas are more damaging than the fees, community service, or minimal jail time imposed by the court. Criminal justice professionals are frequently uninformed about these “non-criminal” issues, however, and thus fail to bring them to a defendant’s attention at the time that it matters most. It is extremely important that people deciding to take guilty pleas understand *all* of the consequences that they face and are able to make a fully informed decision.

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<sup>1138</sup> The Committee joins a growing national consensus with this recommendation. *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATIONS OF CONVICTED PERSONS Standard 19-2.1 (3d ed. 2004); Drafting Committee on Collateral Sanctions and Disqualifications, *Uniform Collateral Sanctions and Disqualification Act, March 2006 Draft*, at Section 3 (National Conference of Commissioners on Uniform State Laws); New Jersey Public Policy Research Institute, *Coming Home for Good: Meeting the Challenge of Prisoner Reentry in New Jersey* (Dec. 2003), available at [www.njsj.org/](http://www.njsj.org/).

This recommendation carries moderate costs, as it requires trainings, materials, and professionals' time as they attend the trainings. Moreover, there would have to be some enforcement mechanism to ensure that clients truly are well-informed at the time that they make a decision about a plea.

**D. REQUIRE JUDGES TO INFORM CRIMINAL DEFENDANTS OF ALL CIVIL CONSEQUENCES PRIOR TO ACCEPTING A GUILTY PLEA AND INCORPORATE THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION INTO THE SENTENCE OR JUDGMENT IMPOSED BY THE COURT<sup>1139</sup>**

One easy remedy for unwarranted civil consequences for criminal charges is to require all parties to understand and consider these consequences prior to a plea being entered. Although a defense attorney should instruct her client as to these issues, the judge, as controlling the outcome of the case, should have the final responsibility for ensuring that such consequences are understood. Such a remedy would require, however, the judiciary to have even more comprehensive knowledge about these outcomes. Therefore education is critical. The collection of collateral sanctions in one chapter of the code will make this advisement requirement practicable.<sup>1140</sup>

**E. DEVELOP REGIONAL ATTORNEY REFERRAL PROGRAMS TO ADDRESS THE CIVIL CONSEQUENCES OF CRIMINAL PROCEEDINGS**

Proper representation is key to addressing many of these issues. We recommend that the State Bar and local bar associations develop referral programs to assist individuals with understanding and handling these consequences.

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<sup>1139</sup> *Id.*

<sup>1140</sup> The Committee makes no recommendation on the consequences of non-compliance on the validity of the plea, noting the tension between the importance of the finality of judgments, on the one hand, and the potential ineffectiveness of a rule with no sanction, on the other. The Committee does recognize that, in certain circumstances, the failure to advise could be so serious and prejudicial as to undermine the voluntariness of the plea or the effectiveness of counsel.



**F. CREATE RESOURCE GUIDES BY COUNTY FOR PEOPLE WITH CRIMINAL RECORDS OR RETURNING FROM PRISON OR JAIL TO SUPPLEMENT COMPREHENSIVE DISCHARGE PLANS<sup>1141</sup>**

In the case that a person is not provided with sufficient transitional planning prior to release or that she is evicted from her home based on criminal record, local resource guides should be developed, regularly updated, and made readily available. Inasmuch as services and housing do exist for people with criminal records, it is very difficult for them to access. Such guides have been developed, but generally in piecemeal fashion and not through one coherent effort to document and regularly update all resources by county.<sup>1142</sup> Such a guide would have to be updated on a regular basis and provided in print and electronic format at no charge to provide an effective tool for people leaving incarceration.

There would be significant incentive to invest in such a project as a one-time effort to make the costs associated with it minimal or to limit it to a particular needs area, such as mental health or HIV.<sup>1143</sup> However, doing so would undermine the effectiveness of the resource, as it would quickly become outdated or would fail to provide assistance to the people who have access to the fewest resources. Instead, an ongoing program would need to be funded to do the necessary updating and distribution around New York State.

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<sup>1141</sup> Council of State Governments, Report of the Re-Entry Policy Council, Chapter D, Policy Statement 19 (2004), available at <http://www.reentrypolicy.org/report/ps19-housing.php>; Nancy Fishman, Briefing Paper: *Legal Barriers to Prisoner Reentry in New Jersey* (Apr. 11, 2003), available at [http://www.njsj.org/reports/barriers\\_report.html](http://www.njsj.org/reports/barriers_report.html).

<sup>1142</sup> See, e.g., Arizona Coalition to End Homelessness, *Strategies for Transitioning Ex-offenders Program: A Handbook to Help You Prepare for Your Release in Maricopa County* (Mar. 2004), available at <http://www.whrai.org/hud.htm>; Baltimore Citywide Reentry and Reintegration Steering Committee, *Ex-Offender Resource Guide: Baltimore Community Services for Individuals with Criminal Backgrounds* (Mar. 2005), available at [http://www.oedworks.com/exoffender/resource\\_guide.pdf](http://www.oedworks.com/exoffender/resource_guide.pdf).

<sup>1143</sup> This has occurred with the New York guides that have been developed up to this point.

**G. EXPAND THE SCOPE OF ONE CURRENT SEALING STATUTE, CPL 160.55,  
AND CREATE NEW SEALING REQUIREMENTS**

As the public access to records has increased, the importance of sealing criminal history records has skyrocketed. Information previously available only to public officials is now available to employers, landlords and other private citizens for a fee. The frequent inaccuracy of this information presents tremendous challenges to those previously involved with the criminal justice system.

The New York State Legislature has enacted an elaborate statutory scheme to shield those who have had minimal contact with the criminal justice system from the disabling array of collateral consequences that attend criminal prosecution. Courts have long recognized the problem of damage to reputation and employment prospects along with other serious byproducts of even unsuccessful criminal prosecutions.<sup>1144</sup> As this report demonstrates, a prosecution that results in no criminal conviction can nonetheless undermine the security of a person's housing, employment, and more. The structure of the New York sealing statutes serves the laudable goal of ensuring that those who are charged but not convicted of a criminal offense do not suffer from this stigma.<sup>1145</sup>

In pursuit of this goal, the sealing statutes encompass an expansive class of dispositions. Section 160.50 of the Criminal Procedure Law (C.P.L.), enacted in 1976, protects those persons who are prosecuted for a crime but win acquittal or dismissal, regardless of whether premised on grounds unrelated to guilt or innocence.<sup>1146</sup> Section 160.55, following the language and logic of § 160.50, extended this protection in 1980 to those whose prosecution terminates with conviction

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<sup>1144</sup> See, e.g., *Hynes v. Karassik* 47 N.Y.2d 659, 662 (1979).

<sup>1145</sup> See *id.*

<sup>1146</sup> See, e.g., *Karassik*, 47 N.Y.2d at 663.

of a non-criminal (petty) offense. Family Court Act §§ 166,<sup>1147</sup> 375.1,<sup>1148</sup> 375.2,<sup>1149</sup> and 375.3,<sup>1150</sup> securing the proceedings of Family Court, and C.P.L. § 720.35, sheltering “youthful offenders,” round out the core of the statutory sealing scheme.<sup>1151</sup> In sum, this framework protects all non-criminal dispositions, from dismissals and other favorable terminations, to convictions of violations and other non-criminal offenses, to youthful offender adjudications.<sup>1152</sup>

Technology and a recent change in the law, however, have rendered CPL § 160.55 nearly useless in sealing the records of petty offenses. Because court records of charges and convictions are not sealed under CPL § 160.55, these records are publicly available in courthouses. More important, the records are available through OCA’s statewide Criminal History Record Search, authorized by statute in 2003.<sup>1153</sup> Potential employers and landlords frequently use this OCA search, which is statewide and available to anyone with a name, date of birth, and a \$52 fee.

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<sup>1147</sup> This section establishes the privacy of family court records.

<sup>1148</sup> This section seals juvenile delinquency favorable terminations.

<sup>1149</sup> FCA § 375.2 permits sealing of records when there is an actual finding of delinquency that is less than a designated felony. Sealing is not automatic, the respondent must file a formal motion with the court, and the motion cannot be made until the respondent’s sixteenth birthday. Records sealed pursuant to 375.2 are available if there is a subsequent adult conviction.

<sup>1150</sup> This section provides for expungement of some Family Court records.

<sup>1151</sup> *See, e.g., Green v. Giuliani*, 187 Misc. 2d 138, 151 (Sup. Ct. N.Y. Co. 2000).

<sup>1152</sup> Additional provisions reveal the expansive spirit of these laws. C.P.L. § 160.60 declares that an arrest and prosecution terminated in favor of the accused shall be declared a nullity so that he “shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution.” New York Executive Law § 296, the State’s foundational anti-discrimination law, includes in subdivision 16 protection of those accused but not convicted of a crime.

<sup>1153</sup> 2003 N.Y. Laws 62 (Part J, Section 14). Hundreds of private, commercial background screening businesses access these data sources and create their own repositories of criminal history information. A recent report by SEARCH for the Department of Justice found that “several companies compile and manage criminal history databases with well in excess of 100 million criminal history records.” SEARCH, The National Consortium for Justice Information and Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (Dec. 2005).

It is important here to distinguish between two very different uses of records of petty offenses – legitimate law enforcement use and the imposition of collateral sanctions. The prosecution community has expressed concern in the past about retaining access to these records for “legitimate law enforcement purposes.” In our view, the only legitimate use would arise in the context of a new criminal case where the individual is charged with a new crime. If law enforcement retains access to a sealed court record for use in any new criminal proceeding, then there is no legitimate law enforcement purpose in keeping a record unsealed for use by the public. Preserving such access cleanly separates legitimate law enforcement purposes from collateral punishments. With law enforcement access preserved, the only purpose for not sealing a record would be to impose collateral sanctions outside the criminal justice system.

- CPL § 160.55 should be amended to explicitly seal the records of charges that originated as summonses.
- CPL § 160.55 should be amended to seal court records of petty offenses and ensure that these records are not available to the public, including potential employers and landlords. Law enforcement and prosecutors would be granted access to these court records as needed for subsequent criminal cases where the individual is the defendant.
- All sealing statutes should be amended to bar the use of sealed records in court proceedings, administrative proceedings, and private decision-making (such as private employment and housing).
- The Legislature should amend CPL § 160.60 so that individuals with Youthful Offender adjudications or convictions for non-criminal offenses are restored to the status they had before their prosecutions.

- The Legislature should create a new sealing provision to seal, automatically or upon application, certain felony and misdemeanor convictions after a certain period.
- DOCS should limit the length of time that conviction history can be posted on its website to 10 years after an individual is released from custody.
- The Legislature should alter the NYS Fair Credit Reporting Act to provide stronger protections for any background check agency providing reports within New York because the accuracy of these reports is notoriously unreliable and incomplete.
- Any public databases, such as NYC DataShare, should be required to purge all records later sealed.

**H. EXPAND THE PROTECTIONS AND STRENGTHEN THE ENFORCEMENT TOOLS OF THE HUMAN RIGHTS LAW AND THE CORRECTIONS LAW**

The protection afforded to individuals pursuant to New York State Human Rights Law, Executive Law § 296(15) and (16), and Correction Law Article 23-A prohibiting discrimination in employment based upon a criminal conviction or an arrest should be expanded to provide that same protection to individuals seeking admission to educational institutions and housing. Enforcement of these protections should be provided for by creating a right of action for individuals wrongfully denied housing or admission to a school because of a criminal conviction or arrest.

**I. REQUIRE THE FILING OF A RE-ENTRY IMPACT STATEMENT FOR ANY NEW LEGISLATION IMPOSING A COLLATERAL PENALTY**

As noted in the report, statutes affecting collateral consequences are scattered throughout our laws in various areas. If that process continues, there will be no way to measure the statute's effect independently or collectively. Requiring a statement that considers the impact of such legislation may lead to reconsideration of its filing or a more informed discussion as to its purpose and intended effect.

**J. ENSURE THAT MODEL LEGISLATION HAS FOUR CRITICAL FEATURES**

In making its recommendations, the Committee is mindful of four important features of any legislation in this area.<sup>1154</sup> First, legislation should require data collection and reporting requirements. We have very little empirical information on the incidence of these sanctions, such as how many employment licenses are denied because of a criminal record, or even how many public housing applications are denied. Second, bills must have strong enforcement provisions – both administrative remedies and enforcement, and private rights of action. Third, proposals should use guided discretion, or have lists of factors to guide decision-making.<sup>1155</sup> Fourth, legislation should have financial incentives such as bonding, tax incentives, or bonuses built into the funding regime to encourage desired behaviors by decision-makers.

**K. REDUCE RETURNS TO PRISON FOR “TECHNICAL” PAROLE VIOLATIONS AND EXPAND USE OF ALTERNATIVES TO INCARCERATION AND OUTPATIENT DRUG TREATMENT**

Returns to prison or placement in in-patient treatment programs often cause individuals to lose housing that they have worked hard to secure, seriously disrupting their lives and forcing them to entirely start over when they are released.

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<sup>1154</sup> See Comments of The Bronx Defenders and Reentry Net to the National Conference of Commissioners on Uniform State Laws on the Uniform Collateral Sanctions and Disqualifications Act, November 3, 2005 (*available at* <http://www.reentry.net>).

<sup>1155</sup> New York Correction Law Article 23A is an example of this technique. See *supra* Chapter II, Employment.

### **III. EMPLOYMENT**

#### **A. RECORD ACCESS REFORM**

The accuracy of criminal records is assuming greater importance as employers are increasingly turning to conducting background checks on prospective job applicants.

Approximately 8 of out 10 private employers now conduct criminal background checks before hiring, according to the Society for Human Resource Management (“SHRM”). Oftentimes, however, criminal records contain inaccuracies, which lead employers to refuse to hire an individual based on erroneous information. Although the Committee recognizes that employers may have a legitimate interest in knowing the criminal background of a job applicant in the event that a past criminal conviction directly relates to the job’s qualifications (for instance, knowing whether an applicant applying for a position working with children has been convicted of child molestation), the Committee urges the State of New York to enact legislation to ensure that the criminal records obtained and viewed by employers are as accurate as possible.

Inaccuracies contained in criminal records of all types have been reported. For instance, basic biographical information may be incorrect. This may cause a check to confuse one person with another. A criminal record may report an arrest, but fail to state the disposition of the case. Moreover, convictions that have been sealed or expunged may appear on a criminal record even though by virtue of their having been sealed they should not so appear. Oftentimes, an employer rejects the application of a job applicant on the basis of an unfavorable criminal background without the applicant ever receiving the opportunity to review his or her criminal record. If inaccuracies contained in criminal records are able to be better spotted and remedied, people with convictions (and even people who have never been convicted but who have inaccurate criminal records that say that they have been) will have a better chance of gaining employment.

New York State should enact a law or regulation that gives a formerly incarcerated person a free copy of his or her criminal record upon release (or if the individual is not subject to imprisonment, upon sentencing). In addition, the person convicted of a crime should be instructed that the purpose of the free report is so that he can have the opportunity to check it for any inaccuracies. The instruction should also contain, in clear and simple language, directions for rectifying any disputed information or inaccuracies. Alternatively, those convicted of a crime should at a minimum be notified that such a report is available at no cost and should be provided with instructions on how to obtain the report. Finally, funding should be devoted to create a centralized process whereby a person can seek correction of any inaccuracies.

**B. EXPAND THE PROTECTIONS AND STRENGTHEN THE ENFORCEMENT TOOLS OF THE HUMAN RIGHTS LAW AND THE CORRECTIONS LAW**

- Currently, under New York Human Rights Law § 296(16), employers may not ask job applicants to disclose prior arrests that did not result in conviction and may not obtain an arrest record from other sources. However, this provision does not extend its protection to current employees, and thus does not prevent an employer from asking a current employee to disclose arrests that did not result in conviction or from taking action, *i.e.*, dismissal from employment. The Human Rights Law should therefore be extended to current employees.
- Similarly, under Article 23-A of the Correction Law (§§ 750-55), employers may not refuse to hire an applicant based on a prior conviction, absent a “direct relationship” between the offense and the employment, or unless employment would involve an “unreasonable risk” to property or safety. However, this provision also does not extend its protection to current employees, and thus does not prevent an employer from dismissing that person for a conviction. Article 23-A should also be extended to cover current employees.



- Additionally, currently Human Rights Law § 296(16) and § 297 permits a private right of action for someone denied employment because of an arrest that led to favorable termination. However, Corrections Law Art. 23A, is much more limited. If the employer is a public employer, then one can challenge the action in an Article 78 proceeding. But, the review in an Article 78 proceeding is very limited. If the employer is a private employer, then the only recourse is to file a complaint with the State Division of Human Rights or City Commission on Human Rights.<sup>1156</sup> The legislature should add a true private right of action to the Corrections Law Article 23-A, regardless of whether the employer is public or private. There should also be a three-year Statute of Limitations to match the Human Rights Law § 297, as well as attorneys' fees provisions.

**C. EMPLOYER PROTECTION FOR NEGLIGENT HIRING LIABILITY:  
AFFIRMATIVE DEFENSE**

Although New York employers are not obligated to conduct background checks on prospective job applicants, New York employers have been found liable for the tort of negligent hiring – *i.e.*, that the employer knew or should have known that the applicant had a violent or criminal tendencies, but hired the applicant nevertheless. On the other hand, Article 23-A of the New York Correction Law requires employers to engage in a delicate multi-factor balancing test when evaluating whether or not to hire an applicant with a criminal record. Thus, there is a tension between the common law tort of negligent hiring and Article 23-A: an employer must use the balancing test set forth in 23-A, but can still be found liable for negligent hiring. With the possibility of a negligent hiring claim looming in the foreground of every employer's decision to hire an applicant whom it knows to have a criminal record, many employers may choose to forgo a balancing test altogether, err on the side of caution so as to avoid the potential

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<sup>1156</sup> N.Y. CORRECT. LAW § 755.

for a negligent hiring claim, place undue consideration on the existence of a criminal record and *ipso facto* deny employment. By taking steps to eliminate the above tension between Article 23-A and the common law tort of negligent hiring, both employers *and* applicants with a criminal record could benefit.

The Committee recommends that the Legislature amend Article 23-A to provide that, in a claim for negligent hiring, it shall be an affirmative defense if an employer can demonstrate that it complied with the eight-part balancing test as currently set forth in Article 23-A. Such a burden-shifting affirmative defense has precedent in both New York Court of Appeals and United States Supreme Court jurisprudence. For example, the Court of Appeals in *Weiss v. Fote*, 7 N.Y.2d 579 (1960), held that a municipality has an affirmative defense to a claim of negligence arising out of faulty highway construction when it can show that it engaged in expert study of the construction. Similarly, the Supreme Court in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998), held that an employer has an affirmative defense to a charge of sexual harassment when it can show that that it exercised reasonable care (such as performing a thorough investigation) to prevent and correct promptly any sexually harassing behavior.

Under the affirmative defense proposal outlined above, an employer could show that it complied with article 23-A by, for example, filling out a simple worksheet whereby the employer weighs each factor in 23-A by assigning a numerical number from 1-10 and adding up the total number.

**D. EMPLOYER PROTECTION FOR NEGLIGENT HIRING LIABILITY: STATE BONDING PROGRAM**

In addition to providing an affirmative defense to negligent hiring liability for employers, the “fear” of negligent hiring liability, and its consequent effects on job applicants with criminal records, can be further mitigated by instituting a state bonding program.

Currently, the *federal* government offers bonding for employers who hire individuals who have been convicted of a crime. Created in 1966 by the US Department of Labor, the Federal Bonding Program helps to alleviate employer concerns that at-risk job applicants will be untrustworthy workers by allowing employers to request “free of charge” fidelity bonds (for six months) to cover people who, like recently released individuals, cannot be covered by commercial insurance. A fidelity bond is a business insurance policy that protects the employer in case of any loss of money or property due to employee dishonesty. It is, in effect, a “guarantee” to the employer that the person hired will be an honest worker. The Federal Bonding Program does not cover negligent hiring liability.

Just as the federal government offers a bonding program to protect against employee dishonesty and whose purpose is to encourage the hiring of individuals who have been convicted of a crime, New York State should implement a bonding program by providing free (or heavily discounted) negligent hiring liability bonding for employers. Offering such a bond would remove the specter of liability from the initial hiring decision, thereby allowing employers to give full weight to the public policy considerations contained in Article 23-A.

New York State should also extend the Federal Bonding Program past six months so that New York employers’ concerns relating to hiring persons with criminal records can be further alleviated. The longer the period of bonding, the less hesitation employers will have in hiring employees with a criminal record.

**E. STANDARDIZE, ENFORCE AND PUBLICIZE PROCEDURES FOR  
CERTIFICATES OF REHABILITATION TO ENHANCE EMPLOYMENT  
OPPORTUNITIES**

Certificates of Relief, which come in two forms – Certificates of Relief from Disability (“CRD”) and Certificates of Good Conduct (“CGC”), have the potential to enable individuals with criminal records who are applying for jobs to gain employment. For instance, for those jobs

that require some sort of license to hold the job (and in New York, there are over 100), a Certificate of Relief can provide evidence that the applicant has been “rehabilitated.” However, whereas the overwhelming majority of certificates of relief are granted, only a very small percentage of eligible individuals for certificates actually apply for one.

We refer to the Overarching Recommendations for a detailed explanation of the ways to implement change to this critical area.

#### **F. SEALING OF CRIMINAL RECORDS**

Although this subject has been addressed in the Overarching Recommendations in greater detail, the Committee notes and further emphasizes the beneficial effect that the sealing of criminal records would have on individuals with criminal records achieving gainful employment. By allowing those individuals legally to deny the existence of some types of crimes in a sealed record, a prospective employer would be unable to consider a minor offense or offense committed long ago in connection with a job application, thus making it more likely that an employee will be considered on the basis of his qualifications, without the stigma of being designated a person convicted of an offense.

#### IV. EDUCATION

##### A. EDUCATIONAL PROGRAMMING SHALL BE AVAILABLE TO ALL INMATES IN JAIL AND PRISON UNTIL HE HAS ATTAINED A GED, REGARDLESS OF AGE

Requiring that educational programming be available to all inmates in jail and prison until s/he has attained a GED does not impose a new burden on the State, rather it is merely a reiteration of *current* DOCS policy. As discussed above, the State has already committed itself to provide an education that will allow each inmate to attain a GED. Thus, this recommendation merely requests that the State fulfill its currently existing obligation.

Moreover, because it is ultimately more expensive *not* to provide this required programming, ensuring that each inmate attains a GED will prove to be a cost-saving for measure for New York State. As one study proclaimed, “to be tough on crime, we must educate prisoners.”<sup>1157</sup> At a minimum, it has been demonstrated (as discussed above) that inmate behavior as a result participation in educational programming results in more “manageable” prisons. In addition, the attainment of a GED is fundamental to inmates being able to secure employment upon release. As discussed above, to the extent that former inmates are able to secure employment on upon release, there is a reduced likelihood of recidivism. Thus the cost of ensuring each inmate has the opportunity to attain a GED is outweighed by the cost of failing to provide this education.

Attaining this goal will require the following actions:

- Sufficient funding should be allocated to allow each inmate to attain a GED.
- The State must provide sufficient funding for, and hire, sufficient teachers to fill all allotted teaching positions at the prisons.

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<sup>1157</sup> Michelle Fine, et. al, *Changing Minds: The Impact of College in a Maximum-Security Prison*, at 35(The Graduate Center of the City of New York and the Women in Prison at the Bedford Hills Correctional Facility Sept. 2001).

- Assembly Bill No. 3925, which requires DOCS to hire enough teachers to teach people so that inmates can attain a GED before their release, should be enacted. The bill also requires a classroom ratio of 20 students to a teacher.
- GED programming should not conflict with other programming requiring inmate participation.
- The right to education for prisoners under age 21 in DOCS custody should be made an explicit statutory right.
- Incentives for inmate participation in GED programming should be continued and created.

**B. THE ANTI-DISCRIMINATION PROVISIONS OF THE HUMAN RIGHTS LAW AND THE CORRECTIONS LAW SHOULD BE EXTENDED TO PROHIBIT DISCRIMINATION WITH RESPECT TO PRIOR CONVICTIONS BY POST-SECONDARY EDUCATIONAL INSTITUTIONS**

Some New York State colleges prohibit the enrollment of individuals with a record of a criminal arrest *or* conviction. Moreover, other colleges pose broad questions regarding prior arrests, convictions and incarceration. Currently, no standards exist regarding the exclusion of individuals from post-secondary educational institutions or the questions that may be posed regarding prior convictions and incarceration.

The anti-discrimination provisions of the State's Human Rights and the Corrections Law should be amended to address this issue by providing standards as to what may be asked and requiring the institution to demonstrate the reasonableness of posing such questions (including ensuring that such questions are not being used as a cover to address issues related to the race of the individual).

**C. ACCESS TO COLLEGE PROGRAMMING SHOULD BE INCREASED**

The State should: (i) restore funding for the Tuition Assistance Program for prisoners for post-secondary education; and (ii) cultivate volunteer programming provided by local colleges. Ultimately, making post-secondary education opportunities available to inmates will be a cost-saving measure for the State, even though it is improbable that more than 10% of the State's prison population would participate in such programming. The State would achieve these cost-savings from a variety of sources. First, the State would benefit from tax revenue generated by the fact that post-secondary programming would help released prisoners to secure jobs upon release. In fact, data shows that individuals who have received college programming in prison have pursued professional careers upon release. In addition, as discussed above, rates of reincarceration and parole violation are dramatically reduced when inmates participate in post-secondary programming. Thus, the State would be spared the cost associated with these problems. One study that attempted to quantify the amount that could be saved by facilitating post-secondary programming found that the extra expenses incurred for withholding college for one hundred inmates would amount to almost \$300,000 and over \$900,000 for two years.<sup>1158</sup> (It should be noted that this amount does not include the State expenses associated with the cost for foster care for children of incarcerated adults, lost wages and tax contributions, and welfare dependency.) Thus, the benefit to the released inmate and the New York State population would outweigh the cost of the program.

Additionally, the state should advocate for inmates and post-release individuals to receive public funding for education. Inmates and post-release individuals have had their access to post-secondary education limited by federal action as well. In 1994, inmates were removed from

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<sup>1158</sup> *Id.* at 20.

eligibility for Pell grants for college, which had enabled many to pursue college degrees from prison.<sup>1159</sup> In addition, the Higher Education Act of 1998 states if a student has a drug conviction on his/her record, the student is not eligible to receive federal aid for college. As a result, it is estimated that over 128,000 applications for federal financial aid have been denied due to this provision.<sup>1160</sup> Because it has been demonstrated that participation in post-secondary education reduces recidivism, the State should lobby the federal government to restore federal public assistance for incarcerated and post-release seeking to pursue to post-secondary education.

#### **D. SPECIFIC STUDIES SHOULD BE CONDUCTED**

##### **1. Juveniles' Ability to Return to Local Schools upon Release**

As described above, the court's monitor in *Handberry v. Thompson* found that the New York City public schools frequently refuse to enroll juveniles released from Rikers. We believe this refusal to enroll released juveniles in local public schools is limited to the New York City public school system. As the court monitor itself recognized, "this is an extremely detrimental policy for high-risk youth recently discharged from a correctional facility."<sup>1161</sup> The State should investigate the extent to which juveniles are excluded from their local public school and enforce these *students'* rights to attend their local public school.

##### **2. Vocational Programming to Meet Market Needs**

DOCS should coordinate with discharge planning groups and other groups (such as those involved with economic planning and the Department of Education) to determine the specific

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<sup>1159</sup> Sara Lawrence, Daniel P. Mears, Glenn Dubin & Jeremy Travis, *The Practice and Promise of Prison Programming*, at 14 (Urban Institute Justice Policy Center May 2002).

<sup>1160</sup> *Frequently Asked Questions About the Higher Education Act Drug Provision*, available at <http://www.raiseyourvoice.com/heainfo.shtml>.

<sup>1161</sup> Sheri M. Meisel, Final Report of the Court Monitor in *Handberry v. Thompson*, 96 Civ. 6161(CBM), at 39 (Dec. 5, 2001).



market needs of the areas to which persons are discharged and identify the programs which can provide these skills.

DOCS should also undertake a comprehensive study of successful educational and vocational programs in New York state prisons and should begin to consider how these programs can be implemented in other prisons.

### **3. Programming for Juveniles, Pre-Trial Detainees, and People Confined for Misdemeanors**

A review of the educational/vocational programming provided to pre-trial detainees and people sentenced to misdemeanors who are confined in local correctional facilities, as well as programming provided to juveniles, is beyond the scope of this report. We recommend that a study of these populations be conducted to determine the educational/vocational needs of the populations and the programming currently provided to them, and to recommend necessary educational/vocational programs.



## V. BENEFITS

Proper and immediate access to Medicaid reduces recidivism and health-care costs. Providing health care to incarcerated people, as well as those re-entering their communities, serves the dual function of: (1) discouraging antisocial and unhealthy behaviors and cutting costs associated with prosecuting drug offenses; and (2) fighting the spread of communicable diseases like HIV and hepatitis. Studies suggest that prompt access to Medicaid leads to fewer incidents of recidivism, greater participation in resident drug treatment programs, and overall reduction in long-term health care costs.<sup>1162</sup> The inadequacy of health care in the state and local correctional systems<sup>1163</sup> only increases the need for continuity of care upon release. Continuity of care includes access to other forms of public assistance that can support people re-entering from jail or prison during their difficult transition to self-sufficiency.

To implement this policy, the Committee recommends the following.

### A. IMPLEMENT A SYSTEM WHEREBY PEOPLE ENTERING JAIL OR PRISON, CURRENTLY RECEIVING MEDICAID, ONLY HAVE IT SUSPENDED RATHER THAN TERMINATED

The federal government and the New York City Commissioners of Health and Mental Hygiene, Corrections, Probation, Homeless Services, and the Human Resources Administration have strongly recommended that Medicaid eligibility be suspended rather than terminated upon incarceration.<sup>1164</sup> This simple suggestion is permitted by current federal and state law.

The only impediment to suspending Medicaid cases is the state's database, the Welfare Management System ("WMS"), which does not provide that eligibility option. The relevant

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<sup>1162</sup> See *supra* Chapter IV, Benefits; Joshua Lee, David Vlahov & Nicholas Freudenberg, *Primary care and health insurance among women released from New York City*, J. OF HEALTH CARE FOR THE POOR AND UNDERSERVED 200-17 (2006), available at <http://www.reentry.net>.

<sup>1163</sup> See Appendix, Mental and Medical Health.

state agencies, the Department of Health and Office of Temporary and Disability Assistance, refuse to make that simple change to the WMS. Some policy makers attempt to justify termination of benefits with fears of fraudulent exploitation of Medicaid benefits. Suspension, however, meets these concerns because it prevents reimbursement for services under a suspended Medicaid case. Importantly, suspension, as opposed to termination, more readily allows for timely and efficient reinstatement of benefits upon release.

**B. PROVIDE ASSISTANCE TO PEOPLE IN PRISON OR JAIL FOR COMPLETION OF BENEFIT APPLICATIONS**

Timely access to benefits upon release potentially avoids problems faced by those without benefits who, upon re-entry, have no means of subsistence, no health care, and nowhere to live. These problems have been linked to increased rates of recidivism.<sup>1165</sup> Establishing programs that facilitate the benefits application process for eligible, incarcerated individuals upon re-entry promotes timely access to benefits upon release and may reduce recidivism.

Such programs are not without a cost, but a variety of options exist. The local social services district could visit correctional facilities at regular intervals or could establish a satellite office with WMS access to process applications directly. Local social and legal services offices could assist incarcerated individuals with applications and facilitate enrollment. Therefore, an assessment of the costs of such programs, versus the overall cost to society presented by the problems stemming from lack of timely access to benefits upon re-entry, would allow for a more informed debate with respect to the link between access to public benefits and recidivism.

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<sup>1164</sup> See Letter of Glenn Stanton to State Medicaid Directors, Center for Medicaid and State Operations Disabled and Elderly Health Programs Group (May 25, 2004).

<sup>1165</sup> See *supra* Chapter IV, Benefits.

**C. ENSURE AVAILABILITY OF PUBLIC ASSISTANCE FOR THE RECENTLY RELEASED**

The waiting periods for processing and approving benefits are a significant barrier in providing continuity of care and basic support during the critical period after release from jail or prison. Access to benefits increases stability, facilitates access to health care and numerous social services, decreases homelessness, and consequently can reduce recidivism. OTDA policy, through 93 INF-11, encourages local social services districts to accept applications from incarcerated persons 45-days before their release so that benefits can begin for eligible applicants on the date of release.

The state should mandate acceptance of applications. Also, to support those re-entering after short jail stays, NEW YORK SOC. SERV. LAW § 153(8), which provides for an exception to the 45-day waiting period for disbursement of funds for “emergency circumstances,” should be construed as including the tenuous circumstance of those newly released from prison or jail. The advantages of continuity of care make a persuasive argument for a consistent and mandatory state policy ensuring access to benefits upon release for eligible persons.

**D. EXPAND THE MEDICATION GRANT PROGRAM FOR PEOPLE EMERGING FROM JAIL OR PRISON**

If the lag time for restoration of benefits to recently released people will nonetheless persist, the State should provide a supply of medication for the relevant waiting period to individuals emerging from incarceration who have serious medical conditions. Currently, New York has a program allowing for such provisions for those with a serious mental illness. Such a program available to all incarcerated persons with serious medical conditions would significantly improve emerging individuals’ chances for successful re-entry by bridging the gap between release and resumption of benefits.

Although an expansion of this program would involve increased short-term costs, it should result in long-term savings by promoting continuity of medical care. Immediate access to medical insurance, as recommended above, would complement this program. In addition, the current program is operated by grants from the state Department of Health to localities that apply. Given the significant medical and financial consequences of the interruption of treatment and care for any serious illness, the program should be mandatory statewide.

**E. MODIFY STATUTORY BANS ON BENEFITS FOR FELONY WARRANTS AND FELONY DRUG OFFENSES**

OTDA should issue clearer guidance about the intent necessary to prove a claimant is “fleeing.” Evidence suggests that to operate on a presumption that an individual is a willful fugitive, and subsequently to suspend public assistance as mandated by law, may be counterproductive in many cases. Individuals who have their public benefits suspended are even more likely to return to prison in some capacity without this needed assistance. Suspension of benefits upon a warrant check, without confirmation that an individual is, in fact, a “fleeing felon,” is under these circumstances difficult to defend. OTDA should issue new regulations and guidance consistent with its own fair hearings and the recent decision by the U.S. Court of Appeals for the Second Circuit in *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir. 2005), concerning analogous federal provisions.<sup>1166</sup>

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<sup>1166</sup> *Fowlkes* held that the Commissioner cannot conclude from the fact that there is an outstanding warrant for a person’s arrest that he is “fleeing to avoid prosecution.” 10 U.S.C. § 1382(e)(4)(A). “Fleeing” in § 1382(e)(4)(A) means the conscious evasion of arrest or prosecution. Thus, there must be some evidence that the person knows his apprehension is sought. Also 20 C.F.R. § 416.1339(b)(1) does not permit the agency to make a finding of flight; rather, it demands a court or other appropriate tribunal to have issued a warrant or order based on a finding of flight.

## **VI. FINANCIAL CONSEQUENCES**

### **A. CONSOLIDATE ALL FINANCIAL PENALTIES INTO ONE FEE**

There is a wide array of financial penalties imposed as a result of criminal convictions, including fines, fees, costs, penalties, surcharges, and assessments. The use of financial penalties has continued to grow over the years. New financial penalties are seemingly added at each legislative session. Many of these financial penalties have been increased several times over the years and are often viewed by the legislature in isolation from all other financial penalties that a person convicted of an offense must pay.

These financial penalties are scattered throughout various statutes and are not consolidated in any one place. Consequently it is difficult to assess the total impact of such financial penalties on an individual or their family. When such financial penalties are totaled, their sum is at times staggering.

In light of the fact that the vast majority of people who are processed through the criminal justice system are, as previously discussed, indigent, the impact of the penalties is all the more burdensome, and actual collection of such penalties is problematic at best.

The stated purposes of such financial penalties, be it punishment, reparation, cost recovery, revenue production, or cost shifting, are outweighed by the heavy financial burden placed on the individual and his or her family as they try to reintegrate back into the community. Financial resources that could assist with the cost of housing, food, and family support are typically meager at the time of the individual's return from prison so that almost any financial penalty is a devastating setback to the re-entry process.

Consolidating all of the financial penalties into one moderate fee will serve several purposes. First, it will promote the efficiency of actual collection of such revenue. Second, it will ameliorate the impact that such financial penalties have on re-entry and reintegration and

protect people from being overburdened, both directly and indirectly, by financial penalties.

Third, it will make transparent for the legislature, the public, and the individual what financial penalties are actually being imposed. Further, it will increase the ability of Judges, prosecutors, and defense counsel to review the financial consequences both in advising the defendant and in weighing the total effect of the penalties to be imposed at sentencing.

Although the decrease in total financial penalties implies a decrease in revenues, that may not be so. A portion of the financial penalties imposed are never collected. A moderation in fees would increase the likelihood of collection. Further, if reintegration is promoted by a moderation in financial penalties, the decrease in long-term costs that are related to recidivism would more than offset any decline in revenues. There would be no cost to implement this recommendation.

Thus, the Committee recommends that all of the financial penalties including fines, fees, surcharges, penalties, assessments and costs be consolidated into one moderate fee schedule. The schedule would set a separate fee for felonies, misdemeanors, and violations. To account for differing abilities to pay, the schedule would set one level of fees for defendants who financially qualify for public defense, and a second level of fees for those who have not.

Restitution, which serves a direct reparative purpose, is not included in the consolidated fee. However, in the event that the amount of restitution ordered to be paid by a Judge exceeds the consolidated fee that would otherwise be imposed on the individual, the fee is waived.<sup>1167</sup>

**B. AMEND CPL § 420.35(2) TO ALLOW FOR WAIVER OF CERTAIN FINANCIAL PENALTIES**

Imposing financial penalties on people who live below the poverty level is simply not good public policy. As noted in the earlier discussion profiling who is subjected to these

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<sup>1167</sup> Current law provides that if restitution is made, such person shall not be required to pay a mandatory surcharge or a crime victim fee. *See* N.Y. PENAL LAW § 60.35(6) and N.Y. VEH. & TRAF. LAW § 1809(6). This consolidated fee shall not affect or prevent forfeiture of assets.



financial penalties, they are disproportionately black and Hispanic, poor, with serious social and medical problems, largely uneducated, unskilled, suffer mental illness, lack solid family supports, have minimal prospects for employment, and upon release from incarceration have the added stigma of a prison record and face the distrust and fear that it inevitably carries with it.

With so many barriers to overcome to reintegrate back into the community, creating additional financial barriers is neither cost effective nor is it in society's best interest. In addition, there would be no cost to implement this change.

Thus, the Committee recommends that CPL §420.35 be amended to allow for the waiver of certain financial penalties based upon the inability of the individual to pay. Such an amendment would provide judicial discretion to waive the surcharges and all of the attendant fees that would otherwise be imposed at the time of sentencing for anyone sentenced to incarceration, and for any person who demonstrates to the Court's satisfaction, at the time of sentencing, that such fees and surcharges would create a financial hardship on the individual or his or her family.<sup>1168</sup>

**C. IMPOSE A MORATORIUM ON ALL NEW FINANCIAL PENALTIES AND THE INCREASE OF EXISTING PENALTIES, AND CONSIDER THE FILING OF A RE-ENTRY IMPACT STATEMENT FOR ANY NEW LEGISLATION IMPOSING FINANCIAL PENALTIES**

The closer one looks at the issue of re-entry, the more one becomes aware of the obstacles, both visible and invisible, that are faced by people returning home after serving the penalty of imprisonment. Our current recidivism rate, which is, according to the Bureau of Justice Statistics, as high as 67%, serves as a reminder that wholesale reintegration presents a formidable challenge. If the lofty goal of reintegration is to be realized, we must, as a society,

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<sup>1168</sup> This recommendation is offered for adoption both in conjunction with the preceding recommendation and as an independent recommendation.

give more meticulous attention and thoughtful analysis to the impact that public policies have on re-entry.

The cost of careful analysis is quite minimal when weighed against the cost of human lives who suffer under the weight of the unintended consequences of our latest legislative initiatives designed to balance the budget and adopt a “tough on crime” posture.

Thus, the Committee recommends imposing a moratorium on all new financial penalties and also on the increase of existing financial penalties until the issue can be considered and studied by a legislative Committee. The requirement of filing a re-entry impact statement should be considered for any new legislation that imposes financial penalties.<sup>1169</sup>

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<sup>1169</sup> The requirement of the filing of a reentry impact statement for any new legislation that imposes financial penalties is related to the Committee’s general recommendation that all new legislation that may cause collateral consequences of a criminal conviction require the filing of a reentry impact statement.

## **VII. HOUSING**

The recommendations below improve public safety by reducing barriers to housing for people with criminal arrests or records. As discussed in the report, the provision of housing is central to an individual's stability. Without housing, it is difficult to raise a family, hold down a job, or maintain connections to a community. Although public safety concerns are used as the justification for barring people with criminal records from housing, it is in fact much safer to provide them with a place to live.

Providing housing opportunities is also far less costly than the alternative – homelessness programs, shelters, prisons, jails, and prosecutions. Although these funding priorities are not generally seen as direct tradeoffs, research shows that anti-eviction measures would result in a large net savings, as they prevent homelessness. Information on recidivism for those living in shelters indicates that similar savings could be calculated within the criminal justice system if stable housing becomes available.

Thus, the Committee recommends the following.

### **A. PROTECT PEOPLE WITH CRIMINAL RECORDS FROM UNJUST DISCRIMINATION**

- Pass New York State law modeled on the employment discrimination law (NY Exec Law § 296(16) prohibiting denial of or eviction from housing based on a criminal case with a favorable disposition or an accusation with a pending criminal case.
- Pass New York State law modeled on New York Corrections Law §§ 750-755, New York Executive Law § 296(15), and the federal Fair Housing Act, 42 U.S.C. § 3613, to prohibit unfair discrimination against individuals with criminal records and their households. Such a statute would include a requirement that Certificates of Relief from Disabilities be considered in making decisions about housing, that applicants may only be screened for

convictions substantially and legitimately related to public safety concerns, and that tenants may only be evicted for similar convictions.

- Pass New York State law combining New York Corrections Law § 755 and the federal Fair Housing Act, 42 U.S.C. § 3613, to allow for enforcement of the above provisions through a choice of the Human Rights Commission or a private right of action in Civil Court. Include a provision allowing for the award of plaintiff's attorney's fees. New York's experience with its current employment anti-discrimination legislation<sup>1170</sup> illustrates the importance of strong enforcement tools.

- If the non-discrimination provisions above are adopted, the legislature should include an incentive for landlords. It should be an affirmative defense to negligence theories of premises liability if a landlord or housing owner can demonstrate that it complied with the balancing test set forth above.<sup>1171</sup>

- Pass legislation prohibiting an entire household's eviction, even if the person with a criminal record would be evicted under the above provisions, as long as that occupant's tenancy is terminated. This legislation would apply to the Bawdy House Law as well.<sup>1172</sup>

**B. REDUCE BARRIERS TO PUBLIC HOUSING SUBSIDIES FOR PEOPLE WITH CRIMINAL RECORDS AND PEOPLE LEAVING INCARCERATION**

Congress should undertake a wholesale review and revision of the barriers to federally subsidized housing for people with criminal records. As explained above, federal law erects substantial roadblocks to the successful re-entry of anyone with a criminal record. In accordance with the central mission of this Committee, however, we limit ourselves here to a general

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<sup>1170</sup> See Devah Pager's study described *supra* in the Chapter II, Employment.

<sup>1171</sup> See *supra* Chapter II, Employment, for additional discussion.

<sup>1172</sup> See N.Y. REAL PROP. LAW § 231(1); N.Y. REAL PROP. ACTS LAW §§ 711(5) & 715.

recommendation of federal law reform. Possible revisions could include: requiring PHAs to conduct an individualized assessment of each applicant with a criminal record before making a decision about admission or eviction; requiring PHAs to consider all mitigating factors before making a decision about admission or eviction;<sup>1173</sup> requiring that PHA screening and eviction guidelines can only consider criminal activity that is directly related to being a good tenant; and repealing federal laws that require PHAs to automatically exclude or evict certain types of people with criminal records.

**C. GUARANTEE EACH PERSON LEAVING INCARCERATION A PLACE TO LIVE AND INCREASE SUPPLY OF AFFORDABLE HOUSING AVAILABLE TO PEOPLE WITH CRIMINAL RECORDS**

As outlined in the report<sup>1174</sup>, access to stable housing is fundamental to the re-entry process and to preventing recidivism. Increasing the supply of affordable housing available to this population could be accomplished in a number of ways. The state or localities could develop transitional supportive housing for people rendered homeless by incarceration. People leaving prison or jail have been recognized as often having a variety of special needs. The supportive housing model provides a variety of support services and programming either onsite in congregate facilities or off-site in scattersite programs.

Similarly, these governmental entities could develop permanent supportive housing for certain populations returning from prison or jail. Many models exist for this type of housing, and it can be government operated, grant-supported, or contracted out to not-for-profits. Legislatures could also establish incentives – such as bonds or tax credits – to encourage housing developers

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<sup>1173</sup> In addition to the mitigating factors already listed in the general mitigation provisions, PHAs must consider: 1) the best interests of any minor children of the applicant or tenant; 2) any evidence of rehabilitation; and 3) whether exclusion will render the applicant homeless. (For general mitigation provisions, *see* 24 C.F.R. § 982.552(c)(2) (section 8); 24 C.F.R. § 960.203 (admission); 24 C.F.R. § 966.4(l)(5)(vii)(B) (termination).

<sup>1174</sup> *See supra* Chapter VI, Housing.

to create housing open to people with criminal records. On the most general level, the state could prioritize the creation of affordable permanent housing.<sup>1175</sup>

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<sup>1175</sup> Similarly, Congress and the state legislature should increase federal and state funding for programs such as Section 8 and conventional public housing.

## **VIII. FAMILY**

The family is the most important social relationship in our society. It is the place where individuals receive the support, nurturing and encouragement essential to their becoming or remaining productive members of their communities. The frequently disruptive and destructive impact of criminal proceedings on the stability of the family unit is in conflict with goals of allowing a citizen to rejoin society after having paid his or her debt for criminal offenses, and is inconsistent with the public safety that comes with strong families and strong neighborhoods. The following recommendations address the most critical changes needed to allow for families to thrive during and after one of its members has been incarcerated.

### **A. AMEND LEGISLATION RELATED TO THE ACCRUAL OF CHILD SUPPORT ARREARS**

There is little dispute that parents should be held financially responsible for ensuring the well being of their children. Aggressive policies directed toward enforcement of child support obligations are designed both to hold parents accountable and to minimize the cost to the public of providing for children. Rigid application of strict child support enforcement rules in instances in which there is no realistic ability to pay, however, is a waste of resources and in many instances may in fact be counter-productive to the ultimate goal of fostering parental responsibility. Our proposals to suspend child support obligations and eliminate the accrual of child support arrears for incarcerated parents with no ability to pay such support are aimed ultimately at providing a greater ability for parents to meet their financial obligations upon release, by removing the insurmountable mountain of debt that currently builds while they are incarcerated. This will better enable them to gain the financial footing to allow them to care for and support their children.

Proponents of current rules limiting modification of child support obligations are concerned that to suspend child support obligations due to incarceration is somehow rewarding voluntary behavior. Although that might be true if the suspension was a blanket one, our proposal is for the tolling of obligations only when the incarcerated parent has no financial ability to pay child support.

In addition, some might argue that continued accrual of child support obligations while in prison would obligate a parent upon release to repay the custodial parent or government agency that has provided support for the child(ren), and that there is a financial cost to government in waiving this un-recouped obligation. However, in reality much of these arrearages are never in fact recovered, and the burden of paying back the amounts owed often forces an obligor into an underground economy which leads to loss of both repayment of the arrears and of tax income.

Our proposal to provide a waiver of automatic license forfeitures based on the accrual of child support arrears is similarly premised on the idea that a parent will be more likely to pay some portion of a child support obligation if he or she is gainfully employed. An automatic forfeiture of licenses that could affect an individual's ability to earn a living appears contrary to the ultimate goal of securing payment of one's child support obligation.

Modification of New York's rules regarding child support obligations is consistent with the goal of maximizing the successful community re-entry of formerly incarcerated individuals. Studies in other jurisdictions have shown that reducing the burden of child support obligations on recently released non-custodial parents increases the total amount of child support actually paid. The successful maintenance of lawful employment has been a noted benefit as well. In addition, parents who are able to meet more modest support obligations are more likely to become involved in the lives of their children.



The changes recommended here would require legislative amendment of certain provisions of the Family Court Act. There would be no new or increased costs related to implementing these changes to statutory provisions related to child support enforcement, because they do not involve creation of new programs. There maybe administrative costs related to new procedures necessary effectuate the new rules, but they should be offset by no longer bearing the administrative expense associated with current unfruitful enforcement and collection efforts.

Specifically, the Committee recommends the following legislative actions:

- Amend the New York State Family Court Act to provide for the suspension of child support obligations during the period of incarceration unless the Child Support Enforcement authorities demonstrate the non-custodial parent's continued ability to pay.<sup>1176</sup>
- Make Family Court Act § 413(1)(g), which limits accrual of child support arrearages to \$500 where the non-custodial parent's income is less than or equal to poverty income guidelines, specifically applicable to incarcerated parents.
- Provide for a waiver of automatic license forfeitures based on the accrual of child support arrears.

**B. IMPROVE DATA COLLECTION AND COORDINATION AMONG THE  
CRIMINAL JUSTICE SYSTEM AND CHILD WELFARE AGENCIES**

Although there has been increased attention to the special problems raised when incarcerated individuals are parents of minor children, there still exists insufficient data to understand fully the complexity of issue, especially as it relates to children in foster care. Our proposals for collection of information about the intersection of the criminal justice and child welfare systems are intended to give policy-makers a more informed basis from which to make

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<sup>1176</sup> We envision a statutory provision similar to that recently passed in Minnesota: For purposes of this section, a child support payment or the relevant portion thereof, is not past due, and no arrearage accrues during any

decisions related to this particular population. Implicit in these proposals is recognition of our State's policy determination that it is in a child's interest to maintain an active relationship with her biological parents, and that government agencies with temporary custodial care of children have an obligation to assist in maintaining contact between parents and their children.

There will undoubtedly be some costs associated with the data collection we propose. Much of the information may in fact exist in the separate databases maintained by the various government agencies responsible for overseeing the populations involved, requiring collating and merger of information as opposed to acquisition in the first instance. Whatever the costs, however, the need for this data to assist child welfare agencies in meeting their mandated responsibilities of facilitating contact between parents and children cannot be seriously denied. Similarly, the training of child welfare workers on how better to address the special needs of foster children with incarcerated parents, and the development of improved systems for communicating between the child welfare and correctional systems, are changes needed to allow caseworkers to meet their mandated responsibility to help maintain parent/child relationships.

One challenge we recognize is the need to designate specific responsibility with both correctional institutions and child welfare agencies to implement these recommendations.

- We recommend that the New York State Office for Children and Family Services promulgate regulations that require local child welfare agencies to record data on how many children with incarcerated parents are under their care, where the parent is being held and the length of sentence. The agency would also be required to notify the Department of Correctional Services of its responsibility for children of parents under DOCS custody, and to provide contact information for the caseworker handling the child's placement and the current address of the

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period when the supporting party is incarcerated, is not on work release, and has no resources with which to make payment. *See* N.C.G.S.A. § 53-13.10(d)(4).

child. The agency should also be mandated to work with designated correctional officials to develop a visitation plan. Finally, child welfare agencies should be required to maintain statistics on how many children in their care have contact with their incarcerated parent, the frequency of that contact, and whether the contact is by telephone or by in-person visit.

- Similarly, we recommend that the Department of Correction designate within each facility an individual responsible for working with child welfare agencies to assist in coordinating efforts to support communication between incarcerated parents and their children in foster care. Among this correction official's mandated responsibilities would be to maintain a roster of all prisoners in the facility with children in foster care, including the name and contact information for the agency worker responsible for the child's placement; provide to the foster care agency information on the parent's entitlement to visitation and the facility's rules related to visitation; and assist in the development of a visitation plan.

In addition, under this coordinated effort, these agencies would:

- Collect information to catalog the overlap between the criminal justice and child welfare systems, such as how many children in foster care have parents in prison or under the control of the criminal justice system; how many individuals under correctional supervision have children in foster care; and with whom these children are residing.

- Designate a liaison person within each system to act as a facilitator to coordinate efforts such as locating a parent or child in the other system, assist in arrangements for visitation, and inform staff on the rules and regulations of the other system.

- Provide special training for foster care caseworkers that work with children of incarcerated parents.

### **C. CHANGE ASFA TIMELINES FOR INCARCERATED PARENTS**

The Adoption and Safe Families Act (“ASFA”) has been instrumental in placing foster children into permanent homes more quickly and, as such, in large part it achieves its objective. On that basis, the Committee does not believe it would be beneficial to propose repealing the automatic termination proceedings in favor of allowing judges to use their sole discretion. However, the Committee does believe that in furtherance of promoting the best interests of children the New York State statute implementing ASFA should be amended to address the unique circumstances of parents who are separated from their children due to incarceration.<sup>1177</sup>

The ultimate goal of the Adoption and Safe Families Act, as implemented in New York and other states, is to ensure that children do not languish in the foster care system for extended periods of time before being placed in permanent homes. However, by its terms, this statute can have effects that are counter to that goal.

The realities of the adoption process are that it takes a significant amount of time for children to be placed in a permanent home after parental rights have been terminated.

Although under ASFA termination proceedings may begin 15 months after a parent is incarcerated, it can be two years or longer, depending on the age of the child, before an adoption becomes final. The average incarcerated mother who wishes to continue to parent her children would likely complete her prison sentence long before her children would otherwise be adopted. Given the difficulties we have noted regarding maintenance of contact between parent and child required by ASFA, as well as inadequate resources for legal assistance to incarcerated parents

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<sup>1177</sup> The federal ASFA statute provides three exceptions to the mandate to file or join a petition to terminate, including when: a. the child is being cared for by a relative (e.g., a parent or a grandparent); b. the state has documented a compelling reason that filing a petition to terminate would not serve the child’s best interests; and c. the situation requires that the non-offending parent be provided reasonable efforts to reunify and those efforts have not been provided. 42 U.S.C. § 675(E)(i), (ii), and (iii). Under the second exception, a state can pass a law that allows for a longer time period prior to filing provided that a short prison stay of 18 months qualifies as a documented reason for not filing a petition in the child’s best interests.

facing termination proceedings, such parents often have difficulty protecting their parental rights. Thus, the goal of decreasing the amount of time that children are in foster care is better served by an automatic stay of termination proceedings for incarcerated parents in limited circumstances.

This Committee recommends that the New York state implementation of ASFA be amended to allow for an automatic stay of termination proceedings for those incarcerated parents who will be released within 18 months.<sup>1178</sup>

The Committee is sensitive to the concern that some could view this recommendation as benefiting a class of parents who by their criminal conduct have “voluntarily” separated themselves from their children, or who at the very least are not deserving of special consideration in the application of ASFA.<sup>1179</sup> However, whatever view one may have of such parents, his or her children are certainly innocent victims of their conduct, and if it is in the best interest of the child to be finally and permanently with a family, provided there are no other child safety issues, the stay of proceedings to terminate parental rights serves that interest.

As with other of the Committee’s recommendations in this area, cost implications are difficult to predict with any precision. However, amending ASFA provisions as suggested has the potential to lead to cost savings if it results in children being moved out of foster care and returned to their parents faster than they would be adopted.

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<sup>1178</sup> The statute gives the states some discretion in determining whether a termination should be filed: “Nothing in this part shall be construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases...” 42 U.S.C. § 678. Colorado has outlined exceptions to the criteria for TPR when a child is in foster care for 15 of most recent 22 months that includes time in foster care is due to circumstances beyond the control of parent, such as incarceration for a reasonable time. COLO. REV. STAT. § 19-3-604.

<sup>1179</sup> See *supra* note 1177 which clarifies that some felony conviction could never be exempt.

Thus, we recommend amending the New York statute that implements ASFA legislation<sup>1180</sup> to allow for an automatic stay of termination proceedings for incarcerated parents who will be released within 18 months, but with an exception for cases where the parent is incarcerated for crimes committed against his or her child or any other child, and a provision that allows the parent to waive the automatic stay.<sup>1181</sup>

**D. ENHANCE CONTACT BETWEEN PARENTS AND CHILDREN DURING PERIOD OF INCARCERATION**

The disparate impact of incarceration on urban communities of color in New York State exists for myriad reasons, and is not the focus of this Committee’s work. However, the fact that most people are imprisoned far from their communities and families, inhibiting the ability to maintain ties between incarcerated individuals and their loved ones, is a collateral consequence of criminal proceedings that the Committee believes needs addressing. The principal concern about the Committee’s proposals is likely to be the cost involved in expanding or implementing new programming. These would include additional funding necessary to support foster care agencies with costs associated with arranging visitation between parents and children in their care, capital expenditures related to expansion and improvement of visitation facilities, and

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<sup>1180</sup> N.Y. Soc. Serv. Law. § 358-a.

<sup>1181</sup> This is consistent with the federal ASFA statute that requires states that receive funding to file an automatic termination of parental rights petition when:

- a. The child has been in foster care for 15 of the most recent 22 months;
- b. The parent has committed murder of another child of the parent;
- c. The parent committed voluntary manslaughter of another child of the parent;
- d. The parent aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter upon a child of the parent;
- e. The parent committed a felony assault upon the child or another child of the parent that results in “seriously bodily injury;”
- f. The court with jurisdiction determines the child is an “abandoned infant.” 42 U.S.C. § 675(5)(E).

This section of the statute also requires the state “concurrently, to identify, recruit, process, and approve a qualified family for an adoption.” 42 U.S.C. § 675(5)(E).

increased personnel costs resulting from the need to staff the additional programs such that security is not compromised.

The Committee's proposes that the costs of enhancement of visitation efforts by foster care agencies be studied to determine whether there is an offsetting decrease in foster care costs resulting from increased and more expeditious reunification of parents and their children. There is not likely to be similarly identifiable cost/benefit analyses of the increased correctional costs resulting from our proposals to improve prison visit facilities and programs. Likewise, the proposed changes in the current relationship between the Department Corrections and MCI, which results in a return of a portion of long distance fees to DOCS, may lead to a reduction in revenue. However, the maintenance of strong family relationships and the increased likelihood of successful re-entry due to the additional support when one returns home makes the investment of such resources a prudent one.

These changes require action both from the legislative and executive branches and administrative improvements by the Department of Correction.

- The State must increase funding to support visitation for incarcerated parents in order to allow foster care agencies to meet their statutory obligation to assist in enabling contact between parents and children. This increased funding should be accompanied by a study to compare the cost of these programs that enable reunification to the cost of continued foster care placement for a child who is not reunified with their incarcerated parent
- The Department of Correction, with increased funding, should make visits more accessible. It could do so by increasing visiting hours in medium-security prisons, and expanding inadequate visiting room facilities. In addition, the Department should improve the conditions of visitation for children by making visiting rooms child-friendly, standardizing and

simplifying visiting policies and making visiting hours responsive to the schedules of child welfare workers and the caretakers responsible for the visits.

- Corrections officials should also expand the successful summer visitation programs and increase participation in the Family Reunion Program to all maximum and some medium security prisons.

- The Department of Correctional Services should reduce the cost of collect calls by modifying its current contractual relationship with MCI, either through legislation or through administrative changes.



## **IX. CIVIC PARTICIPATION**

### **A. PERMIT THOSE ON PAROLE TO VOTE**

#### **1. Policy**

As discussed earlier, New York currently prohibits from voting people who are either: (1) in prison on felony convictions; or (2) on parole. The Committee recommends that restrictions on the latter group be eliminated so that all persons who have been released from prison are allowed to vote.

This recommendation reflects a theme underlying many of the recommendations in this report – post-release prohibitions and penalties with respect to civic participation are undesirable for a variety of reasons. Given the disproportionate numbers of minorities among those who are on parole, one must be aware that disenfranchisement laws will serve to reduce the numbers of minorities in the general electorate. On a micro level, if a board of parole has decided that an individual is eligible to be released from prison into a considerably reduced level of custody (parole), it is difficult to discern the reason why this individual should be prohibited from voting and why this person should be treated differently than those on probation. The core difference between those on parole and those on probation is that a judge sentenced the former to prison. However, given the more recent determination by the board of parole that person deserves to be released, it is logical to treat this person the same as those who are also under a reduced form of state custody (*i.e.*, probation).

Furthermore, society must take steps to encourage reintegration and must stop punishing people who have committed felonies but have served their time. Such punishments are often unfair, and prohibitions on voting are no exception. There are no compelling justifications for restricting people on parole from voting, and the dangers posed to democracy by allowing such people to vote are remarkably low, if not non-existent. Although some level of custody

following release is often desirable, restrictions on voting serve little purpose other than to create another hurdle to reintegration into society.

Allowing people on parole to vote would also ease issues with administration of the disenfranchisement laws. No longer could boards of elections and registrars ask for non-existent paperwork and effectively expand the group of citizens subject to the disenfranchisement bar. If a person is able to show up at the polls, that person will be able to vote.

Finally, the Committee recommends that the existing laws which permit those awaiting trial and those in jail for non-felony offenses to vote be enforced to make that right a reality and that people who will soon regain their right to vote be informed of how to register to vote so as to counteract the many factors which suppress post-incarceration voting. How to implement these recommendations as well as the expansion of the franchise to those on parole is discussed below.

## **2. Implementation**

Notwithstanding the possibility that the Supreme Court will grant *certiorari* in the *Hayden v. Pataki* case, litigation as a means to change the status quo appears unpromising. Moreover, as a practical matter, it appears that numerous other groups and associations (including the Association of the Bar of the City of New York) have and continue to work every possible angle still available through the courts.

Given that the source of the disenfranchisement bar is statutory, the most direct means of expanding the franchise to parolees is to amend the statute accordingly. The aforementioned S01355 would expand the franchise to those in prison as well as those on parole. The Committee urges the State Bar to support this bill. However, the Committee has decided that because of the significant hurdles to the aforementioned federal legislation (which prohibits only post-parole restrictions) being approved in the current Congress and to it being constitutional if it were passed, as well as the fact that it would not change the status quo in New York (however

parochial a view that may be), expending the State Bar's finite resources and energy in support of the such legislation regarding disenfranchisement would not be worthwhile.

Support of S01355 means support for expanding the franchise to all of those currently in custody. The Committee feels strongly that continued participation in the democratic process, even during periods of incarceration, is both valuable for our democracy and valuable as a means of rehabilitation and reintegration. The Committee is further moved by the realities of the status quo – currently people who are in prison are counted for purposes of the census as residents of the towns in which prisons are located. As a result, such towns are the beneficiary of increased largess from state and federal coffers. Although the Committee understands the rationale for this arrangement, it cannot ignore the resemblance of the status quo to the noxious “three-fifths compromise” which was struck at the time of the Constitution's creation, a compromise which formally relegated slaves to less-than-citizen status. Counting people for purposes of the census but then refusing to allow them to participate in the democratic process is not significantly different in the Committee's eyes, and the Committee therefore recommends that people in prison be allowed to vote.

In terms of enforcing the laws currently on books, the Committee recommends that absentee ballots, registration forms and provisional ballots be made available within jails and other detention facilities so that those who are allowed to vote under the law now, and as amended as recommended above, are actually able to vote. The franchise means little to those who have no access to it and if the government has decided to include such persons within the electorate, they should be afforded a real opportunity to vote.

New Jersey's government has taken steps recently to increase voting participation among those who are in prison. Its Department of Correction distributes a brochure to people in prison

that discusses the applicable law and registration procedures for people with felony convictions and shows a video in all state prisons as part of preparing people for reintegration.<sup>1182</sup>

Furthermore, New Jersey's State Parole Board recently required that all people on parole be provided with a voter registration form and instructions on how to register upon completion of parole.<sup>1183</sup> New York should consider taking these fairly low-cost measures to truly restore its citizens' right to vote.

**B. REPEAL THE BAR ON JURY SERVICE FOR THOSE NO LONGER INCARCERATED**

**1. Policy**

The Committee recommends that jury service be handled in a similar matter as voting – if a person is able to walk the streets, that person should be able to serve on a jury. The Committee recognizes that jury service cannot be expanded to all of those who are eligible to vote because of the practical difficulties in expanding jury service to people who are in jail or in pre-trial detention.

Prohibitions such as New York's which ban people *for life* from serving on a jury are simply unreasonable. Such prohibitions exacerbate the racial disparities imbedded in the criminal justice system by creating jury pools that lack a representative number of blacks and Hispanics. They add to the stigma that people who have been convicted of felonies encounter when attempting to reintegrate into society. They ignore the fact that *voir dire* can screen out those who, by reason of inability to render fair and impartial judgment, should not be serving on the jury. And the prohibitions run counter to the general trend in New York of expanding the jury pool.

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<sup>1182</sup> New Jersey Institute for Social Justice, *New Jersey Reentry Digest*. Nov. 17, 2005.

<sup>1183</sup> *Id.*

## **2. Implementation**

Given the difficulties encountered so far in litigating issues relating to the jury pool and jury service, the most direct and efficient way to effect change in the laws relevant to jury service is through legislative amendment of state statutes. The Committee recommends that the state legislature take up and pass such legislation.



## **X. IMMIGRATION**

### **A. ADOPT LEGISLATION MANDATING COURT ADVISEMENT OF THE IMMIGRATION CONSEQUENCES OF PLEADING GUILTY**

As discussed in the report,<sup>1184</sup> New York's current law, which requires courts to advise defendants of potential immigration consequences before accepting a guilty plea, is deficient in three essential ways:

- Judicial warning provisions in the law only apply to felony pleas and do not extend to misdemeanors or violations.
- The statute does not provide defendants additional time to consider fully the impact and weight of the warning.
- New York's statute is unenforceable, as the law explicitly states that the court's failure to advise a defendant of potential immigration consequences will *not affect the voluntariness of a plea of guilty* or afford a defendant any rights in subsequent immigration proceedings.

The Committee recommends that New York adopt legislation that mandates its courts to advise criminal defendants, in both misdemeanor and felony cases, of the potential adverse immigration-related consequences of a guilty plea. The court should advise defendants of specific immigration consequences, such as deportation, and allow the defendant to rescind a guilty plea if the court did provide the advisement.

This recommendation highlights the fact that immigrants in criminal proceedings need to be extremely careful in how they resolve criminal charges. Plea bargaining, after all, requires a cost benefit analysis. It requires that a defendant balance the surety of certain consequences through a plea against the uncertainty of a trial. The immigrant criminal defendant has a

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<sup>1184</sup> See discussion in Chapter IX.B.8.b.

dramatically different calculus than his citizen counterpart when deciding to take a plea. For the citizen, the choice is between the uncertain consequences of trial versus the bargained for consequences of a guilty plea. For the immigrant the choice is between the uncertain consequences of trial versus the bargained for consequences of a guilty plea followed by permanent exile. Knowing that deportation is definite or even possible is certainly a very important consideration for anyone considering a plea offer. Non-citizens must be told of this consequence if they are to make a knowing and intelligent decision.

The Committee recommends that New York follow the example of states, such as Massachusetts and California, and adopt legislation, strengthening their judicial warning provisions.<sup>1185</sup>

The Committee recommends the adoption of Assembly Bills A5285 and A4100 and Senate Bills S3191 and S829, which propose significant changes to New York's current judicial warning statute. The bills would mandate a court advisory on the immigration consequences of criminal convictions for both misdemeanor and felony cases and allow for post-conviction relief if the judge failed to provide the advisory.

The most effective way to protect the due process rights of non-citizen immigrants is to amend the New York statute to allow non-citizen defendants ample time to consider their alternatives. Some may still choose to accept a plea bargain as their best avenue for relief. However, others may opt for a trial, as this may be their only way to prevent their deportation.

In contrast with many other states, New York has been slow to acknowledge this relationship between criminal justice and deportation, resulting in a two tiered system of justice for citizens and non-citizens, the latter subject to far greater consequences for the same

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<sup>1185</sup> See *supra* Chapter IX.B.8.b.



convictions as their citizen counterparts. To restore some sense fairness to this system, New York must, at the very least, mandate that courts advise non-citizen defendants of the immigration consequences of pleading guilty.

**B. Educate and Train Judges and Counsel on the Immigration-Related Consequences of Criminal Convictions**

The Committee recommends mandatory immigration training on the immigration-related consequences of criminal convictions for the prosecutor's office, the public defender's agencies, as well as the 18-B panel.

Often, and particularly in the case of pleas to misdemeanors, defense counsel will waive formal allocution so that many of the rights the statutes require to be administered are not in fact administered. The justification for allowing this shortened colloquy with the court is the presumption that defense counsel has fully advised the client of all his rights prior to the plea. But given the Court of Appeals' decisions stating that defense counsel need not advise their clients of the immigration consequences of a plea, that presumption would be invalid. State and federal courts have declined to find ineffective assistance of counsel where the defendant's attorney has failed to inform or advise his/her client of the immigration consequences of a guilty plea on the grounds that immigration consequences are collateral.<sup>1186</sup>

In light of the current state of the law, when it comes to advising clients of the immigration consequences arising from a plea offer, the cautious criminal defense attorney in New York would best keep silent. At least that is the inference that has been sent by the New York Court of Appeals.<sup>1187</sup>

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<sup>1186</sup> See *infra supra* Chapter IX.B.8.c.

<sup>1187</sup> *Id.*

Thus, the Committee recommends CLE programs and other educational sessions for judges on judicial responsibility with regard to immigration consequences of criminal convictions. Often criminal judges do not comprehend the immigration ramifications of not extending a judicial warning to guilty pleas for misdemeanors or violations. These criminal charges may also have serious negative immigration consequences, such as those of felonies. It is therefore, critical that criminal judges receive training on the immigration consequences of criminal convictions.

Lastly, the Committee also recommends the adoption of the ABA standard 14-3.2(f) for criminal defense attorneys in New York, which states that “to the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.” This would allow defense counsel to educate themselves about the immigration consequences of a conviction by accessing the New York State Defender Association’s website or by calling their hotline, which provides advice to defense counsel on immigration issues.<sup>1188</sup>

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<sup>1188</sup> Additionally, Manuel Vargas of the New York State Defenders Association, Immigrant Defense Project, has published a manual “Representing Noncitizen Criminal Defendants in New York State,” which is an invaluable and indispensable aid for any defense attorney.

## **CONCLUSION**

New York has unwittingly constructed formidable barriers to those attempting to re-enter society following interaction with the criminal justice system. These barriers, consisting of a myriad of “collateral consequences,” were erected by statutory, regulatory and policy decisions made without adequate consideration of their combined detrimental effect. As they presently stand, these collateral consequences hinder successful reintegration by restricting access to the essential features of a law-abiding and dignified life – family, shelter, work, civic participation and financial stability. These barriers doom us all: those blocked from successful re-entry find themselves on the road to recidivism, and the rest of us pay the price.

We believe the time is overdue to begin the deconstruction of these barriers and the construction of a smoother path to successful re-entry and reintegration. It will take a concerted, holistic approach to reform a tangle of collateral consequences that developed largely haphazardly. But the benefits are undeniable. Promoting successful re-entry and reintegration will increase the chances that a person with a criminal record can become a productive member of society and will decrease recidivism rates, making us all safer. The New York State Bar Association – the voice of the legal profession in this state – should be at the forefront of building this road to public safety.



## **APPENDIX: MEDICAL AND MENTAL HEALTH ISSUES**

If medical and mental health care are not provided when a person is in jail or prison, that person's condition can deteriorate, leading to even greater costs and burdens to the person, their family and society upon release. In addition, being incarcerated has significant medical and mental health consequences, both to the individual and to society. These consequences result from a myriad of factors, including the cost and quality of health care and the security concerns in meeting inmates' needs for health care.<sup>1189</sup>

The provision of health care in any setting is complicated; in a correctional setting there are unique barriers to the provision of care. For example, inmates cannot self-medicate, they cannot go to a pharmacy and choose an over-the-counter remedy, they cannot choose a medical provider, and they cannot bring a trusted family member to an appointment to translate for them. Inmates are completely dependent upon prison authorities for all aspects of their medical and mental health.

Given their breadth, this report does not attempt to address the many issues involving the provision of medical and mental health services to incarcerated persons. It does not, for example, attempt to address the appropriate interplay between security and the provision of health care.<sup>1190</sup> It does not look to the question of whether an inmate should be able to see the physician of his or her choice if he or she has the funds.<sup>1191</sup> It does not evaluate the adequacy

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<sup>1189</sup> Collateral consequences extend to all parts of jail and prison life that are not government-sanctioned punishments, including assaults from other inmates, staff assaults, and sexual abuse. This does not mean that government could not take actions to address these areas. *See, e.g.*, Prison Rape Elimination Act, Public Law § 108-79 (2003).

<sup>1190</sup> *See, e.g., Reynolds v. Sielaff*, 81 Civ. 107 (Stipulation and Order of Settlement Oct. 1, 1990) (Consent Judgment imposing absolute prohibitions on the shackling of certain categories of prisoners in New York City Department of Correction custody who are admitted to municipal hospitals, including women admitted to deliver a baby and persons near death).

<sup>1191</sup> *See, e.g., Matter of Lombard v. Breslin*, Index No. 8344/04, Decision and Order (Richmond County Mar. 30, 2005) (granting Article 78 allowing inmate access to ophthalmologist at New York Eye and Ear Hospital

and availability of the substance abuse treatment provided in New York, despite the obvious need for such services,<sup>1192</sup> the relationship between drug involvement and recidivism, and the long waiting lists for treatment within DOCS custody.<sup>1193</sup>

The types of issues that arise with regard to medical care and mental health care arise in both the New York State correctional system, which is overseen by the New York State Department of Correctional Services (DOCS) and the local jails, including the New York City Department of Correction. Although significant information is available about the New York City jail system, data has not been gathered about the local jail facilities throughout the State. For this reason, this report focuses on the state correctional system but recommends that a review of medical care and mental health care in all the local jail facilities in the State be undertaken.

Instead, this report focuses on some of the most serious medical conditions experienced by people in custody, particularly AIDS and hepatitis C as well as the provision of mental health services. The challenges involved in providing care to these populations exemplify many of the more general issues regarding the provision of health care in prison. These broader issues should be addressed by others involved in the NYSBA who are interested in criminal justice and health issues.

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where inmate claimed he was going blind, and was willing to pay all expenses), *rev'd, Lombard v. Breslin*, 813 N.Y.S.2d 233 (2006).

<sup>1192</sup> Seventy-three percent of inmates in DOCS report a substance abuse history. See New York State Dep't of Correctional Servs., *Hub System: Profile of Inmate Population Under Custody*, at i (Jan. 1, 2004).

<sup>1193</sup> See The Correctional Ass'n of New York, *State of the Prisons 2002-2003: Conditions of Confinement in 14 New York State Correctional Facilities*, at 20 (June 2005).

## A. MEDICAL CARE

### 1. The Law and Its Effects

#### a. The Legal Obligations Regarding Medical Care

The Supreme Court has held that “deliberate indifference” to an inmate’s serious medical needs violates the prohibition of cruel and unusual punishment. Protections under the law are vague, with no clear affirmative obligations and standards imposed upon prison and jail authorities.<sup>1194</sup>

There has been a steady stream of litigation about the provision of health care, focusing on issues including the delay or denial of access to medical attention;<sup>1195</sup> the denial of access to medical personnel qualified to exercise judgment about a particular problem;<sup>1196</sup> and the interference with medical judgment by non-medical factors, including cost and security.<sup>1197</sup>

Institutional reform litigation concerning health care in both the New York City jails and New York State prisons has been substantial.<sup>1198</sup> For example, Bedford Hills, the largest women’s

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<sup>1194</sup> See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (“The government [has an] obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on those prison authorities to treat his medical needs. It is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself.”).

<sup>1195</sup> See, e.g., *Benjamin v. Schwartz*, 299 F. Supp. 2d 196, 201 (S.D.N.Y. 2004) (holding that a two year delay in necessary surgery stated a claim); *Suarez v. Keiser*, 338 F. Supp. 2d 442, 444 (W.D.N.Y. 2004) (holding that an allegation of protracted delay in treating a vascular condition resulting in serious pain and confinement to a wheelchair stated a constitutional claim); see also *McKenna v. Wright*, 386 F.3d 432, 437 (2d Cir. 2004) (holding protracted delay in starting hepatitis C treatment stated a claim); *Brock v. Wright*, 315 F.3d 158 (2d Cir. 2003) (holding that a policy of denying treatment for painful keloid scars presented a jury question of a constitutional violation).

<sup>1196</sup> *Hemmings v. Gorczyk*, 134 F.3d 104 (2d Cir. 1998) (allegation of delay in sending a prisoner with a ruptured tendon to a specialist stated a constitutional claim).

<sup>1197</sup> *Wright*, 386 F.3d at 437 (allegation of delay in treatment for serious illness because the prisoner might be released in 12 months stated a constitutional claim).

<sup>1198</sup> Major institutional reform cases, most litigated by the Prisoners’ Rights Project of the New York City Legal Aid Society, include: *Hilton v. Wright*, 9:05-CV-1038 (N.D.N.Y. Feb. 26, 2006), filed by Koob & Magoolaghan (statewide challenge to hepatitis C policies); *Disability Advocates, Inc. v. Office of Mental Health*, 02 CV 4002 (S.D.N.Y. filed May 2002) (statewide challenge to inadequate mental health services); *Inmates with HIV v. Goord*, 90 CV 252 (N.D.N.Y. filed 1990) (statewide challenge to medical treatment of HIV-infected prisoners);

prison in New York State, was subject to a federal court order about medical care for more than 20 years.<sup>1199</sup>

### **b. Particular Health Care Issues in DOCS**

The New York State Department of Correctional Services (DOCS) is responsible for providing medical and mental health care to the 64,000 inmates in its custody. In recent years, the most common inmate complaints received under DOCS' inmate Grievance Program have related to the quality of medical care.<sup>1200</sup>

### **c. HIV/AIDS**

The current population of HIV-infected inmates in New York represents the highest number, and percentage, of HIV-infected inmates in any prison system in the United States. As of the end of 2003, the year for which the most recent national figures are available, New York's HIV-infected prison population was 5,000, more than one and a half times the size of Florida's,

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*Benjamin v. Schembri*, 75 Civ. 3073, Stipulation and Order (S.D.N.Y. June 29, 1994) (agreed order limiting medical care budget cuts); *Todaro v. Ward*, 565 F.2d 48 (2d Cir. 1977) (affirming injunction concerning medical care at women's maximum security state prison); *Milburn v. Coughlin*, Stipulation of Terms of Modified Judgment by Consent (S.D.N.Y. Sept. 27, 1991) (consent decree governing medical care at men's maximum security state prison, still in effect); *Dean v. Coughlin*, 623 F. Supp. 392 (S.D.N.Y. 1985) (decision finding dental care at maximum security women's prison constitutionally inadequate); *Reynolds v. Ward*, 81 Civ. 107 (MEL), Stipulation and Order of Settlement (S.D.N.Y. Aug. 1, 1990) (consent decree governing mental health care, living conditions, and restraint practices in New York City hospital prison wards and for "outposted" patients in civilian wards); *Vega v. Ward*, 82 Civ. 6475 (SAS), Stipulation and Order (S.D.N.Y. Oct. 12, 1990) (consent decree governing medical care and living conditions for prisoners held in Rikers Island Infirmary); *Vega v. Mitchell*, 82 Civ. 6475, Order Relating to Medical Placement and Isolation of Patients with Contagious Diseases (S.D.N.Y. May 16, 1992) (order requiring the construction of Contagious Disease Units on Rikers Island).

In addition to these cases seeking injunctive relief, there have been and continue to be large numbers of damage cases involving allegations and/or findings of serious medical mistreatment. *See, e.g., McKenna v. Wright*, 386 F.3d 432 (2d Cir. 2004) (holding challenge to prison rule limiting hepatitis C treatment stated a deliberate indifference claim against chief medical officer).

<sup>1199</sup> *Todaro v. Coughlin*, 74 Civ. 4581 (RJW), Second Modified Judgment; Stipulation and Order (Order terminated Dec. 1, 2004). The court ordered minimum levels of nurse and physician staffing, including infectious disease physicians; a chronic care recall system to ensure that prisoners with chronic illnesses would periodically be seen by appropriate medical providers; procedures to ensure access to ordered care, including specialists; and stringent time frames for access to gynecological care for women, particularly for those with AIDS or with a background making it likely that she had been infected with the AIDS-virus.

<sup>1200</sup> New York State DOCS, *Inmate Grievance Program Annual Report 2003*; New York State DOCS, *Inmate Grievance Program Annual Report 2002*.



more than twice that of Texas, and more than quadruple the number of HIV-infected inmates in the California prison system.<sup>1201</sup> Recent, blind seroprevalence studies show that approximately 5% of males and 14% of females are infected when they arrive in DOCS' custody.<sup>1202</sup> Of these estimated 5,000 HIV positive prisoners in DOCS custody at year's end in 2003, only about 1,650 were known to DOCS medical staff through a positive lab test conducted following counseling and informed consent by the inmate.<sup>1203</sup> The low number of individual inmates known to be infected demonstrates that available counseling and testing programs are not successful at encouraging inmates to seek out their HIV status and to make decisions about whether to begin treatment.

Although AIDS related deaths have declined markedly in the general population since 1995, largely due to the availability of life prolonging antiretroviral medication, inmates with HIV/AIDS, many of whom die of liver failure, cancer, and other diseases, still account for one-third of prison deaths in New York State.<sup>1204</sup>

Efforts to treat and prevent the spread of the disease have not been comprehensive. There is little structure in place to monitor the patients to make sure that they are taking their medication and that proper adjustments, which are often required for HIV-positive patients, are

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<sup>1201</sup> Laura M. Maruschak, *HIV in Prisons*, 2003 (U.S. Dept. Of Justice, Bureau of Justice Statistics, Sept. 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivp03.pdf>.

<sup>1202</sup> Testimony of DOCS Comm'r Glenn S. Goord, Assembly Committees on Health and Correction (Nov. 14, 2003).

<sup>1203</sup> New York State Dep't of Correctional Servs., Response to Document Request of the Assembly Committee on Correction and Committee on Health (Dec. 30, 2003).

<sup>1204</sup> The Correctional Ass'n of New York, *State of the Prisons 2002-2003: Conditions of Confinement in 14 New York State Correctional Facilities*, at 11 (June 2005), available at [http://www.correctionalassociation.org/PVP/publications/State\\_of\\_Prison\\_02\\_03.pdf](http://www.correctionalassociation.org/PVP/publications/State_of_Prison_02_03.pdf) (citing testimony of John A. Beck, Public Hearing on Health Care in NYS Prisons, Assembly Committees on Health and Corrections (Apr. 30, 2004)).

being made to their medicinal regimen.<sup>1205</sup> There are inadequate numbers of health care providers on the prison health care staffs with the necessary training and expertise to perform the increasingly complex medical management of HIV-infected patients.<sup>1206</sup>

With respect to issues of prevention, DOCS, along with the correctional departments of 47 other states,<sup>1207</sup> has refused to distribute condoms among the inmates because sexual relations are technically not allowed in prison. Commissioner Goord has stated that if condoms were distributed to the inmates it would embolden them to commit more crimes of violence (rape and other sexual assaults) because they would not have to worry about leaving behind DNA or contracting HIV.<sup>1208</sup>

Prison advocates have argued that condoms should be distributed in prisons, both because of the risk of infection within prisons themselves and because of the impact on the public health because inmates are released back into their communities where others can be infected.<sup>1209</sup> In

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<sup>1205</sup> The Correctional Ass'n of New York, *Health Care in New York State Prisons: A Report of Findings and Recommendations by the Prison Visiting Committee of the Correctional Association of New York*, at 7 (1999).

<sup>1206</sup> Although 20 DOCS health care providers qualified as HIV Specialists under a DOCS-administered program in 2000 and 2001, those providers were not matched with the patients who needed their services because they were not necessarily deployed at facilities with the highest incidences of the disease. In 2002, DOCS providers began receiving HIV Specialist credentials from the American Academy of HIV Medicine (AAHIVM), and Commissioner Goord has testified that 30 DOCS physicians were credentialed in that year. Testimony of Comm'r Glenn S. Goord (Nov. 14, 2003). However the accuracy of that testimony is in question, since the AAHIVM website lists at most six DOCS-employed health care providers as HIV Specialists. Testimony of Milton Zelermyer, at 6-7 (Apr. 30, 2004).

<sup>1207</sup> Mississippi and Vermont distribute condoms to inmates, as do the jail systems in New York City, Philadelphia, Washington, D.C., San Francisco, and Los Angeles. Theodore M. Hammett, Patricia Harmon & Laura M. Maruschak, *1996-97 Update: HIV/AIDS, STDs and TB in Correctional Facilities* (National Institute of Justice, July 1999), available at <http://www.ncjrs.gov/pdffiles/176344.pdf>; Human Rights Watch, *Tell California to Allow Condoms in Prison* (sample letter to Governor Schwarzenegger), available at <http://hrw.org/english/docs/2005/04/27/usdom10551.htm>.

<sup>1208</sup> Testimony of NYS Dep't of Correctional Servs. Comm'r Glenn S. Goord, Assembly Standing Committees on Health and Correction, at 8-12 (Mar, 15, 2004).

<sup>1209</sup> Brent Staples, *Fighting the AIDS Epidemic by Issuing Condoms in the Prisons*, N.Y. TIMES, Sept. 7, 2004, available at <http://www.aegis.com/news/nyt/2004/NYT040905.html>; Human Rights Watch, *Tell California to Allow Condoms in Prison* (sample letter to Governor Schwarzenegger), available at <http://hrw.org/english/docs/2005/04/27/usdom10551.htm>; The Correctional Ass'n of New York, *Health Care in*

recognition of the needs and benefits of preventing transmission of HIV and other diseases in the state's prisons, state legislators introduced bills (A. 3720, S. 3048) to require DOCS to institute education and prevention programs, including distribution of condoms.

**d. Hepatitis C**

A growing problem in prisons has been the spread and treatment of hepatitis C . The hepatitis C virus is one of the most important causes of chronic liver disease in the United States.<sup>1210</sup> Chronic hepatitis C can cause cirrhosis, liver failure, and liver cancer.<sup>1211</sup> It accounts for about 20% of acute viral hepatitis, 60 to 70% of chronic hepatitis, and 30% of cirrhosis, end-stage liver disease, and liver cancer. Many people with hepatitis C have no symptoms of liver disease. In the United States, two different treatments have been approved as therapy for hepatitis C: monotherapy with alpha interferon and combination therapy with alpha interferon and ribavirin.<sup>1212</sup> A new, more effective form of interferon, called pegylated interferon has been approved and is the preferred type for both monotherapy and combination therapy.

Hepatitis C has an enormous impact on prison health care in New York State. Approximately 14% of male inmates and 23% of female inmates are infected with this disease.<sup>1213</sup> Inmates face obstacles to treatment for hepatitis C that are similar to those confronted by inmates in obtaining other medical treatment, including delays in evaluation and problems in access to specialty care. The issues in the treatment of hepatitis C illustrate the

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*New York State Prisons: A Report of Findings and Recommendations by the Prison Visiting Committee of the Correctional Association of New York*, at 14 (1999).

<sup>1210</sup> "Chronic Hepatitis C," NIDDK, WebMD Public Information from the National Institutes of Health.

<sup>1211</sup> *Id.*

<sup>1212</sup> *Id.*

<sup>1213</sup> The Correctional Ass'n of New York, *State of the Prisons 2002-2003: Conditions of Confinement in 14 New York State Correctional Facilities*, at 13 (June 2005).

effects of incarceration on the provision of medical care. DOCS' decisions to impose barriers to treatment not found in other settings and not mandated by treatment considerations remained in place for years, and were removed only after substantial court intervention.

First, inmates who had a history of drug or alcohol abuse were required to participate in an Alcohol and Substance Abuse Treatment or Residential Substance Abuse Treatment program (ASAT/RSAT) as a co-requisite to treatment for hepatitis C. DOCS changed this policy in October, 2005, following court decisions in the Second Circuit<sup>1214</sup> and the Appellate Division,<sup>1215</sup> which held that imposing such a programmatic barrier constituted deliberate indifference to a serious medical need when treatment for hepatitis C is indicated, and after a class action on behalf of inmates with hepatitis C was filed.<sup>1216</sup> As a result, no such pre-requisite is now being imposed by DOCS.<sup>1217</sup>

Second, inmates could only receive treatment for hepatitis C if it could be assured that they would remain in DOCS custody for a set period of time, so that the inmate could be evaluated for treatment and the treatment regimen completed.<sup>1218</sup> Depending on virus genotype, the required period of anticipated incarceration was either 9 or 15 months.<sup>1219</sup> The rationale for this policy was to ensure that treatment would be completed without disruption, because of DOCS' belief that there was a lack of treatment providers in the community for inmates upon

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<sup>1214</sup> *McKenna v. Wright*, 386 F.3d 432 (2d Cir. 2004); *Johnson v. Wright*, 412 F.3d 398 (2d Cir. 2005).

<sup>1215</sup> *Domenech v. Goord*, 797 N.Y.S.2d 313 (2d Dep't 2005).

<sup>1216</sup> See Declaration of Lester Wright, Chief Medical Officer of DOCS, submitted in *Hilton v. Wright*, 05-Cv-1038 (DNH/DEP) (Oct. 18, 2005).

<sup>1217</sup> See Teletype by Lester Wright, Chief Medical Officer of DOCS, re: Revised Hepatitis C Guidelines.

<sup>1218</sup> See Hepatitis C Primary Care Guideline, from Lester Wright, Chief Medical Officer of DOCS (Oct. 13, 2005).

their release.<sup>1220</sup> Inmates with insufficient time remaining until their release, or eligibility for release from DOCS custody, could *not* receive hepatitis C treatment because of potential deficiencies in discharge planning. This led to inmates not receiving needed hepatitis C treatment. On occasion, it resulted in inmates having to choose between treatment and agreeing to stay in prison past their release date, or foregoing needed medical care.<sup>1221</sup> Following the filing of the class action on behalf of inmates infected with hepatitis C, and acknowledging that statewide availability to care upon release had been developed, this barrier was dropped in October, 2005.<sup>1222</sup> DOCS agreed that even if an inmate/patient does not have anticipated incarceration adequate to complete evaluation and treatment, the patient can begin treatment and be followed after release through the “Continuity Program,” which is supposed to provide hepatitis C treatment in the community following release.<sup>1223</sup>

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<sup>1219</sup> DOCS Hepatitis C Practice Guideline (July 20, 2004). For genotype 1 or 4, the duration of treatment is 48 weeks; for genotype 3 or 4, it is 24 weeks. Also, for someone co-infected with hepatitis C and HIV, the duration of treatment is 48 weeks, regardless of genotype.

<sup>1220</sup> Testimony by Comm’r Glenn S. Goord, Committees on Correction and Health, at 16 (Dec. 30, 2003) (“This requirement is meant to minimize partial treatment since, there being no program to provide treatment for Hepatitis C in the community, many of those who are released from prison would not be able to complete treatment after release.”)

<sup>1221</sup> The Correctional Ass’n of New York, *State of the Prisons 2002-2003: Conditions of Confinement in 14 New York State Correctional Facilities*, at 13 (June 2005).

<sup>1222</sup> *Id.*

<sup>1223</sup> See Hepatitis C Primary Care Guideline, from Lester Wright, Chief Medical Officer of DOCS (Oct. 13, 2005).

**2. Suggestions Regarding Medical Care in DOCS**

**a. Legislation Supporting the Distribution of Condoms in Correctional Facilities to Address the HIV Crisis in the Prisons**

In recognition of the needs and benefits of preventing transmission of HIV and other diseases in the state's prisons, legislation (A. 3720, S. 3048) requiring DOCS to institute education and prevention programs, including the distribution of condoms, should be enacted.

**b. Oversight is Needed to Ensure that Access to Hepatitis C Treatment is not Curtailed**

Following substantial court intervention, as of October, 2005, DOCS changed its most draconian policies regarding hepatitis C treatment. DOCS now allows inmates to receive needed hepatitis C care without imposing programmatic barriers. DOCS also allows inmates who are close to release to receive needed treatment, and thus not penalize inmates in need of care because of DOCS inadequate discharge planning. DOCS' ultimate recognition that medical judgments need to be paramount to programming considerations and their acknowledgment that it is important to develop a continuum of care between prisons and the community are to be applauded. These changes in DOCS' policies occurred only after advocates sought and the courts required that the policies be changed. Vigilance should be maintained by advocates so that rationing or other barriers to treatment are not instituted.

**c. The New York State Department of Health Should be Given Statutory Oversight of Prison Health Care**

Although the New York State Department of Correctional Services is responsible for the health care needs of almost 64,000 prisoners, it is not subject to the oversight of the New York State Department of Health which has such oversight over other health care providers in New York. Bills introduced in the 2006 sessions would address some of these deficits: A. 3544, which creates oversight responsibility for the Department of Health regarding DOCS policies

and practices for the treatment of HIV/AIDS and hepatitis C; and A. 3586, which would amend the Public Health Law to bring DOCS-run medical facilities within the Department of Health's regulatory authority.

## **B. MENTAL HEALTH CARE**

### **1. The Law and Its Effects**

This section focuses on the collateral consequences of confinement for prisoners with mental illness, including the interrelationship between inadequate resources for mental health treatment within the prisons, the prison disciplinary system and parole. Collateral consequences for the prisoner with mental illness can include: confinement in psychiatrically punishing disciplinary isolated confinement housing, a longer stay in prison, and civil commitment to a psychiatric hospital instead of parole to the street.<sup>1224</sup>

The Commissioner of Correctional Services and the Commissioner of Mental Health have joint responsibility for establishing programs for the treatment of inmates with mental illness who need psychiatric care but who do not require hospitalization for the treatment of their mental illness.<sup>1225</sup> For those inmates who require psychiatric hospitalization, the Commissioner of Mental Health is mandated to provide facilities where inmate-patients may receive care and treatment.<sup>1226</sup> In New York State, approximately 7,500 inmates, 11% of the prison population,

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<sup>1224</sup> There are numerous other issues that this report does not address that need review including the "traveling Rivers orders" which permit treatment over objection to court orders being carried out within the prisons. *Rivers v. Katz*, 67 N.Y.2d 485, 498 (1986). Prisoners with mental illness are now the only mental health patients who are treated over objection outside of a therapeutic hospital setting. See, e.g., *In re Smith*, 195 Misc. 2d 854, 763 N.Y.S.2d 200 (Sup. Ct. N.Y. Co. 2002). The lack of a therapeutic environment within the prison is further complicated by the lack of access to the Mental Hygiene Legal Services attorneys who represent all other patients subject to involuntary medication orders.

<sup>1225</sup> N.Y. CORRECT. LAW § 401.

<sup>1226</sup> N.Y. MENTAL HYG. LAW § 29.27(b).

are assigned to the mental health caseload.<sup>1227</sup> A study conducted in 2002 determined that 72% (5,400) of their caseload has a diagnosed serious mental illness such as schizophrenia, bi-polar disorder and major depressive disorder.<sup>1228</sup> Inpatient and outpatient services are provided by the Office of Mental Health (OMH) through Central New York Psychiatric Center (CNYPC) which includes CNYPC, the maximum security forensic inpatient hospital in Marcy, NY, and its' outpatient services in twelve Satellite Mental Health Units and eleven Mental Health Units located within the prisons. CNYPC, the psychiatric inpatient hospital in Marcy, NY, has 189 beds for state inmates. CNYPC is not a DOCS facility, it is run by OMH with security provided by DOCS staff. Similarly, the CNYPC outpatient units within the state prisons are staffed by OMH personnel with security provided by DOCS.

OMH and DOCS classify patients and facilities from level one (highest level of need/largest amount of services available) to level six (no mental health services needed or available). A level one classification means that the facility houses a Satellite Mental Health Unit with full time psychiatric staff, a Residential Crisis Treatment Program (RCTP) and an Intermediate Care Program (ICP). Until very recently, the ICP was the only outpatient residential mental health care program in New York State prisons.<sup>1229</sup> The RCTP is not a

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<sup>1227</sup> New York State Office of Mental Health, *2005-2009 Statewide Comprehensive Plan for Mental Health Services*, at 89.

<sup>1228</sup> Beatrice Kovaszny, Richard Miraglia, Richard Beer & Bruce Way, *Reducing Suicides in New York State Correctional Facilities*, PSYCHIATRIC Q., Vol. 75, No. 1, at 64 (Spring 2004); *see also* U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, MENTAL HEALTH TREATMENT IN STATE PRISONS, 2000, at 6, App. tbl. B (in New York, 0.4% of inmates receive inpatient treatment, 10.2% of inmates receive mental health services, 6.7 % receive psychotropic medications).

<sup>1229</sup> In late summer and early fall 2005, OMH and DOCS opened two residential "Behavioral Health Units" located at Great Meadow and Sullivan. There are 102 beds in the two units combined. *See New York State Office of Mental Health 2005-2009 Statewide Comprehensive Plan for Mental Health Services*, at 98. There are also two "Special Treatment Programs" (STP) located within isolated confinement disciplinary Special Housing Units (SHU). At Five Points, the STP patients are housed in a separate section of the SHU. At Attica the patients are housed at cell locations throughout the SHU. There are 43 STP slots in the two facilities. An additional 75 STP slots are anticipated to be opened in 2006. *Id.* at 99.



housing area; it provides only short term crisis beds within a Satellite Mental Health Unit. The RCTP crisis beds consist of beds in a small open dormitory area and in individual locked observation cells. Prisoners on a suicide watch are housed in the observation cells on the RCTP. A level two facility maintains full-time OMH staff with part-time psychiatric staff. Levels three and four facilities offer outpatient care as well but only maintain part time OMH staff. Level six classification (there is no level five) means that there are no mental health services available. All OMH level 1 facilities are also maximum security prisons. Recently two Satellite Mental Health Units have opened in medium security prisons (Mid-State and Fishkill) and there are plans for one more (Albion). However, those facilities are classified as OMH level 2 status and consequently do not house any of the state's prisoners who are classified as most in need of mental health services (OMH level 1). All patients who require the highest level of available mental health services are confined in maximum security prisons due to their mental illness regardless of their security classification.

**a. Prisoners with Mental Illness**

Housing patients with mental illness within a corrections environment is challenging because the corrections environment is based upon a punishment paradigm not a treatment paradigm.<sup>1230</sup> The correctional setting is simply contrary to the goals of providing for the therapeutic needs of many individuals with mental illness. Moreover, the symptoms of many patients with mental illness (*e.g.*, fearfulness, impulsivity, paranoia, hopelessness, manic behavior, bizarre behaviors associated with psychosis) make it difficult for the mentally ill person to adapt to prison rules and conditions.<sup>1231</sup> In addition, many prisoners, who prior to

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<sup>1230</sup> See Joel A. Dvoskin & Erin M. Spiers, *On the Role of Correctional Officers in Prison Mental Health*, PSYCHIATRIC Q., Vol. 75, No. 1 (Spring 2004).

<sup>1231</sup> *Id.*; see Terry Kupers, *Malingering in Correctional Settings*, Correctional Mental Health Report (Mar./Apr. 2004).

incarceration, never suffered a psychiatric crisis and who may not have a serious mental illness diagnosis will, nonetheless, during a term of incarceration, at some point experience a serious mental health need that will require intervention by mental health professionals. This conflict between the need to treat and the need to punish has resulted in recurring problems for corrections staff, mental health staff and prisoners with mental illness, and in numerous lawsuits for wrongful death (for tragic consequences including suicide and death by positional asphyxia), and lawsuits which allege disability claims, due process claims and Eighth Amendment claims of deliberate indifference to serious mental health needs.<sup>1232</sup>

In New York State, prisoners with the most serious mental health needs are classified as OMH level 1 and as a result are housed in maximum security prisons. Housing in a maximum security prison limits access to all programming not available in maximum security prisons and may also limit access to programming within the maximum security prison due to a patient's increased vigilance and concern for victimization whether that concern is real or merely perceived. Maximum security prisons also have more restricted movement requirements and a generally more structured environment than medium or minimum security prisons. For the prisoner with mental illness who has problems with adapting to the maximum security prison environment (*e.g.*, due to a history of trauma which has created a distrust and fear of authority, to

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<sup>1232</sup> See *Disability Advocates Inc. v. New York State Office of Mental Health et. al.*, 02 CV 4002 (S.D.N.Y. 2002) (state-wide litigation alleging inadequate mental health treatment in violation of Eighth Amendment, the Americans with Disabilities Act and the Rehabilitation Act); *Dipace v. Goord*, 02 Civ. 5418 (S.D.N.Y. 2004) (wrongful death action for suicide of prisoners with serious mental illness); *McClary v. Kelly*, 4 F. Supp. 2d 195 (W.D.N.Y. 1998) (prolonged term in administrative segregation raises due process implications based in part on the negative affect of isolation on prisoners' mental health); *Perri v. Coughlin*, No. 90-Cv-1160, 1999 WL 395374 (N.D.N.Y. June 11, 1999) (deficient mental health treatment in SHU and RCTP); *Anderson v. Goord*, 87 CV 141 (N.D.N.Y. 1987) (due process claims and Eighth amendment claims concerning prisoners with mental illness in SHU at Auburn and Green Haven); *Eng v. Goord*, Civ. 80-385S (W.D.N.Y. 1980) (claims of inadequate mental health treatment in Attica SHU); *Langley v. Coughlin*, 715 F. Supp. 522 (S.D.N.Y. 1989) (effects of SHU placement on individuals with mental disabilities at Bedford Hills).

impulsivity, or to hyper vigilance), all too common results are that the prisoner runs afoul of the prison regulations or that the prisoner suffers repeated psychiatric deteriorations, or both.

### **b. Discipline**

Violation of prison rules and regulations subject the prisoner with mental illness to the disciplinary procedures of the prisons.<sup>1233</sup> State law has long required that when mental health is “at issue” in a prison disciplinary hearing it should be considered by the hearing officer.<sup>1234</sup> Despite this requirement, a disproportionately high number of prisoners with mental illness are housed in disciplinary housing where they are locked in their cells for twenty-three hours per day.<sup>1235</sup> The detrimental impact of housing prisoners with mental illness in isolated confinement housing is well established. Its most tragic consequence is repeatedly illustrated by the disproportionate number of the suicides of DOCS prisoners which occur within these disciplinary isolated confinement housing areas.<sup>1236</sup>

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<sup>1233</sup> 7 NYCRR § 251.1 *et. seq.*

<sup>1234</sup> See *Huggins v. Coughlin*, 548 N.Y.S.2d 105, 107 (3d Dep’t 1989), *aff’d*, 76 N.Y.2d 904 (1990) (the Third Department determined that even though there is no regulatory authority providing that the affirmative defense of mental disease or defect is available in a prison disciplinary hearing, there is support for the proposition that the hearing officer is required to consider the prisoner’s mental condition in making the disciplinary disposition when the inmate’s mental state is at issue); *People ex rel. Reed v. Scully*, 140 Misc. 2d 379, 531 N.Y.S.2d 196, 199 (Sup. Ct. Oneida Cty. 1988) (“the mental competence and mental illness of a prisoner must be considered during the prison disciplinary process where a Penal Law § 40.15 adjudication has been made or a well-documented history of serious psychiatric problems calls the prisoner’s mental health into question,” and the mental condition of the prisoner must be considered in deciding whether the disciplinary determination is supported by substantial evidence); *Trujillo v. Lefevre*, 130 Misc. 2d 1016, 498 N.Y.S.2d 696, 698 (Sup. Ct. Clinton Co. 1986) (the seriousness of the offense or the number of incidents is irrelevant and “any determination by the mental health unit that the petitioner’s lack of mental health was a causal factor in his misbehavior should apply equally to all charges.”).

<sup>1235</sup> *In Eng v. Goord*, DOCS and OMH stated, in the June 12, 2000, *Mental Health Services Plan for Special Housing Unit Patients at Attica Correctional Facility*, that between 30-40% of prisoners housed in the Attica SHU are on the active OMH caseload.

<sup>1236</sup> Only 8% of the total prison population is housed in isolated confinement housing settings. An analysis of 76 suicides by prisoners on the OMH caseload between 1993 and 2001 revealed that 30% of the suicides occurred in these isolated confinement housing settings (23% in disciplinary housing and 7% in administrative segregation housing). Kovaszny et al, *supra* note 1228, at 66.

The failure of DOCS and OMH to intervene during disciplinary proceedings to prevent prisoners with mental illness from being punished for manifestations of their illness and the failure to intervene to remove prisoners with mental illness from the harsh conditions of disciplinary isolated confinement housing have been the subject of several lawsuits.<sup>1237</sup> As a result, there have been recent developments in both the disciplinary process and in the treatment provided in the Special Housing Units in New York State prisons.<sup>1238</sup> Moreover, in this Circuit, the psychological effects of prolonged isolation in disciplinary confinement are clearly viewed as

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<sup>1237</sup> See *Disability Advocates Inc. v. New York State Office of Mental Health et. al.*, 02 CV 4002 (S.D.N.Y. 2002) (state-wide litigation alleging inadequate mental health treatment in violation of the Eighth Amendment, the Americans with Disabilities Act and the Rehabilitation Act); *Anderson v. Goord*, 87 CV 141 (N.D.N.Y. 1987) (due process claims and Eighth amendment claims concerning prisoners with mental illness in SHU at Auburn and Green Haven); *Eng v. Goord*, Civ 80-385S (W.D.N.Y. 1980) (claims of inadequate mental health treatment in Attica SHU); *Langley v. Coughlin*, 715 F. Supp. 522 (S.D.N.Y. 1989) (effects of SHU placement on individuals with mental disabilities at Bedford Hills).

<sup>1238</sup> A settlement of the due process claims in the case *Anderson v. Goord*, 87 CV 141 (N.D.N.Y. 1987), resulted in amendment of 7 NYCRR §§ 251.2.2, 254.6, and 254.7, and adoption of 7 NYCRR § 310, incorporating into the regulations procedures by which the mental health of inmates will be given consideration in prison disciplinary proceedings and following their assignment to SHU. Although *Huggins* established that mental health status was relevant to both responsibility for alleged misconduct and for mitigation of punishment, it was not clear when mental health was “at issue,” how the hearing officer will know when it is, nor how much weight it is to be afforded in the process. The amended regulation requires that when certain circumstances occur, mental health will be considered by the hearing officer. See 7 NYCRR § 254.6 (b)(1)(i)-(viii); see also *Rosado v. Kuhlmann*, 164 A.D.2d 199, 563 N.Y.S.2d 295 (3d Dep’t 1990) (the court held that the hearing officer had constructive notice that mental health was at issue where the disciplinary violation occurred while the prisoner was being taken to the facility psychiatric unit for observation and the prisoner was then kept in mental observation for 20 days).

The creation of the Special Treatment Program (STP) for prisoners with mental illness housed in the Attica SHU was the result of the settlement reached in 2000 in *Eng v. Goord*, Civ 80-385S (W.D.N.Y. 1980). An additional STP has been opened in the SHU at Five Points and an additional 75 STP beds are included in the 2004-2005 budget. See New York State Office of Mental Health, *2005-2009 Statewide Comprehensive Plan for Mental Health Services*, at 99. In addition, OMH has amended the CNYPC Outpatient Operations Policy and Procedure Manual to increase SHU mental health treatment services. In the OMH level 1 and level 2 facilities which have an OMH Satellite Mental Health Unit, OMH caseload patients in the SHU now receive a minimum of two private interviews per month with a primary therapist and a minimum of one private interview with a psychiatrist which may be held jointly during one of the primary therapist interviews. At the level 3 and 4 facilities, the SHU 200’s that are level 2 or 3, Southport and Upstate, each OMH caseload patient in SHU is offered at least one private interview per month with the primary therapist, and the psychiatrist should see patient’s on medication monthly and other patients at least quarterly. At the SHU 200’s that are level 4 or 6 there is no monthly psychiatry requirement. *CNYPC Outpatient Operations Policy and Procedure Manual*, Section Six, at 13-16. These policies do not apply to patients in other forms of isolated confinement (e.g., keeplock, administrative segregation, protective custody) unless they are housed in a SHU.

relevant to the determination of whether the discipline imposed constitutes an atypical and significant hardship.<sup>1239</sup>

**c. Lack of Sufficient Treatment Resources**

Prisoners with mental illness who suffer acute psychiatric crises due, at least in part, to the stressors of the prison environment, find themselves transferred back and forth between prison, the observation cells or dormitory beds of the RCTP and inpatient hospitalizations at CNYPC. For the disruptive prisoner with mental illness, this cycling often includes placements in the twenty-three hour isolated confinement settings of SHU, keeplock, administrative segregation, and protective custody.<sup>1240</sup> Other less disruptive prisoners with mental illness may cycle from general population or even from placement in one of the residential mental health housing program ICPs (Intermediate Care Program).<sup>1241</sup> This pattern of repeated transfers of

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<sup>1239</sup> See, e.g., *Colon v. Howard*, 215 F.3d 227 (2d Cir. 2000) (Circuit advises district courts that in cases challenging SHU confinement, evidence of psychological effects of prolonged confinement in isolation is relevant evidence); *Lee v. Coughlin*, 26 F. Supp. 2d 615, 637 (S.D.N.Y. 1998) (the court found that 376 days in SHU was atypical and significant and also observed that “[t]he effect of prolonged isolation on inmates has been repeatedly confirmed in medical and scientific studies.”); *McClary v. Kelly*, 4 F. Supp. 2d 195 (W.D.N.Y. 1998) (the court held that evidence of psychological harm (both expert evidence and the plaintiff’s own testimony) created a triable issue under the *Sandin* atypical and significant standard).

<sup>1240</sup> See *The Prison Careers of Mentally Ill Women*, Chapter 15, in *ACTING OUT: MALADAPTIVE BEHAVIOR IN CONFINEMENT* (2002), contributed by Elaine Lord, Hans Toch and Adams; Hans Toch, *Mainstreaming disturbed offenders in the prison*, *J. OF PSYCHIATRY & L.* (Winter 1993); Hans Toch, *Pathology and Disruptiveness Among Prison Inmates*, *J. OF RES. IN CRIME AND DELINQ.*, Vol. 23 No. 1 (1986); Hans Toch, *The disturbed disruptive inmate: where does the bus stop?*, *J. OF PSYCHIATRY & L.* (1983).

<sup>1241</sup> The failure of OMH and DOCS to create appropriate mental health treatment programs to prevent the repeated cycling of patients to crisis beds and to create sufficient mental health housing options in the state prison system form part of the allegations in *Disability Advocates Inc. v. New York State Office of Mental Health et. al*, 02 CV 4002 (S.D.N.Y. 2002). Since the filing of the *DAI* lawsuit, OMH and DOCS have agreed to increase STP slots for SHU patients by 75, increase ICP beds by 166, increase CNYPC inpatient beds by 20 and have created 102 BHU beds. However, the proposed increases in beds and the types of beds being created may not be sufficient to address the known need. For example, there has been no prior inpatient bed increase at CNYPC since 1981 when the DOCS census was only 28,000 (current census is approximately 68,000) and the need for an additional 150 inpatient beds was identified more than 8 years ago. *New York State Task Force on the Future of Forensic Services Report of the Subcommittee on Prison Mental Health Services*, at 26-27 (Jan. 31, 1997). The system’s lack of any program for long-term inpatient care was identified in the 1980’s by Joel Dvoskin, former NYS Director of Forensic Services for the Office of Mental Hygiene who reported that “one essential component of such a comprehensive system is absent - the extended inpatient care capacity for inmates in the state prison system. While there may be additional beds needed for some portions of the current system, only extended care for prison inmates has no beds.” There are no

mentally ill inmates evidences repeated psychiatric deterioration in these patients and demonstrates that their mental health treatment needs are not being adequately addressed by their prison programming and placement. Additional mental health housing and program alternatives, which will decrease this cycle of crisis management, are needed. In addition, the prison system provides the intensive inpatient treatment at CNYPC only for involuntary commitments to the forensic hospital after a finding that the patient is a danger to self or others. There is no other long-term inpatient care and no voluntary hospitalization available to any prisoners in New York state.

The resources for mental health treatment are limited, the conditions of prison confinement are far from therapeutic, and the pay scale for OMH staff is less than it is in private treatment settings. In addition, OMH staff in the prisons must cooperate and communicate with DOCS security staff who may not perceive the DOCS role as one of assisting in the care and treatment of prisoners. The prisoners who are patients may be manipulative and needy in ways that are related or unrelated to their mental illness. The difficulty in recruiting OMH staff to work in the prisons adds to the problem. In some cases, excessive clinician caseloads have persisted while vacancies were left unfilled. Admittedly, the culmination of these types of factors may lead to staff burn-out in any setting.

**d. Inappropriate Labeling**

In New York prisons, all too often, the frustration of clinical staff with the limited resources and difficult patients has resulted in the inappropriate labeling of some prison patients as “malingerers”, as “manipulative” or as having “no diagnosis on Axis I” (*e.g.*, an Axis I diagnosis of a serious mental illness is changed to an Axis II character disorder such as

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voluntary inpatient commitment beds available to prisoners with mental illness. All inpatient placements at CNYPC are involuntary commitments for patients who are found to be a danger to self or others.

Antisocial Personality Disorder). This labeling of the prisoner as “bad” and not “mad” results in the failure to recognize and treat behaviors associated with mental illness. The danger of over-utilization of these terms along with reducing diagnoses of patients despite an often well-documented history of serious mental illness has been brought to the attention of OMH and DOCS in litigation and repeatedly by the State Commission of Correction through their Medical Review Board investigations of deaths by suicide in the prisons.<sup>1242</sup> The history of disregarding symptoms inappropriately in New York prisons results in the disproportionate placement of prisoners with mental illness in the disciplinary isolated confinement settings where the harsh conditions further exacerbate their illness. Although clinicians in prison and other settings need to be careful with the limited resources that are available for the treatment of patients in their care, the tendency to look at patients as either “bad” or “mad” must be eradicated.<sup>1243</sup>

#### **e. Neuropsychiatric Services**

Neuropsychiatric and neurocognitive problems can significantly affect the clinical presentation and response to treatment of a patient with mental illness.<sup>1244</sup> Knowledge of results of neuropsychiatric testing can be essential for differentiating between psychiatric disorders and neuropsychiatric conditions masquerading as psychiatric disorders. Test results are also essential

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<sup>1242</sup> For example, in the expert report of Dr. Stuart Grassian in *Eng v. Goord*, he described Attica OMH staff as “reflexively” viewing their patients in this manner “without any meaningful attempt at psychiatric evaluation.” *Eng v. Goord*, Site Visit Report 1 (June 1999). In the State Commission of Correction (SCOC), Mar. 25, 1999 Final Death Report in the suicide of inmate Daniel Horn on May 4, 1998, the SCOC recommended that OMH and CNYPC should conduct a comprehensive quality assurance review of this case specifically addressing Horn’s inappropriate labeling as manipulative and not mentally ill despite his diagnosis and the array of capricious changes in Horn’s mental health service levels by OMH clinical staff. In the September 17, 2003, SCOC Final Death Report in the suicide of inmate Paul Lagoe on September 23, 2002, the SCOC reported that the “psychologist determined that Lagoe’s anger and statements were all goal oriented and that he was manipulating.”

<sup>1243</sup> Only about one-third of prisoners have Antisocial Personality Disorder according to the NIMH Epidemiological Catchment Area Study (Robins & Regier ‘91) and a comparable rate was found by Hare 1983 (*Am J Psychiatry* 140:887).

<sup>1244</sup> Jeffrey Metzner, *Treatment in Jails and Prisons, Treatment of Offenders with Mental Disorders* 211, 230-31 (Robert M. Wettstein, ed. Guilford Press 1998) (“Neuropsychological screening data can be useful for inmate management, medical treatment, educational placement, work assignments, and psychotherapy.”).

in some cases for adapting psychiatric treatments to the needs of the individual patient whose cognitive deficits may prevent them from benefiting from certain types of treatment and/or interfere with their social functioning. It is predictable, and studies have shown, that a history of head injury in prisoners is several times higher than in the general population.<sup>1245</sup> Despite this evidence, OMH and DOCS do not regularly conduct neuropsychological screenings and assessments of the prisoners in their care. There is no specific screening done for history of head trauma, birth complications, lead exposure in childhood, inhalant abuse or especially heavy alcohol or substance abuse, in the medical and mental health evaluations performed during reception.<sup>1246</sup> An appropriate neuropsychiatric screening and assessment should be incorporated into the process for developing a treatment plan for every prisoner with a psychotic disorder.<sup>1247</sup>

#### **f. Trauma Treatment**

The prevalence of a significant history of past physical and/or sexual trauma is extremely high among prisoners and many studies have found high rates of Post-Traumatic Stress Disorder (PTSD) in prisons. However, in New York, the diagnosis of PTSD rarely appears in OMH prisoner patient records and trauma history is seldom the focus of treatment planning. Some trauma programming has been created and utilized in the ICP programs and at the women's

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<sup>1245</sup> See Bill Slaughter, Jesse R. Fann & Dawn Ehde, *Traumatic brain injury in a county jail population: prevalence, neuropsychological functioning and psychiatric disorders*, BRAIN INJURY Vol. 17(9), at 731-41 (Sept. 2003); Michael Sarapata, Doulgas Herrman, Thomas J. Johnson & Rose Aycok, *The role of head injury in cognitive functioning emotional adjustment and criminal behaviors*, BRAIN INJURY 12 (110), at 821-42 (Oct. 1998). The prevalence of an organic brain disorder, *i.e.*, the presence of diagnosable symptoms and impairment, of any organic etiology was 3-17% higher in one study. *Offenders with Brain Damage*, Nedopil, N. in *Violence, Crime and Mentally Disordered Offenders* (S. Hodgins & Rudiger Muller-Isberner Eds. 2000).

<sup>1246</sup> National Commission on Correctional Health Care standards recommend structured screening for history of head trauma and other conditions associated with neurocognitive problems including special education and seizures.

<sup>1247</sup> Charles Buscema is the former Director of Psychiatry at CNYPC. See Charles Buscema, Qamar Abbasi, David Barry & Timothy Lauve, *An algorithm of the treatment of Schizophrenia in the correctional setting: the Forensic Algorithm Project*, J. OF CLINICAL PSYCHIATRY, 61 (10):767-83 (Oct. 2000) (importance of evaluating for history of closed head injuries in inmates due to the high prevalence of Schizophrenia in the prison population and the effect such injuries have on behaviors such as hostility, aggression, and response to treatment for Schizophrenia).



maximum security prison Bedford Hills, but the need for trauma treatment remains largely unaddressed. The failure to implement appropriate trauma treatment programs results in both disciplinary action and the cycling of patients between prison and mental health settings as a past history of trauma frequently results in significant problems developing trust in relationships, including with figures of authority and treatment providers.

**g. MICA**

The majority of inmates with mental illness in any prison system have co-occurring substance abuse disorders.<sup>1248</sup> Patients with co-occurring substance abuse disorders are more difficult to engage in treatment, more likely to be noncompliant with medication, and have higher rates of hospitalization, suicide attempts, violence, and problems with social functioning. (GAINS Center, *Creating Effective Treatment Programs for Persons With Co-Occurring Disorders in the Justice System, 2000*. Integrated treatment, which treats both disorders as primary and treats them simultaneously, has been considered the standard of care for co-occurring disorders for several years. OMH and DOCS have long been aware of these facts, yet the agencies do not provide for integrated treatment for their patients in the prison setting.<sup>1249</sup> Failing to provide adequate services to inmates with co-occurring disorders makes their adjustment to incarceration more difficult, increasing the likelihood of disciplinary infractions, including for aggressive behaviors and putting them at the risk of suicide.

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<sup>1248</sup> For example, the National Commission on Correctional Health Care guidelines for the treatment of Schizophrenia states that considerably more than half of inmates with Schizophrenia also have a substance abuse disorder. Available at [http://www.ncchc.org/clinical\\_guidelines/schizophrenia.pdf](http://www.ncchc.org/clinical_guidelines/schizophrenia.pdf).

<sup>1249</sup> Dr. William Tucker, OMH Director, Bureau of Psychiatric Services, stated in 1999: “Research has conclusively demonstrated that [separate treatment] does not work – both disorders must be treated simultaneously.” Available at [http://www.omh.state.ny.us/omhweb/omhq/q1299/cooccurring\\_disorders.htm](http://www.omh.state.ny.us/omhweb/omhq/q1299/cooccurring_disorders.htm). The National Commission on Correctional Health Care standards state that inmates with co-occurring disorders should have integrated treatment planning and should receive integrated services from the same provider; the American Psychiatric Association’s Task Force on Psychiatric Services in Jails and Prisons (2d ed. 2000) recommended integrated treatment.

## **h. Mental Illness and Parole**

Executive Law § 259 grants the Parole Board substantial discretion. Section 259-i 2.(c) states: “[d]iscretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law. In making the parole decision, the guidelines adopted pursuant to subdivision four of § 259-c shall require that the following be considered: .... institutional record, academic, vocational, training or work, therapy and interpersonal relationships with staff and inmates; - temporary release program; - release plans.” The Parole Board can and does take mental status, the ability to engage in treatment and disciplinary records into consideration in making their decisions. For the prisoner with mental illness who has not received adequate treatment, has cycled through psychiatric crises, has been labeled by OMH as manipulative or who has been incapable of adjusting to prison rules and has been repeatedly disciplined, all of this may result in a poor record evaluation by the Parole Board and a resultant lengthier stay in prison. For many prisoners with mental illness, release has not been until their maximum expiration date. Moreover, there are many examples of prisoners who, although they were not being treated as inpatients at CNYPC prior to discharge, have a discharge plan of civil commitment to a psychiatric hospital at the time of parole (or at maximum expiration of their sentence).

These results are problematic in a number of ways: mentally disabled prisoners are less able to utilize the program of Parole as are non-disabled prisoners; prisoners with mental disabilities may refuse treatment or try to mask their symptoms to avoid being labeled as mentally ill and having that status used against them at a Parole Hearing; the fact that mental

status can detrimentally effect discharge causes distrust of treatment providers as they are working to maintain the patient in the prison custodial setting.<sup>1250</sup>

**2. Suggestions Regarding Mental Health Care**

**a. Advocate for additional mental health resources in the State correctional system.**

Increased resources are needed to ensure that inmates with mental illness receive appropriate treatment while incarcerated. Resource needs include: increased staffing; increased availability of long-term inpatient care; increased availability of mental health treatment in minimum and medium security facilities; creation of appropriate treatment modalities for specific segments of the prisons population (MICA, trauma, neuro psychiatric, voluntary).

**b. Support legislative proposal S2207/Nozzolio-A 3926/Aubrey**

This legislation would restrict the housing of prisoners with severe psychiatric disabilities in the isolated confinement housing areas, provide for external oversights of mental health treatment in the prison system; increase housing options for prisoners with mental illness; and increase training for correctional staff on mental health issues.

**c. Study the need for the expanded availability of legal advocacy for prisoners with mental illness in various types of proceedings (e.g., disciplinary hearings, parole hearings and court-ordered treatment).**

**d. Advocate for additional resources for Discharge Planning for prisoners with mental illness.**

Discharge planning for prisoners with mental illness should include: the provision of a short-term supply of needed medications; a summary of the treatment provided while

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<sup>1250</sup> This section does not review the need for additional resources for discharge planning for prisoners with mental illness although the lack of resources for appropriate discharge planning are clearly a collateral consequence to conviction for individuals with mental illness. The discharge of patients to homeless shelters with a prescription, an appointment and a set of directions to the community mental health center, remains problematic with many patients incapable of adhering to these instructions.

incarcerated; the establishment of specific contacts for case management, mental health care, substance abuse treatment, housing, benefits and job training.

- e. **Study Mental Health Issues and Services at Local Jails Throughout New York State.**

## GLOSSARY

### GLOSSARY OF RELEVANT TERMS<sup>1251</sup>

**arraignment:** The first appearance before the court by a person charged with a crime, at which time he or she is advised of the pending charges, the right to counsel and the right to trial by jury.

**arrest:** The act of being taken into custody by the police.

**Assigned Counsel Plan for the City of New York:** A listing of private lawyers who represent people in criminal cases who do not have enough money to pay for a lawyer. The government pays for the services of these lawyers.

**bail:** Money or property promised or given to the court in exchange for release from jail while a criminal case is pending, with the agreement that the defendant will return to court when ordered to do so. The court sets the bail amount or value depending on several factors, including the seriousness of the charges and the likelihood that the defendant will attempt to flee prior to the required court appearances. Bail is forfeited to the court if the defendant fails to return to court.

**bench warrant:** A court order for a person's arrest that is issued when a person fails to appear in court on a scheduled date.

**beyond a reasonable doubt:** The burden of proof that the prosecutor must meet at trial in proving that a person is guilty of an offense.

**Central Booking:** Police Department office where fingerprints and photographs are taken after an arrest.

**concurrent sentences:** Sentences that are served at the same time.

**conditional discharge:** A sentence allowing for release from jail without supervision by the Department of Probation, but which requires compliance with conditions set by the court.

**consecutive sentences:** Sentences that must be served one after another.

**conviction:** A finding of guilt of an offense, following either a guilty plea or a trial verdict.

**Criminal Justice Agency (C.J.A.):** An organization whose employees interview individuals who have been arrested to find out about their backgrounds in order to help judges decide whether to set bail, order release without bail (R.O.R.), or order confinement in jail while a case is pending.

**Desk Appearance Ticket (“D.A.T.”):** A document that charges a person with a violation. The ticket requires one's appearance at a specific court at a specified time.

**18-B Panel:** See “Assigned Counsel Plan.”

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<sup>1251</sup> Adapted from: <http://www.courts.state.ny.us/litigants/crimjusticesyshandbk.shtml#anchor753911>. and <http://www.reentrymediaoutreach.org/pdfs/glossary.pdf>.

**felony:** An offense which is punishable by a sentence of imprisonment of more than one year, or a sentence of death for murder in the first degree.

**felony complaint:** The first document filed with the court that sets out the initial charges in a felony case.

**fingerprint report (rap sheet):** A summary of a defendant's prior and/or currently pending arrests and convictions.

**grand jury:** A group of citizens who decide if the prosecutor has enough evidence to pursue felony charges against a person.

**indictment:** A document that contains the felony (and perhaps also misdemeanor) charges that were voted by the grand jury.

**information:** Formal charging document issued by a prosecuting attorney without grand jury involvement.

**jail:** Local facility where persons are held, usually those awaiting trial or those convicted of minor offenses.

**Juvenile Offender (J.O.):** A person who is sentenced for certain kinds of felony offenses that were committed when the person was thirteen, fourteen, or fifteen years old.

**life imprisonment without the possibility of parole:** Sentence of imprisonment without the possibility of release.

**misdemeanor:** An offense less serious than a felony and punishable by up to one year in jail.

**misdemeanor complaint:** A document filed with the court that sets out the initial charges in a misdemeanor case.

**parole:** Release of a prisoner from imprisonment, but not from legal custody.

**plea bargain:** An agreement between a defendant, a judge, and a prosecutor, in which the defendant admits guilt, usually in exchange for a promise that a particular sentence will be imposed.

**plead guilty (guilty plea):** Where a defendant admits to having committed a charged offense.

**pre-sentence memoranda:** Documents prepared by the prosecutor and the defendant to help the judge determine a sentence.

**pre-sentence report:** Report prepared by the Department of Probation containing information to help the judge determine a sentence.

**preliminary hearing:** A hearing upon a felony complaint where the State must establish that there is probable cause to believe that the accused committed the specific crime charged, and which may require witness testimony.

**prison:** State facilities where persons convicted of the commission of a felony are held.

**probation:** A sentence that does not involve prison, but requires compliance with certain conditions for a specified period of time under the supervision of the Department of Probation. Any violation of the requirements imposed on the defendant's behavior may result in revocation of the probation.

**Probation, Department of:** An agency that prepares a written report concerning a defendant's background and the circumstances surrounding the offense. The Department of Probation also supervises defendants sentenced to probation.

**probation officer:** An employee of the Department of Probation who prepares pre-sentence reports and supervises defendants placed on probation.

**prosecutor:** A lawyer who represents the government in criminal cases (also known as the assistant district attorney or A.D.A., the People, or the prosecution).

**rap sheet (fingerprint report):** A summary of a defendant's prior and/or currently pending arrests and convictions.

**remand or remanded to custody:** To be sent to jail.

**restitution:** A sentence that requires the payment of money to a victim as reimbursement for monetary losses incurred as a result of the crime.

**R.O.R.'d (release on recognizance):** To be released from jail without bail while a case is pending.

**sentence:** A punishment imposed by a judge following a conviction.

**sentencing:** A court proceeding at which a sentence is imposed.

**sentencing proceeding:** Trial before a jury to determine if a sentence of death or life imprisonment without the possibility of parole should be imposed.

**split sentence:** A jail sentence followed by a period of probation.

**Superior Court Information (S.C.I.):** A written accusation filed by the prosecutor containing felony and perhaps also misdemeanor charges.

**Supreme Court:** The court where cases involving felonies are heard.

**surcharge:** A payment of money that is required upon conviction.

**unconditional discharge:** A sentence which does not require either any imprisonment or conditions.

**violation:** An offense punishable by up to fifteen days in jail and/or a fine.

**Youthful Offender (Y.O.):** A person who is sentenced for an offense that occurred when the person was fourteen, fifteen, sixteen, seventeen, or eighteen years old.