



Testimony of
MATHIAS H. HECK, Jr.
on behalf of the
AMERICAN BAR ASSOCIATION
for the hearing on
COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS
AND THE PROBLEM OF OVER-CRIMINALIZATION OF FEDERAL
LAW
before the
Committee on the Judiciary
Task Force on Over-Criminalization
of the
UNITED STATES HOUSE OF REPRESENTATIVES
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Chairman Sensenbrenner, Ranking Member Scott and Members of the Task Force on Over-Criminalization:

Good morning. My name is Mathias H. Heck, Jr. I am the Prosecuting Attorney for Montgomery County, Ohio. I serve as the current Chair of the American Bar Association's Criminal Justice Section which has over 20,000 members including prosecutors, private defense counsel, appellate and trial judges, law professors, correction and law enforcement personnel, public defenders and other criminal justice professionals.

I appear today at the request of ABA President James R. Silkenat to present the views of the ABA concerning the status of the law regarding collateral consequences of criminal conviction and its relationship to over-criminalization of federal criminal law. The American Bar Association, with a membership of nearly 400,000 lawyers worldwide, continuously works to improve the American system of justice and to advance the rule of law in the world.

The American legal system has long recognized that certain legal disabilities flow from a criminal conviction in addition to the sentence imposed by the court. These collateral consequences of conviction include such familiar penalties as disenfranchisement, deportation, and loss of professional licenses, as well as newer penalties such as felon registration and ineligibility for certain public welfare benefits.

Collateral consequences of conviction have been increasing steadily in variety and severity for the past 30 years, and it has become increasingly difficult to shake off their lingering effects. Collateral consequences have accumulated with little coordination in disparate provisions of state and federal codes, making it difficult to determine all of the penalties and disabilities applicable to a particular offense. As I will discuss later, our National Inventory Project has compiled and listed on its website over 45,000 such provisions nationwide.

Some collateral consequences serve an important and legitimate public purpose, such as keeping firearms out of the hands of persons convicted of crimes of violence, or barring persons recently convicted of fraud from positions of public trust. Others are more difficult to justify, particularly when applied automatically across the board to whole categories of convicted persons. Perhaps most problematic are laws that limit the exercise of fundamental rights of citizenship, or restrict access to otherwise generally available public benefits and services. The indiscriminate imposition of collateral penalties has serious implications, not only in terms of fairness to the individuals involved, but also in terms of the resulting burdens on the community.

Persons convicted of a crime ordinarily expect to be sentenced to a term of probation or confinement, and perhaps to a fine and court costs. What they often do not anticipate is that conviction will expose them to numerous additional legal penalties and disabilities, some of which may be far more onerous than the sentence imposed by the judge in open court.

Those sanctions may apply for a definite period of time, or indefinitely for the convicted person's lifetime. To the extent they occur outside the sentencing process, they often take effect without judicial consideration of their appropriateness in the particular case, without notice at sentencing that the individual's legal status has dramatically changed, and indeed without any requirement that the judge, prosecutor, defense attorney or defendant even be aware of them.

The unprecedented increase in the number of persons convicted and imprisoned over the past three decades in the United States means that this half-hidden network of legal barriers now affects a growing proportion of the populace. More people convicted inevitably means more people who will ultimately be released from prison or supervision, and who must either successfully reenter society or be a risk of reoffending.¹

Collateral consequences of conviction contribute to the criminal justice system's reentry challenges. The ABA supports fair, efficient, and effective sentencing. The Association also supports reasonable restrictions on former offenders holding certain jobs where their records would raise genuine issues of public safety. Nonetheless, not all collateral consequences of conviction are fair or effective. Many have no relationship to public safety and prevent a former offender from doing productive work to support a family and contribute to the community. Moreover, some collateral sanctions remove potential employees and workers from the employment market when both they and employers would benefit from the removal of sanctions. In some instances, collateral bars on employment prevent someone who has been trained by the government at taxpayer expense from taking the very job for which he or she has been trained – which makes no sense at all.

The relationship between over-criminalization and unnecessary, ill-advised collateral consequences is clear, and both need to be addressed to promote fairness. If an appeal to fairness is not by itself sufficient to encourage attention to this public policy problem, perhaps an added concern for public safety and fiscal responsibility will.

Our criminal justice system faces daunting challenges. America has the highest rate of incarceration in the world and the concentration of those incarcerated relative to the rest of the population disproportionately includes men, the young, and racial and ethnic minorities. For example, one in 12 African American men currently reside behind bars contrasted with only one in 87 white men.² A limited education or a lack of employment characterizes a disproportionate portion of the prison population as well. An African American man between the ages of 20-34 years old without a high school diploma has a 37 percent likelihood of being in prison while only a 26 percent likelihood of being employed.³

Aside from the substantial economic burden to tax payers – over \$65 billion a year – incarceration carries long lasting economic and social repercussions for ex-offenders, families, and communities. Ex-offenders fortunate enough to find employment can expect an 11 percent reduction in hourly wages and, at the age of 48, an ex-offender will have earned \$179,000 less than if he had never served any time.⁴ Moreover, 54% percent of inmates have juvenile children,

¹ 729,295 persons were released from state and federal prisons in 2009. See Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2009* (2010).

² "Collateral Costs: Incarcerations Impact on Economic Mobility" The Pew Center on the States available at http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653.

³ "Collateral Costs: Incarcerations Impact on Economic Mobility" see note 2.

⁴ "Collateral Costs: Incarcerations Impact on Economic Mobility" see note 2.

meaning that 2.7 million children have a parent behind bars.⁵ These same children of ex-offenders have a 19% greater chance of expulsion or suspension than their classmates.⁶

The reality is that ex-offenders who cannot find jobs as well as those who cannot find jobs that provide sufficient income to support families and children who are excluded from school are more likely to commit criminal acts. Smart public policy would seek to confine the use of criminal penalties to behavior that cannot be adequately deterred by civil penalties or behavior so threatening to peace and order that a criminal sanction is the only appropriate response. And smart public policy would eliminate barriers to employment, education, housing and other benefits that are needed to enable individuals to be contributing members of their communities.

To promote smart public policy, the ABA and its Criminal Justice Section have made finding solutions to obstacles of reentry and reducing recidivism a top priority. We have accomplished these goals largely through studies and research that lead to the Section's recommending policies for adoption by the ABA House of Delegates, its policy making body.

I will briefly discuss some of the ABA's policy recommendations and our ongoing work.

ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons

The ABA House of Delegates approved in August 2003 a comprehensive set of principles regarding collateral sanctions. The final product, the ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons⁷ was the result of careful drafting and meticulous and extensive review by representatives of all segments of the criminal justice system: judges, prosecutors, private defense counsel, public defenders, court personnel, corrections officers, and academics active in criminal justice teaching and research.

Under prevailing law and procedure, collateral sanctions are imposed on individuals upon conviction without notice or legal process. Judges are ordinarily not required to advise defendants of collateral consequences at plea or sentence, and defense counsel ordinarily need not inform their clients about collateral consequences when advising about the appropriate course of action.⁸ Because judges and defense lawyers need not consider them, there is no compelling reason for prosecutors to educate themselves about them either.

⁵ "Collateral Costs: Incarcerations Impact on Economic Mobility" *see note 1*.

⁶ "Collateral Costs: Incarcerations Impact on Economic Mobility" *see note 1*.

⁷ *See* ABA Standards for Criminal Justice, Third Edition: *Collateral Sanctions and Discretionary Disqualification of Convicted Persons* available at:

http://www.americanbar.org/groups/criminal_justice/policy/index_aba_criminal_justice_policies_by_meeting.html#am03101a.

⁸ A few courts require that a defendant be advised of particular collateral consequences at plea or sentence. *See, e.g., Barkley v. State*, 724 A.2d 558 (Del. 1999) (failure to inform defendant that his driver's license would automatically be revoked upon conviction, as required by applicable court rules, rendered guilty plea invalid); *Skok v. State*, 760 A.2d 647 (Md. 2000) (noncitizen permitted to challenge guilty plea by writ of coram nobis where he was not advised of immigration consequences as required by court rule). The most significant context where statutes, court rules or constitutional duties require advisement of potential collateral consequences is with respect to deportation. *See Padilla v. Kentucky*, 559 U.S. 356 (2010) (failure by defense attorney to advise non-citizen client about deportation risks of a guilty plea violate Sixth Amendment right to counsel to immigration consequences).

As a result, all those present at a sentencing may later be surprised to learn the full extent of the offender's changed legal status. Indeed, many collateral consequences are under-enforced simply because the convicted person is unaware of them. An offender's failure to appreciate how his legal situation has changed as a result of his conviction may have far-reaching consequences for his own ability to conform his conduct to the law.

One goal of the ABA in promulgating and disseminating the Standards has been to encourage awareness of the full legal consequences of a criminal conviction, particularly those that are mandatory upon conviction. There is no justification for participants in the legal system to operate in ignorance of the effects of its actions. Prosecutors when deciding how to charge, defendants when deciding how to plead, defense lawyers when advising their clients and judges when sentencing should be aware, at least, of the legal ramifications of the decisions they are making or advice they are giving.

A second goal of the ABA has been to focus attention on the impact of collateral consequences on the process by which a convicted person re-enters the free community, and is encouraged and supported in his efforts to become a law-abiding and productive member of society. As our prison population has grown dramatically in recent years, the concern for offender reentry has grown correspondingly. The criminal justice system aims at avoiding recidivism and promoting rehabilitation, yet collateral sanctions and discretionary barriers to reentry may severely impede an offender's ability for self-support in the legitimate economy, and perpetuate his alienation from the community. As the laws restricting convicted persons in their ordinary life activities have multiplied, they have discouraged rehabilitation of offenders and created a class of people who live permanently at the margin of the law.

The ABA Standards on Collateral Sanctions call for a number of significant reforms to current law. Among them are:

1. A directive that at both the federal and state level, the legislature should set out or reference all collateral consequences in a single chapter or section of the jurisdiction's criminal code. The chapter or section should identify with particularity the type, severity and duration of collateral sanctions applicable to each offense.
2. Collateral sanctions should be considered by the court at the time of sentencing. Rules of procedure should require that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under state and federal law.
3. The legislature should authorize a court or specified administrative body to enter orders waiving, modifying, or granting timely and effective relief from any collateral sanction imposed by the law of that jurisdiction, and should establish a process by which a convicted person may obtain an order relieving the person of all collateral sanctions imposed by the law of that jurisdiction.
4. Jurisdictions should not impose the following collateral sanctions:
 - (a) Deprivation of the right to vote, except during actual confinement;
 - (b) Deprivation of judicial rights, including the right to initiate or defend a suit, be eligible for jury service, except during actual confinement or under court supervision; or execute judicially enforceable documents and agreements;
 - (c) Deprivation of legally recognized domestic relationships and rights other than in accordance with rules applicable to the general public;

- (d) Ineligibility to participate in government programs providing the necessities of life, including food, clothing, housing, medical care, disability pay, and Social Security;
- (e) Ineligibility for governmental benefits relevant to successful reentry into society, such as educational and job training programs.

Justice Kennedy Commission

In 2003, Justice Kennedy addressed the American Bar Association's House of Delegates regarding the "hidden world of punishment," and called on the legal profession to direct the "energies . . . of the entire Bar. . ." to issue of collateral consequences.⁹ In response, the ABA President convened a commission of ABA members with diverse criminal justice backgrounds and substantial experience in the criminal justice system to undertake a study on a broad number of criminal justice issues including mandatory minimum sentencing schemes, disparate sentencing rates among racial and ethnic groups, and the objectives of incarceration.

The ABA Justice Kennedy Commission undertook a comprehensive national examination of federal and state justice policies that have led the Nation to the current state of mass incarceration, with minorities bearing the brunt of the increased prison and jail populations.

The Kennedy Commission made a number of important recommendations, all of which were adopted by the ABA.¹⁰ One finding of particular importance today was that the most significant predictor of recidivism was employment. Based on this finding, the Kennedy Commission recommended that "barriers to employment, housing, treatment, and general public benefits must be eliminated to the greatest possible extent in order to have greater opportunity for successful reentry for those with a criminal conviction."¹¹ The finding and the recommendation should not be a surprise to anyone who has studied recidivism. If a former offender cannot support himself or herself with honest employment, criminal activity is the unfortunate, likely alternative. That is why reentry (the effort to enable a former offender to return successfully to the community and to be a contributing member) is at the top of the list of criminal justice reforms that so many seasoned prosecutors, judges and defense counsel support.

Second Chances in the Criminal Justice System

Following the success of the Justice Kennedy Commission Report, the American Bar Association's Commission on Effective Criminal Sanctions (CECS) expanded upon the work of the Justice Kennedy Commission to create a compendium on the topic of reentry that focused on the fairness and proportionality of punishment and on ways in which criminal offenders may avoid or escape the permanent legal disabilities and stigma of a criminal record. The CECS

⁹ Justice Kennedy Commission: Report and Recommendations, American Bar Association (2004), p. 2.

¹⁰ The full Justice Kennedy Commission Report and Recommendations is available at the following site, beginning at p. 58: <http://www.americanbar.org/content/dam/aba/migrated/cecs/secondchances.authcheckdam.pdf>.

¹¹ Justice Kennedy Commission, *see note 13*, at p. 7.

report and its recommendations looked at the relationship between those with criminal records and opportunities for employment.¹²

Most people would agree that those who have committed a crime should be entitled to a second chance after paying their debt to society. Very few jurisdictions have figured out how to accomplish this successfully, however. The statute books in every state are filled with laws that disqualify people from jobs and licenses based on a criminal record. Even where it does not mandate exclusion, the law generally allows rejection of applicants for employment (and termination of existing employees) based solely on the fact of a criminal record. Some private employers have adopted sweeping policies against employing people with criminal records, including those who were arrested and never convicted. The increased reliance since 9/11 on criminal records checks as a screening mechanism makes it much more difficult for the millions of Americans who have a criminal record to find employment and become productive citizens in our society.

The CECS report showed that ex-offenders who were jobless after reentry were three times more likely to return to prison; furthermore, the report also noted that 60% of former prisoners were unemployed a year after release from prison.¹³

The report examined the impact of a reliance on criminal background checks on the hiring process. It found that increases in the exchange of information due to technology have made it easier for employers to access background information on applicants, but the information generated is not necessarily accurate. Criminal background checks can contain inaccurate information, perhaps due to identity theft, or incomplete information, such as information on arrests that did not lead to criminal convictions.¹⁴ Moreover, many employers have little knowledge of how the criminal justice system works and what a particular record actually represents, so even when completely accurate information is provided, employers can misinterpret the information contained in a background check.

The CECS report recommended limiting access to criminal background information for purposes other than law enforcement.¹⁵ The report also recommended that employers and credit reporting agencies ensure that the information on a criminal history is accurate and that the information does not contain sealed or expunged records.¹⁶

The CECS recognized that offenders' lack of vocational skills often result in an ancillary barrier to employment that places them at a significant disadvantage in a competitive job market,¹⁷ and without the opportunity to develop marketable vocational skills while incarcerated, overcoming all of the barriers to employment becomes unlikely at best. The report offered several recommendations. First, and perhaps most important, was the recommendation that disqualifications for employment should only be applied when the crime is *substantially* related

¹² Second Chances in the Criminal Justice System, American Bar Association (2007), available at: <http://www.americanbar.org/content/dam/aba/migrated/cecs/secondchances.authcheckdam.pdf>.

¹³ Second Chances, p. 27.

¹⁴ Second Chances, p. 36.

¹⁵ Second Chances, p. 8.

¹⁶ Second Chances, p. 38.

¹⁷ Second Chances, p. 27.

to the job opportunity or where serious public safety concerns exist.¹⁸ The CECS also recommended that, when there is a finding that a crime is substantially related to the job opportunity, there should be some process for relief, such as allowing the applicant to demonstrate his or her fitness of character.¹⁹

It recommended the adoption of federal and state laws that would provide for a case-by-case exemption or waiver process to give persons with a criminal record an opportunity to make a showing of their fitness for the employment or license at issue, and require a statement of reasons in writing if the opportunity is denied because of the conviction. Federal and state law should also provide for judicial or administrative review of a decision to deny employment or licensure based upon a person's criminal record. The CECS favorably noted New York law in this regard. New York's fair employment practices law extends its protections to people with a criminal record, and prohibits public and private employers and occupational licensing agencies from discriminating against employees based upon convictions and arrests that did not result in a conviction, unless disqualification is mandated by law.²⁰

Further, the CECS recommended against automatic barriers to employment and favored discretionary factors that should be handled on a case-by-case basis.²¹ Moreover, the CECS recommended that the barriers should expire after a reasonable period of time. Its report noted that a person who has not committed a crime in seven years is no more likely to commit a crime than a person who has never committed a crime.²²

It complemented the work of the Kennedy Commission, built upon that work, and added to the realistic chance that criminal justice reform might actually be undertaken and might work both (a) to reduce recidivism, reduce the number of crime victims, eliminate wasteful expenditures on jails and prison, reform the ways in which probation and parole are handled, and improve public safety; and (b) simultaneously to reduce the number of people incarcerated in United States jails and prisons, improve the prospects of former offenders to achieve successful reentry, break the cycle of recidivism, and ameliorate the impact of the criminal justice system on minority communities.

The collateral consequences of criminal records to employment represents one of the more difficult issues facing our justice system and our nation. Without question, if the substantial barriers to employment for ex-offenders continue to exist, the United States will remain on top of the world in recidivism rates. Unfortunately, the solution is not as simple as removing the statutory barriers and the background check requirements. Many small businesses across America cannot afford a hiring mistake; a business that hires an ex-offender immediately increases its exposure to liability because of civil suits for negligent hiring. States like Illinois have tried to find a middle ground in the form of certificates of rehabilitation.²³ Ex-offenders can apply for a certificate and, if they meet a set of factors, they are awarded a certificate that

¹⁸ Second Chances, p. 29.

¹⁹ Second Chances, p. 31.

²⁰ N.Y.S. Human Rights Law, N.Y.Exec. Law § 296(16).

²¹ Second Chances, p. 29.

²² Second Chances, p. 27.

²³ Second Chances, p. 32.

immunizes employers from negligent hiring law suits. Factors that are considered are length of time that has passed since release, age at the time of the offense, nature of the offense and any actions the offender can report regarding their good conduct and rehabilitation. Without this middle ground approach, the few employers that do have discretion to hire ex-offenders without statutory licensing barriers will continue to eliminate ex-offenders from their hiring pool.

Coincidental with the barriers to employment for persons with criminal conviction records, is the related problem of the unreliability of the data base most commonly used by employers for job-related background checks, the FBI criminal records database. The FBI maintains criminal history records on more than 75 million individual, one in every four Americans. According to the Department of Justice – the custodian of the records at issue – roughly 50 percent of the FBI criminal records are incomplete or inaccurate.²⁴ The most common inaccuracy is omission of information on final disposition after arrest, including dismissals and other exculpatory information. Despite its acknowledged shortcomings, the use of FBI background checks for employment purposes has grown at a phenomenal rate, estimated at 17 million employment-related FBI checks in 2012, six times the number conducted a decade ago.²⁵ An estimated 1.8 million workers a year are subject to background checks that include faulty or incomplete information, and 600,000 may be prejudiced in seeking employment by FBI reports that do not include accurate or up-to-date information that would benefit them.²⁶

Despite significant federal funding over many years to improve the FBI criminal records database, little progress has been made since the 2006 DOJ Report to Congress. We support Congressional action to require implementation of accuracy standards for this most important database and commend Representatives Bobby Scott and Steve Cohen for introducing the Fairness and Accuracy in Criminal Background Checks Act.

Collateral Consequences of Conviction Grant

The Collateral Consequences of Conviction Project funded by the National Institute of Justice recently has completed developing a state-by-state database of all collateral consequences of criminal convictions that exist in every jurisdiction's code of laws and regulations. The project was authorized by Congress in 2008 in large part due to the leadership of Senator Patrick Leahy. This monumental project has identified about 45,000 collateral consequences.²⁷ The expectation is that this resource can be used, without cost, by everyone – the public, attorneys, prosecutors and defense attorneys, judges, and policy makers – to reveal all of the repercussions attendant to a conviction. Knowledge of these consequences can only lead to a more fair and accurate discussion of plea bargains, decisions to charge and prosecute, sentencing decisions, and lawmaking.

²⁴ U.S. Dept. of Justice, Office of the Attorney General, *The Attorney General's Report on Criminal History Background Checks* (June 2006) pg. 3, available at http://www.justice.gov/olp/ag_bgchecks_report.pdf.

²⁵ *Wanted: Accurate FBI Background Checks for Employment*, The National Employment Law Center (2013) pg. 5, available at <http://www.nelp.org/page/-/SCLP/2013/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf?nocdn=1>.

²⁶ *Wanted: Accurate FBI Background Checks for Employment*, p. 13.

²⁷ See National Inventory of the Collateral Consequences of Conviction website at: <http://www.abacollateralconsequences.org/>.

ABA attorneys working with the Project have reviewed hundreds of thousands of statutes and regulations, identifying and cataloguing each of the collateral consequences that they have found. In particular, the attorneys determine: (1) whether a consequence applies automatically by operation of law or if there is a discretionary component to the statute; (2) the type of benefit affected²⁸ (*i.e.*, employment and licensing); (3) the duration of the consequence; (4) whether there is any relief specified within the statute; and (5) what crime triggers each consequence.

The vast majority of collateral consequences identified by the project are employment-related. These are specific provisions that may prohibit employment generally in a field or have a subsidiary effect on employment by limiting professional, occupational, and business licensing. License applicants – ranging from a cosmetology license to a license to practice law – can be denied because of a previous criminal conviction, regardless of how long ago the incident occurred. This is true despite the fact that state correctional systems spends millions of dollars on job training programs in prison, only to then bar re-entering individuals from obtaining licenses that would allow them to work in the fields for which they were trained in prison. While there are a countable number of identified employment-related consequences, it does not begin to address the discrimination based on criminal history in unregulated private enterprise, where a criminal history will preclude hiring for most any job.

Furthermore, like considerations of criminal histories, many collateral consequences act as permanent disqualifications. Although some permanent disqualifications represent a considered legislative or administrative judgment, many more simply fail to specify an end date for the disqualification, most likely because no one focused on the appropriate length of the disqualification. Thus, a crime committed at age 18 can ostensibly be used to deny a former offender the ability to become a licensed barber or stylist when he or she is 65 years old.

The collateral consequences of greatest concern, however, affect offenders' ability to live and provide for themselves – for instance, collateral consequences that deny welfare benefits or housing assistance. These consequences can put the offender's family in a double bind: where they must choose between providing for themselves or helping their loved one or fellow man; whether to continue to receive public benefits against helping a brother, a father, a friend, a recent offender have a safe place to sleep. The irony is that a stable support structure is crucial to reduce recidivism. When offenders leave prison, if they have no place to live and no way to earn money, is it any wonder that they may reoffend?

Finally, the mechanisms for relief of particular collateral consequences are for the most part non-existent and traditional relief mechanisms – like executive pardons, expungements, sealing provisions, and set-asides – do less in our internet age, where criminal searches will always document a criminal past. In effect, a criminal history becomes a seemingly insurmountable barrier to successful reentry.

While this is a bleak picture of collateral consequences, there is a growing awareness of the impact these laws are having and signs a consensus may be forming toward action to rationalize

²⁸ Collateral consequence categories include employment, public benefits, civic participation, family rights, individual rights, military, immigration, and those crimes subject to the Sex Offender Registration and Notification Act

the law in this area. The hope is that this project will provide everyone a readily accessible resource and tool to assist all stakeholders in the criminal justice system and the general public that has an interest in reducing crime to finally begin to know the full scope of and the actual number of collateral consequences. Armed with knowledge, they can propose and deliver on appropriate reform of unfair and unjust collateral consequences. Until there is reform, at least practitioners, judges, prosecutors, and defense attorneys will be better able to provide more informed assistance and counsel to any American who has or may have a criminal history or is facing criminal charges.

Thank you for the opportunity to appear before the Task Force today to share the views of the American Bar Association.