



RESEARCH AND ADVOCACY FOR REFORM



**Testimony of Marc Mauer
Executive Director
The Sentencing Project**

**Collateral Consequences of Criminal
Convictions: Barriers to Reentry for the
Formerly Incarcerated**

**Prepared for House Judiciary Subcommittee on
Crime, Terrorism, and Homeland Security**

June 9, 2010

Thank you for the opportunity to present this testimony on the impact of the collateral consequences of a criminal conviction. I am Marc Mauer, Executive Director of The Sentencing Project. I have been engaged in research and public policy advocacy on criminal justice issues for thirty years, and am the author of books and journal articles on issues of sentencing, incarceration, and collateral consequences. I am also the co-editor of the book, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, one of the first volumes to examine the broad effects of the current generation of collateral consequences.

In my testimony today I will present an overview of the range of consequences that affect people with criminal convictions as well as an assessment of their impact on reentry, recidivism, and civic participation. I will also offer recommendations for reform that I believe would address some of the problems in this area and would lead to more successful outcomes.

THE GROWING PROBLEM OF COLLATERAL CONSEQUENCES

One of the few bright spots in the economy this year was the substantial number of people who were able to obtain employment to help carry out the national census. While the Census Bureau is expected to hire 700,000 temporary workers, these will generally not be people with previous criminal convictions. The Census agency's practice involves screening out applicants if their names show up in an FBI database, either for an arrest or conviction. Applicants then have 30 days in which to produce official records showing the disposition of their cases.

Eugene Johnson and Evelyn Houser were two African American applicants denied employment through this process. Johnson, who has done field survey work for market researchers, had been arrested on misdemeanor assault charges in 1995 stemming from a dispute with his landlord. He was sentenced to perform community service and pay restitution. Houser, a 69-year old retired home health care aide, had been arrested in 1981 and charged with theft and forgery involving a check she had found near a dumpster and cashed. She was placed in a diversion program and was not even formally convicted. In 1990, she had been hired as a census taker, and had no subsequent arrests. But neither Johnson nor Houser could produce court records to document that their cases had been settled, and so both were denied employment.

There have been restrictions placed on persons with criminal convictions since the founding of the nation. Growing out of the medieval concept of "civil death," which restricted offenders from entering into contracts, inheriting property, or voting, the early American nation incorporated many aspects of this tradition. Thus, offenders were frequently denied the right to enter into contracts, had their marriages dissolved, and had broad restrictions placed on their access to employment and

benefits. The prevailing sentiment of two hundred years ago was a starkly punitive one that was probably not useful then and is certainly not useful today.

I am pleased that this committee is choosing to reexamine this unfortunate legacy today. While collateral consequences such as employment barriers have been a feature of the criminal justice system for many years, their existence today is more far-reaching than ever before. This is a function of two overlapping trends.

First, the sheer increase in the number of people with felony convictions and those sentenced to prison over the past three decades is unprecedented. The U.S. currently imprisons eight times as many people as were held in state and federal prisons in 1970, a record 1.6 million people. Inclusion of those awaiting trial or serving a sentence in local jails brings the total to 2.3 million today. It is important to note that these dramatic increases are largely a result of changes in policy, not crime rates. Through such policy initiatives as the “war on drugs,” mandatory sentencing, and cutbacks in parole release, policymakers have enacted a series of harsh sentencing laws that have sent more people to prison and for longer periods of time than in any previous era.

Current estimates suggest that about 13 million Americans are either serving a felony sentence or have had a felony conviction in the past. In addition, 47 million people have a criminal record on file. Since even an arrest that does not lead to conviction can have consequences for an individual, these figures clearly indicate that the problem affects a substantial proportion of the adult population. Moreover, given the racial dynamics of the criminal justice system, communities of color are experiencing these impacts at substantially higher levels than the national average. This can be seen most dramatically for African American males, with one of every six having served time in prison, and even greater numbers having a felony conviction.

Second, in addition to the growth of the criminal justice population, there has been a parallel development of a new generation of collateral consequences enacted by policymakers. Many of these have grown out of the “war on drugs,” and have been directly targeted toward persons with a drug conviction. In many cases, the same retributive impulses that have led to excessive sentencing provisions have also resulted in this new range of punishments and restrictions that accompany a criminal conviction. The conglomeration of collateral consequences can now touch every aspect of an individual’s life, affecting employment, housing, education, military service, public benefits, driver’s licenses, child custody, voting, and jury service, among others.

Three additional points regarding the spread of collateral consequences are notable as well. First, it is ironic that the reach of these sanctions is now so broad, given the growing support for sentencing reform and reentry over the past decade. Second, many of these restrictions extend well beyond the term of the criminal conviction, and frequently result in lifetime prohibitions on access to public benefits and services. And third, many collateral sanctions have been in existence for decades without ever being reviewed for effectiveness or utility.

COLLATERAL CONSEQUENCES ARE PROBLEMATIC FOR SUCCESSFUL REENTRY

Some collateral consequences of a criminal conviction are based on a premise of public safety, and may be considered as necessary and appropriate for that objective. For example, few people would object to restrictions on convicted pedophiles being able to work in a day care center. In this instance, public safety is clearly the objective of the restriction, and the person's past criminal behavior is directly linked to that objective. In assessing the full range of collateral sanctions, though, there are few instances such as this where we can discern a public safety objective that is defined by targeted restrictions on the offender. Instead what we see all too often are restrictions that fail to promote public safety, that frequently run counter to integrating formerly incarcerated people into the community, and that are based on political posturing rather than behaviorally based analysis.

The problems posed by a broad range of collateral sanctions for successful reentry are many, including the following:

Many restrictions on employment are irrational and counterproductive – As noted above, some of the restrictions based in law or licensing provisions are related to legitimate public safety objectives. But in far too many cases, it is difficult to detect any such consideration. In Florida, for example, there are at least 71 occupational groups which subject potential employees to background checks, covering as many as one-third of the 7.9 million jobs in the Florida economy.¹ These include such diverse positions as working at a dog racetrack, physical therapist, funeral embalmer, and asbestos abatement. Some of these restrictions are lifetime bans, others require

¹ Collins Center for Public Policy, "Florida's Restrictions on Employment Opportunities for People with Criminal Records," February 2006.

restoration of civil rights by the governor, while still others are discretionary by the relevant agency.

Drug-related collateral consequences are particularly unfair and counterproductive – A little-noticed provision at the time of enactment of the 1996 federal welfare reform legislation was a permanent prohibition on receipt of welfare benefits and food stamps for anyone with a felony drug conviction. Presumably, members of Congress believed that this measure represented one more means of “sending a message” about the harms of drug use and drug selling, although curiously the ban does not apply to far more serious crimes such as murder or armed robbery. This ban disproportionately affects women and children, by far the overwhelming proportion of recipients of such benefits. The impact of the ban means that a woman returning home from prison who may gain temporary employment but is then laid off during a recession is left with no “safety net.” And further, children are essentially punished for the acts of their parents.

Under the 1996 law, the ban applies nationally, but states may opt out of its provisions. To date, 9 states have fully opted out, while 33 others have partially opted out. These latter include states in which convictions for drug selling result in the ban, but not those for drug possession, or where the ban is suspended for someone participating in drug treatment.

The ban on receipt of Pell grants in prison was based on politics, not research – As an element of the 1994 federal crime bill, prisoners who seek to enroll in higher education are now denied access to Pell grant funds. Previously, these funds generally covered the tuition costs of the community college programs that frequently provided higher education in prison. At the time, prison programs represented less than 1% of all Pell grant spending nationally. As a result of the ban,

the number of such programs has declined precipitously. A wealth of research over time demonstrates that education helps to reduce recidivism, and so this ban runs counter to promoting public safety.

IMPLEMENTATION OF COLLATERAL CONSEQUENCES IS PROBLEMATIC FOR BOTH INDIVIDUALS AND DECISION MAKERS

The broad range of collateral consequences of conviction encompasses a patchwork of federal, state, and local initiatives, and have been enacted over a period of many years. As such, they pose a series of problems for consideration by policymakers.

These include:

Collateral consequences are not catalogued in any systematic manner – Arguably, one rationale for imposing collateral consequences might be that policymakers hope they will have a deterrent effect on potential offenders, who might consider the consequences of their actions. Yet under current practice, there is no means by which this can occur, since there is no systematic catalogue of such sanctions in any state. This situation is a function of the fact that these policies have been enacted over many years, that they are written into varying sections of state law, that some are imposed by the federal government, and that some are functions of licensing agencies. Therefore, an offender reentering the community generally will have no means of knowing which benefits and services he or she is restricted from accessing.

Fortunately, the National Institute of Justice is supporting a project aimed at producing a comprehensive catalogue of collateral sanctions by state. However, it is likely that this resource will not be available for at least two to three years, and so until then both policymakers and people with felony convictions will have little guidance in understanding the breadth of these sanctions.

Collateral consequences are rarely acknowledged in the courtroom – If one believes that collateral sanctions have some utility, then they should be transparent and considered carefully as part of the court process. But this is rarely the case. The first significant point at which this poses an issue regards the defense attorney advising a client on plea negotiations. If the plea is to truly be an informed one, then we would normally expect that the attorney would advise the client of all the potential consequences of conviction. This is particularly critical for non-citizens who may face deportation as a result of a plea. In many jurisdictions defense attorneys now regularly inform their clients of this, but as seen in the recent Supreme Court decision in the *Padilla* case, all too often this is not done effectively. The *Padilla* case involved a man who had lived in the U.S. for 40 years and was a legal resident, but was incorrectly told by his attorney that pleading guilty to a drug charge would not affect his immigration status. In fact, the plea brought with it a mandatory deportation.

Even more rare in a courtroom is any statement by a sentencing judge regarding the collateral sanctions that are imposed upon conviction. In many cases this is in part due to the judge being unaware of the range of restrictions that are triggered by the conviction, since there is little discussion of this in judicial training or practice.

COLLATERAL SANCTIONS ARE OFTEN IMPLEMENTED IN ERROR

Because collateral consequences are frequently misunderstood even by the officials charged with enforcing them, they are subject to both arbitrariness and error in their implementation. There is a good deal of evidence of this in the area of felony disenfranchisement in particular.

Felony disenfranchisement policies are state-based, and 48 states and the District of Columbia variously call for restrictions on voting while in prison, or on probation or

parole. The implementation problems result from several factors. First, there is little training of election officials regarding relevant state law. One survey of officials in ten states found that one-third misinterpreted the relevant law in their state.² A second problem is access to information. In most states, election officials do not have ready access to criminal justice records, and so have to go through a cumbersome process (or rely solely on the word of the applicant) to certify that a person is eligible to vote. This process can be very costly to the jurisdiction as well, involving significant amounts of personnel time.

Anecdotal evidence suggests that misinformation results in two types of error. In some cases, persons who are legally disenfranchised are permitted to vote, while in others people who are legally eligible to vote are mistakenly prevented from doing so. Clearly, an electoral system can only be respected if it enforces the law fairly and uniformly.

A GROWING MOVEMENT FOR REFORM

As a result of increased attention to the challenges posed by collateral consequences policymakers in a number of jurisdictions have enacted reforms designed to either eliminate or scale back the scope of many such policies. In addition, organizations such as the American Bar Association and others have developed policy recommendations designed to implement a more rational system. We can see the direction of these changes in many areas.

In regard to felony disenfranchisement, 21 states have enacted reforms in policy and practice since 1997. These have included eliminating the ban on post-sentence

² Alec Ewald, "A 'Crazy Quilt' of Tiny Pieces: State and Local Administration of American Disenfranchisement Law" The Sentencing Project, 2005.

voting in Iowa, Maryland, New Mexico, and Texas, extending voting rights to persons on probation and/or parole in Connecticut and Rhode Island, and easing the rights restoration process in Florida, Virginia, and other states.

As noted above, 42 states have chosen to opt out, either in whole or in part, of the TANF/food stamp bans required by Congress. These actions by the states should be considered as an indication that such sweeping federal policies may not be viewed as desirable at a state and local level.

In the area of employment, a number of jurisdictions have taken measures to reduce the barriers posed by a criminal conviction. Under these “ban the box” measures, applicants for public employment are no longer asked if they have a criminal conviction on an initial application. If the applicant is called for an interview and is being considered for the position, the employer can then request the criminal history information. The objective of such measures is to not automatically screen out persons with a criminal history, and instead to only consider such information in the overall context of the employee’s qualifications. In recent years, such measures have been adopted statewide in Minnesota and New Mexico, as well as in the cities of Boston, Minneapolis, and San Francisco.

CONCLUSION AND RECOMMENDATIONS

Congress's demonstrated commitment to the issues confronting people reentering communities after incarceration, as demonstrated through its overwhelming support and funding of the Second Chance Act passed in 2008, is commendable. The programs funded through this law will undoubtedly provide critical assistance to those facing significant obstacles, aid their rehabilitation and ultimately reduce levels of recidivism. But, unfortunately, much more remains to be done.

Each year 700,000 people leave prison and millions more leave local jails. The consequences of their criminal conviction remain present even after incarceration and hinder their reintegration. Without access to housing or financial assistance, or even food during this critical period of transition, every day can be an overwhelming challenge. People leaving incarceration need a reasonable opportunity at a successful life but collateral consequences can make this impossible, resulting in an almost inevitable rearrest or reincarceration.

Congress's commitment to successful reentry should not ignore the numerous collateral consequences confronting those with criminal convictions. In order to provide more comprehensive support for reentry, there are several areas in which Congress should take action. These include:

- Eliminate the lifetime ban on Temporary Assistance for Needy Families (TANF) and the Supplemental Nutrition Assistance Program (formerly Food Stamps) eligibility for people with drug felony convictions.
- Amend the Higher Education Act to restore Pell Grant eligibility to incarcerated people.

- Reconsider the broad discretionary power of Public Housing Authorities to deny public, Section 8, and other federally assisted housing to anyone who has had any involvement in a drug-related or violent crime, regardless of time passed since the offense.
- Create a federal standard on the use of criminal background checks for employment purposes when screening for arrest and conviction. A standard should consider the relationship between the offense and the job position, how long ago the offense occurred, the severity of the offense, and any evidence of rehabilitation.
- Restore federal voting rights to those who are no longer incarcerated and ensure accurate notification of voting rights.



514 TENTH STREET, NW SUITE 1000

WASHINGTON, DC 20004

TEL: 202.628.0871 • FAX: 202.628.1091

WWW.SENTENCINGPROJECT.ORG