

Collateral damage occurs in any war, including America’s “War on Crime.” Ironically, our zealous efforts to keep communities safe may have actually destabilized and divided them. The vast expansion of the nation’s criminal justice system over the past 40 years has produced a corresponding increase in the number of people with a criminal record. One recent study estimated that 65 million people — one in four adults in the United States — have a criminal record.² At the same time, the collateral consequences of conviction — specific legal restrictions, generalized discrimination and social stigma — have become more severe, more public and more permanent. These consequences affect virtually every aspect of human endeavor, including employment and licensing, housing, education, public benefits, credit and loans, immigration status, parental rights, interstate travel, and even volunteer opportunities. Collateral consequences can be a criminal defendant’s most serious punishment, permanently relegating a person to second-class status. The obsession with background checking in recent years has made it all but impossible for a person with a criminal record to leave the past behind. An arrest alone can lead to permanent loss of opportunity. The primary legal mechanisms historically relied on to restore rights and status — executive pardon and judicial expungement — have atrophied or become less effective.

It is time to reverse this course. It is time to recognize that America’s infatuation with collateral consequences has produced unprecedented and unnecessary collateral damage to society and to the justice system. It is time to celebrate the magnificent human potential for growth and redemption. It is time to move from the era of collateral consequences to the era of restoration of rights and status.

NACDL recommends a broad national initiative to construct a legal infrastructure that will provide individuals with a criminal record with a clear path to equal opportunity. The principle that individuals have paid their debt to society when they have completed their court-imposed sentence should guide this initiative. At its core, this initiative must recognize that individuals who pay their debt are entitled to have their legal and social status fully restored.

Until recently, defense lawyers have not regarded avoiding and mitigating collateral consequences as part of their responsibility to the client. This has changed, in part because of court decisions recognizing collateral consequences as an integral part of the criminal case, and in part because of the increasing social and economic significance of collateral consequences themselves. As a result, in 2011 NACDL established a Task Force on Restoration of Rights and Status After Conviction to inquire into how existing restoration mechanisms are actually functioning and to determine how they can be improved. The Task Force conducted extensive hearings in six different major American cities in five distinct regions of the country over more than two years and took testimony from more than 150 wit-

nesses. The result is this report and the following comprehensive recommendations for reform.

I. The United States should embark on a national effort to end the second-class legal status and stigmatization of persons who have fulfilled the terms of a criminal sentence.

The three branches of government, on the federal, state and local levels, should undertake a comprehensive effort to promote restoration of rights and status after conviction. This is a major effort that requires a multifaceted approach. It should include enactment of laws to circumscribe or repeal existing collateral consequences and a resolve to stop enacting new ones. More fundamentally, government entities, the legal profession, the media and the business community must promote a change in the national mindset to embrace concepts of redemption and forgiveness, including a public education campaign to combat erroneous and harmful stereotypes and labels applied to individuals who have at one point or another committed a crime. As a cornerstone of this movement, the United States and its states and territories should establish a “National Restoration of Rights Day” to recognize the need to give individuals who have successfully fulfilled the terms of a criminal sentence the opportunity to move on with their lives.

Defender organizations and offices, as well as individual defense attorneys and the legal profession as a whole, have an important role to play in this effort. They should propose and support efforts to repeal collateral consequences and to enact effective ways to relieve any remaining collateral consequences. They should participate in efforts to catalogue collateral consequences and make them available in a form that is useful and educational to lawyers, courts, government agencies, researchers, and the public at large. These entities should work to change the way people with a criminal record are depicted in the media and discourage the use of disparaging labels such as “felon,” “criminal” and “ex-con” that reinforce fear-inducing stereotypes and perpetuate discriminatory laws and policies. They should participate in efforts to educate the public about the broad range of conduct that can result in conviction and the harmful effects of permanently burdening those who are convicted. Further, they should support efforts to provide equal opportunity to people with a criminal record, including in their own employment policies and practices.

II. All mandatory collateral consequences should be disfavored and are never appropriate unless substantially justified by the specific offense conduct.

Legislatures should not impose a mandatory collateral consequence unless it has a proven, evidence-based public safety benefit that substantially outweighs any burden it places on an individual's ability to reintegrate into the community. This means that most mandatory collateral consequences should be repealed, including the loss of voting and other civil and judicial rights, which serve no public safety purpose at all. For those few mandatory consequences that can be justified in terms of public safety, sentencing courts should be authorized to relieve them on a case-by-case basis at sentencing and while a person is under sentence. Any mandatory consequence that is not relieved should automatically terminate upon completion of an individual's court-imposed sentence unless the government can prove a public safety need for its continued application.

III. Discretionary collateral consequences should be imposed only when the offense conduct is recent and directly related to a particular benefit or opportunity.

Where a decision-maker is authorized but not required to deny or revoke a benefit or opportunity based upon a conviction, it should do so only where it reaches an individualized determination that such action is warranted based upon the facts and circumstances of the offense. States and the federal government should develop and enforce clear relevancy standards for considering a criminal record by discretionary decision-makers, requiring them to consider the nature and gravity of the conduct underlying the conviction, the passage of time since the conviction and any evidence of post-conviction rehabilitation. Administrative agencies should be required to specify and justify the types of convictions that may be relevant in their particular context, and to publish standards that they will apply in determining whether to grant a benefit or opportunity. Benefits and opportunities should never be denied based upon a criminal record that did not result in conviction.

IV. Full restoration of rights and status should be available to convicted individuals upon completion of sentence.

After completing their sentence, individuals should have access to an individualized process to obtain full restoration of rights and status, either from the executive or from a court, by demonstrating rehabilitation and good character. This relief process should be transparent, accountable and accessible to all regardless of means. Standards for relief should be clear and attainable, high enough to make relief meaningful, but not so high as to discourage deserving individuals. A pardon or judicial certificate should relieve all mandatory collateral consequences, and decision-makers should give full effect to a pardon or judicial certificate where a collateral consequence is discretionary. Jurisdictions should give their residents with convictions from other jurisdictions access to their relief procedures, and should also give effect to relief granted by other jurisdictions.

V. Congress and federal agencies should provide individuals with federal convictions with meaningful opportunities to regain rights and status, and individuals with state convictions with mechanisms to avoid collateral consequences imposed by federal law.

Congress should expand non-conviction dispositions for federal crimes, and federal prosecutors should be encouraged to offer them wherever appropriate. Individuals convicted of federal crimes should have an accessible and reliable way of regaining rights and status through the courts or a reinvigorated federal pardon process. Congress should limit access to and use of federal criminal records through judicial expungement, set-aside or certificates of relief from disabilities.

Congress should authorize state and federal courts to dispense with mandatory collateral consequences arising under federal law. By the same token, state legislatures should provide individuals with federal convictions a way to avoid consequences arising under state law. Federal courts and agencies should recognize and give effect to state relief.

Federal agencies should provide incentives to public and private employers to offer equal opportunity to persons with a criminal record. The federal government should fund research into whether relief mechanisms help individuals reintegrate into society and reduce recidivism.

VI. Individuals charged with a crime should have an opportunity to avoid conviction and the collateral consequences that accompany it.

To avoid harmful and unnecessary collateral consequences, diversion and deferred adjudication should be available for all but the most serious crimes, and prosecutors and courts should be encouraged to use these alternatives. Non-conviction dispositions should be sealed or expunged and should never trigger collateral consequences. Decision-makers should be barred from asking about or considering such dispositions.

Collateral consequences should be taken into account at every stage of the case by all actors in the criminal justice system. Defense lawyers should advise clients about them and explore opportunities to avoid them through creative plea bargaining and effective sentencing advocacy. Prosecutors should structure charges and negotiate pleas to enable defendants to avoid collateral consequences that cannot be justified. Courts should ensure that defendants are advised about applicable collateral consequences before accepting guilty pleas, and should take collateral consequences into account at sentencing.

VII. Employers, landlords and other decision-makers should be encouraged to offer opportunities to individuals with criminal records, and unwarranted discrimination based on a criminal record should be prohibited.

Government at all levels should find creative ways to give employers, landlords, and other decision-makers affirmative incentives to offer opportunities to those with criminal records. There should be meaningful tax credits for hiring or housing those with criminal records and free bonding to provide insurance for any employee dishonesty. Decision-makers should be eligible for immunity

from civil liability relating to an opportunity or benefit given to an individual with a criminal record if they are in compliance with federal, state and local laws and policies limiting the use of criminal records and with standards governing the exercise of discretion in decision-making. Jurisdictions should enact clear laws prohibiting unwarranted discrimination based upon an individual's criminal record, and should provide for effective enforcement and meaningful review of discrimination claims.

VIII. Jurisdictions should limit access to and use of criminal records for non-law enforcement purposes and should ensure that records are complete and accurate.

State repositories, court systems and other agencies that collect criminal records should have in place mechanisms for ensuring that official records are complete and accurate, and should facilitate opportunities for individuals to correct any inaccuracies or omissions in their own records. Records must be provided in a form that is easy to understand and that does not mislead. Records that indicate no final disposition one year after charges are filed should be purged from all records systems. The FBI must ensure that information relating to state relief, such as expunged and sealed records, is reflected in its criminal record repository.

State and federal authorities should limit access to their central repositories to those with a legitimate need to know. Court records should be available only to those who inquire in person, in order to balance public access to records with privacy concerns for individuals with a criminal record, and access to online court system databases should be strictly limited. Law enforcement records (non-judicial) should never be publicly disseminated. Criminal records that do not result in a conviction should be automatically sealed or expunged, at no cost to their subject. Jurisdictions should prohibit non-law enforcement access to conviction records after the passage of a specified period of time, depending upon the nature and seriousness of the offense, and should authorize courts to prohibit access in cases where it is not automatic. Any exceptions should be justified in terms of public safety, and persons who disclose records in violation of limitations on access should be subject to substantial civil penalties.

Employers and other decision-makers should be prohibited from asking about or considering a criminal record to which access has been limited by law or court order. For accessible records, decision-makers should comply with applicable relevance and non-discrimination standards. Employers should also be prohibited from inquiring about an applicant's criminal record until after a contingent offer of employment has been made.

Jurisdictions should never sell criminal records and should strictly regulate private companies that collect and sell records. Federal law should prohibit credit reporting agencies from disclosing records of closed cases that did not result in conviction, and convictions that are more than seven years in the past. States should enact their own restrictions on credit reporting companies to the extent permitted by federal preemption. Jurisdictions should provide for effective enforcement of laws governing credit reporting agencies.

IX. Defense lawyers should consider avoiding, mitigating and relieving collateral consequences to be an integral part of their representation of a client.

Defense counsel should consider avoiding and mitigating collateral consequences to be an integral part of their representation of a client, both at and after sentencing. If post-sentence representation is not feasible, defense counsel should refer clients to organizations or individuals that can provide such representation. Agencies that fund indigent defense services should fund representation in connection with restoration of rights and status.

X. NACDL will initiate public education programs and advocacy aimed at curtailing collateral consequences and eliminating the social stigma that accompanies conviction.

NACDL resolves to use all of its resources, particularly the dedication of its members who are on the front lines fulfilling the mandates of the Sixth Amendment, to implement the preceding nine principles. The nation's criminal defense bar must be in the vanguard of the effort to make the full restoration of rights and status a reality for all who successfully fulfill the terms of a sentence. NACDL and the defense community will lead efforts to repeal or modify existing collateral consequences that cannot be justified in terms of public safety, to avoid enacting any additional ones, and to implement meaningful restoration procedures both during and after the conclusion of the criminal case.