



# The Collateral Consequences of Arrests and Convictions under D.C., Maryland, and Virginia Law

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October 22, 2014

A report of the Washington Lawyers' Committee  
for Civil Rights & Urban Affairs

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# PREFACE

As documented in this report, there can be no question that the problem of collateral consequences of arrest and conviction is a key civil rights issue in the Washington, D.C. area. This is the second in a series of reports focusing on criminal justice reform and civil rights by the Washington Lawyers' Committee for Civil Rights and Urban Affairs. As with last year's report, this report is dedicated to Judge Louis F. Oberdorfer, the distinguished jurist, who inspired the creation of the Washington Lawyers' Committee in 1968 while a partner at Wilmer, Cutler & Pickering. Judge Oberdorfer served on the Committee's Board of Trustees until his elevation to the bench in 1977. Throughout his long career, Judge Oberdorfer, who died in February 2013, spoke eloquently in support of civil rights and criminal justice reform. In his memory, the Louis F. Oberdorfer Fund has been established to support the Committee's ongoing work on criminal justice reform and civil rights advocacy. We are pleased to note that Elliot Minberg, a significant contributor to this report, is now serving on the Washington Lawyers' Committee's staff as the Louis Oberdorfer Senior Counsel. A stipend to support his work is provided by the Oberdorfer Memorial Fund.

The Washington Lawyers' Committee would like to acknowledge with particular gratitude the service of the following retired and senior Federal and District of Columbia Judges who composed the Advisory Committee assisting with this study:

*John M. Ferren*, Senior Judge, District of Columbia Court of Appeals

*Rufus G. King III*, Senior Judge, Superior Court of the District of Columbia

*James Robertson*, Retired Judge, United States District Court for the District of Columbia

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*Patricia M. Wald*, Retired Chief Judge, United States Court of Appeals for the District of Columbia Circuit

We also want to express our appreciation for the invaluable assistance in researching and writing this report and in interviewing D.C. area residents suffering from collateral consequences that was provided by a team of lawyers from Covington & Burling LLP: Alan Pemberton, Richard Hertling, Michael Beder, Mingham Ji, Han Park, Addar Weintraub, Lily Rudy, and Alex Kiles, with additional assistance from pro bono coordinator Kelly Voss, summer associate Mark Storslee, and SEO intern Kendra Mells.

Finally, the Committee would like to recognize the contributions of Bread for the City, the Washington Legal Clinic for the Homeless, the Legal Aid Society of the District of Columbia, former US Pardon Attorney Margaret Love, and Offender Aid and Restoration in Northern Virginia, whose work on the collateral consequences problem was indispensable to this undertaking.

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# EXECUTIVE SUMMARY

## FINDINGS

- The problem of collateral consequences of arrest and conviction – penalties that are imposed not by penal laws or sentences but by ancillary rules, statutes, or practices that make it harder to get a job, housing, and other necessities – is significant and growing in DC, Maryland and Virginia.
- In DC alone, some 60,000 residents have past conviction records. About 8,000 more people are released each year, and each year police make about 35,000 arrests.
- The disproportionate impact on minorities makes this very clearly a civil rights problem. For example, although African-Americans make up less than 48% of the city’s population, over 92% of those sentenced by the DC Superior Court in 2012 were African-Americans, whose overall rate of incarceration in DC is some 19 times the rate of whites.
- As to employment, the Council on Court Excellence estimated that nearly half of those in DC who have been incarcerated “may be jobless with little prospect of finding consistent work.” Strong evidence suggests that this inability to find work is directly related to past arrest or conviction history, and that it is a major contributing cause of recidivism.
- Although there have clearly been improvements in licensing and employment law, DC, Maryland and Virginia law still leave licensing boards and employers significant discretion to deny employment because of past criminal history. A license, which is needed for many occupations, can be denied by a licensing authority in DC, for example, when it determines, in its discretion, that there is “a potential direct relationship” between the offense and the license. Limits on use of criminal history to deny a license or job in the area are not subject to effective judicial enforcement.
- Arrest and conviction history have serious effects on the ability to find public or private housing. None of the three jurisdictions restricts private landlords from denying housing based on criminal history, and Maryland and Virginia specifically authorize it.
- Although federal law requires public housing authorities and subsidized housing owners to have discretion to exclude applicants because of specified types of

activity (primarily convictions for drug-related or violent crime), only DC has sought to limit that discretion. Even in DC, private owners of subsidized units have gone beyond their federally authorized discretion in denying housing.

- DC has made need-based welfare and food stamp benefits fully available to otherwise qualified citizens with drug convictions, while Virginia and Maryland have not. The two states also restrict jury service by individuals with certain convictions, and Virginia still provides in its constitution for the permanent disenfranchisement of anyone convicted of a felony unless the Governor exercises discretion to restore an individual's voting rights. All three jurisdictions restrict firearms possession.
- The report includes case studies of people in the DC area who have been denied jobs and housing based on past records. Interviews of dozens more confirm the problem.

## RECOMMENDATIONS

- Any rules or practices authorizing any collateral consequences should always reflect the principles of necessity, due process, flexibility, and rehabilitation. This means that all such consequences must be justified by a specific need, that they should rarely if ever be triggered by arrests or charges alone, that they generally should not be mandatory, and that a priority should be not to impede an individual's rehabilitation.
- All three area jurisdictions should review and improve their existing mechanisms for seeking individualized relief from collateral consequences, through methods like expungement or sealing of records and restoration of rights. The Lawyers' Committee hopes to discuss this subject in a subsequent report.
- All three jurisdictions should further limit the discretion of licensing boards to deny licenses based on criminal records, enact or strengthen ban-the-box laws limiting employers' use of criminal records in hiring decisions, and further limit access by most employers to official arrest and conviction records. Such limits should include adequate provisions for judicial enforcement.
- Ban-the-box type laws should be enacted in all three jurisdictions, with adequate enforcement to limit the ability to deny housing based on past records. Public housing authorities should limit their use of criminal records to deny housing and should publish clear guidance on how they evaluate such information.

- Maryland and Virginia should follow DC's lead in making need-based welfare and food stamps fully available to otherwise qualified persons regardless of prior convictions.
- Virginia should repeal its constitutional disenfranchisement of persons convicted of felonies. Virginia and Maryland should no longer categorically exclude individuals from jury service based on prior convictions after those individuals have successfully completed their sentences.
- A series of community forums should be convened to help educate the public, solicit community testimony, and develop further recommendations to address collateral consequences.
- Organizations that work with people with prior convictions should be involved with these forums and should receive additional support so they can expand the services that they provide.
- An area-wide program of testing should be developed and implemented to further document the extent of the collateral consequences problem, in order to further document its extent and to serve as the basis for additional legislation or litigation as necessary, especially as to employment and housing. Legal representation should be provided to people seeking to challenge unjust collateral consequences. The Lawyers' Committee is committed to continuing monitoring and action on the collateral consequences issue.





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# I. INTRODUCTION AND OVERVIEW

This report is the second in a series of reports focusing on criminal justice reform and civil rights undertaken by the Washington Lawyers' Committee for Civil Rights and Urban Affairs, in conjunction with the firm of Covington and Burling LLP and a distinguished judicial review committee composed of senior and retired judges. Over the 46 years since its founding in 1968, the Washington Lawyers' Committee has developed a range of litigation and advocacy programs and projects addressing the full spectrum of civil rights and poverty concerns, including criminal justice reform and civil rights. The first report in this series, *Racial Disparities in Arrests in the District of Columbia, 2009-2011* (2013), examined the implications of such disparities for civil rights and criminal justice in D.C. and has already led to significant dialogue and action. It is hoped that this report on the collateral consequences of arrest and conviction under D.C., Maryland, and Virginia law will also contribute to public dialogue and reform in this important area.

The problem of collateral consequences of arrest or conviction – penalties on those formerly arrested or convicted of crime that are imposed not by penal laws but by ancillary rules, statutes, or practices that make it much harder to obtain a job, housing, or other necessities – is significant and growing, both across the nation and in the D.C. area. Nationally, it is estimated that 65 million people – one in four adults—have a criminal record.<sup>1</sup> In Washington, D.C., some 60,000 District residents, about 10 percent of D.C.'s population, have been convicted of an offense, with approximately 8,000 additional residents released from incarceration each year.<sup>2</sup> In D.C. alone, the Council on Court Excellence has written, “nearly half of previously incarcerated persons...may be jobless with little prospect of finding consistent work.”<sup>3</sup>

Strong evidence suggests that this inability to find work is directly related to past arrest or conviction history. Studies in New York and Milwaukee have found, for example, that a criminal record reduces the likelihood of a job offer or callback by approximately 50 percent. Another study in several cities concluded that a majority of employers indicated that they “probably” or “definitely” would not be willing to hire an applicant with a criminal record.<sup>4</sup>

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<sup>1</sup> National Association of Criminal Defense Lawyers, *Collateral Damage* (May 2014) (“NACDL Report”) at 12; National Employment Law Project, *65 Million Need Not Apply: The Case for Reforming Criminal Background Checks* (March 2011) at 27 n.2.

<sup>2</sup> See D.C. Council Comm. on the Judiciary and Public Safety, “Report on Bill 20-642, the ‘Fair criminal records Screening Amendment Act of 2014’” (May 28, 2014) (“D.C. Report”) at 3; Council for Court Excellence, *Unlocking Employment Opportunities for Previously Incarcerated Persons in the District of Columbia* (2011) (“CCE Report”) at 7.

<sup>3</sup> CCE Report at 5.

<sup>4</sup> A. Solomon, “In Search of a Job: Criminal Records as Barriers to Employment,” *National Institute of Justice Journal* (June 2012); D. Pager, “The Mark of a Criminal Record,” *American Journal of Sociology* 957-60 (2003); D. Pager *et al.*, “Discrimination in a Low-Wage Labor Market: A Field Experiment,” *American Sociological Review* 777-79 (Oct. 2009); H. Holzer *et al.*, “Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers,” *Journal of Law and Economics* 451, 453-4 (2006).

The collateral consequences problem is particularly serious for three reasons. First, the different collateral consequences of a past arrest or conviction — even for minor offenses— often exacerbate each other. For instance, individuals who are unemployed are more likely to need assistance in obtaining housing, food, and other necessities until they can earn an income, but access to this assistance may be restricted or unavailable to those with criminal histories. At the same time, an individual who lacks stable housing and other basic support will find it more difficult to conduct an effective job search. In one survey by advocates for the homeless, those surveyed cited a lack of training and education, homelessness, and a lack of appropriate clothing and/or appearance as their main barriers to employment.<sup>5</sup> And the job-search process itself is made far more difficult when employers can and do systematically screen individuals with a criminal history from consideration. Thus, a person’s criminal history can both make the person more likely to need public assistance (by raising direct barriers to employment) while at the same time blocking access to this assistance.

In addition, the inability of previously incarcerated individuals to find stable jobs and housing due to collateral consequences makes recidivism much more likely, harming both the individuals who are directly affected and society as a whole. Research shows that housing and employment barriers, for instance, specifically increase the risk of recidivism,<sup>6</sup> thus reducing public safety while increasing the costs of the criminal justice system and social services. As the Brennan Center for Justice has noted, each homeless individual costs taxpayers on average some \$30,000 annually,<sup>7</sup> and one study of returning citizens in New York City estimated that nearly a third of those who must stay in a shelter after release returned to prison within two years<sup>8</sup> — thus contributing to the more than \$75 billion states and localities spend each year on corrections.<sup>9</sup> The D.C. Council Committee on the Judiciary and Public Safety recently concluded that “[w]ithin three years of being released from jail or prison, about 50 percent of returning citizens will reenter the criminal justice system, and whether or not a returning citizen can find employment is one of the best predictors of recidivism.”<sup>10</sup> Thus, from a fiscal as well as human cost perspective, lack of employment due to collateral consequences too often leads to economic

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<sup>5</sup> See National Coalition for the Homeless, “Homeless Employment Report: Findings and Recommendations,” <http://www.nationalhomeless.org/publications/homelessemploymentreport/> (August 2009).

<sup>6</sup> See, e.g., J. McGregor Smyth, “From Arrest to Reintegration,” 24 *Criminal Justice* No. 3, available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_cjmag\\_24\\_3\\_smyth.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_24_3_smyth.authcheckdam.pdf) (Fall 2009) (citing Stephen Metraux, Caterina G. Roman, and Richard S. Cho, “Incarceration and Homelessness,” in *Toward Understanding Homelessness: The 2007 National Symposium on Homelessness Research*, #9 (2007); and Christy A. Visher, Laura Winterfield, and Mark B. Coggeshall, *Ex-offender employment programs and recidivism: A meta-analysis*, *J. Experimental Criminology*, at 1:295-316 (Sept. 2005)).

<sup>7</sup> Testimony of the Brennan Center for Justice at NYU School of Law to the House Judiciary Committee Over-Criminalization Task Force (June 26, 2014) (hereinafter “Brennan Center Testimony”) (citing Kate Santich, “Cost of Homeless in Central Florida? \$31K Per Person,” *Orlando Sentinel* (May 21, 2014), [http://articles.orlandosentinel.com/2014-05-21/news/os-cost-of-homelessness-orlando-20140521\\_1\\_homeless-individuals-central-florida-commission-tulsa](http://articles.orlandosentinel.com/2014-05-21/news/os-cost-of-homelessness-orlando-20140521_1_homeless-individuals-central-florida-commission-tulsa); and Daniel Flaming et al., Econ. Roundtable, *Where We Sleep: Costs When Homeless and Housed in Los Angeles 1* (2009), available at [http://www.economicrt.org/pub/Where\\_We\\_Sleep\\_2009/Where\\_We\\_Sleep.pdf](http://www.economicrt.org/pub/Where_We_Sleep_2009/Where_We_Sleep.pdf)).

<sup>8</sup> *Id.* (citing Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release: Assessing the Risk 11* (2002), available at <http://csgjusticecenter.org/nrc/publications/homeless-shelter-use-and-reincarceration-following-prison-release-assessing-the-risk-3/>).

<sup>9</sup> Jason Ziedenberg, *Community Corrections Collaborative Network: Safe and Smart Ways To Solve America’s Correctional Challenges* n.1 (citing U.S. Department of Justice data), available at [http://static.nicic.gov/UserShared/2013-06-20\\_cccn\\_main\\_document\\_final.pdf](http://static.nicic.gov/UserShared/2013-06-20_cccn_main_document_final.pdf).

<sup>10</sup> D.C. Report, *supra* note 2, at 5.

and housing problems, criminal behavior, and costly incarceration, imposing additional costs on taxpayers as well as even more serious costs on our society. In contrast, successful reentry programs in places like Baltimore and St. Louis — which help returning citizens navigate the barriers posed by collateral consequences — have shown promise in significantly reducing recidivism.<sup>11</sup>

Finally, the evidence is overwhelming that many underlying arrests and convictions are for minor offenses, and that arrests for minor offenses have a particularly serious and disproportionate impact on African Americans. Previous analyses by the Washington Lawyers' Committee<sup>12</sup> and organizations such as the ACLU<sup>13</sup> show that large numbers of individuals are arrested and convicted each year for minor offenses. For instance, the Washington Lawyers' Committee's analysis of adult arrests in the District of Columbia from 2009 through 2011 found that, of more than 142,000 arrests recorded in that period, almost one-fourth were for traffic offenses, one-fifth were for drug offenses, and one-tenth were for "disorderly conduct."<sup>14</sup> In contrast, less than one out of 20 arrests was for an offense classified as "violent" under the FBI's Uniform Crime Reporting system.<sup>15</sup> In 2012 and 2013, D.C.'s Metropolitan Police Department reported a total of more than 84,000 arrests (including more than 6,000 juvenile arrests), of which more than 14 percent were drug arrests.<sup>16</sup> These arrests produce tens of thousands of new convictions each year, although many of these arrests are not pursued or otherwise do not result in convictions.<sup>17</sup>

As noted, African Americans are disproportionately likely to be arrested and convicted. The Washington Lawyers' Committee's analysis of adult arrests in D.C., for instance, found that more than eight in ten adult arrests from 2009 through 2011 were of African Americans, including nine out of ten drug arrests, even though African American adults made up only 47.6 percent of the city's population and used illegal drugs at similar rates as whites.<sup>18</sup> Sixty-three percent of drug arrests were for simple possession charges (including possession of drug paraphernalia), and African American arrestees accounted for nearly nine out of ten simple possession drug arrests during the study period.<sup>19</sup> These disparities appeared to persist through the court process, with about 87 percent of D.C. Superior Court cases that could be matched to an arrest involving African American defendants.<sup>20</sup> That conclusion is consistent with the D.C. Sentencing Commission's finding that of the 2,154 felony offenders sentenced by the D.C.

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<sup>11</sup> U.S. Conference of Mayors, "Status of Ex-Offender Reentry Efforts in Cities," at 19, 22 (2009), available at <http://usmayors.org/pressreleases/uploads/REENTRYREPORT09.pdf>.

<sup>12</sup> Washington Lawyers' Committee for Civil Rights & Urban Affairs, *Racial Disparities in Arrests in the District of Columbia, 2009-2011: Implications for Civil Rights and Criminal Justice in the Nation's Capital* (Jul. 2013) ("WLC Arrest Report").

<sup>13</sup> American Civil Liberties Union, *The War on Marijuana in Black and White* (Jun. 2013).

<sup>14</sup> WLC Arrest Report at 2, 12.

<sup>15</sup> *Id.* at 11.

<sup>16</sup> See Metropolitan Police Department Annual Report 2013 at 28, available at [http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Annual%20Report%202013\\_lowres.pdf](http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Annual%20Report%202013_lowres.pdf).

<sup>17</sup> See WLC Arrest Report at 25-26.

<sup>18</sup> *Id.* at 2, 16.

<sup>19</sup> *Id.* at 14.

<sup>20</sup> *Id.* at 27.

Superior Court in 2012, 92.8 percent were African American.<sup>21</sup> Overall, the rate of incarceration of African Americans in D.C. has been estimated to be some 19 times the rate of whites.<sup>22</sup>

Similar disparities appear to be present in Maryland and Virginia. In Virginia, law enforcement agencies reported more than 325,000 arrests in 2013, including about 40,000 drug arrests.<sup>23</sup> Almost 41 percent of arrestees — and almost 45 percent of drug arrestees — were African American,<sup>24</sup> although African Americans make up less than 20 percent of Virginia’s population.<sup>25</sup> In Fiscal Year 2012, African Americans accounted for 61 percent of Virginia’s prison population, including 72 percent of those imprisoned for a drug offense and 46 percent of those imprisoned for a public order offense.<sup>26</sup> Maryland does not publish statewide compilations of arrest statistics, but statistics from the state Division of Correction show that 71.5 percent of the Maryland’s prison inmates as of June 30, 2013, were African American,<sup>27</sup> though African Americans make up only about 30 percent of Maryland’s population.<sup>28</sup>

In short, collateral consequences pose a devastating problem for the individuals affected and their families, a disproportionate number of whom are African-Americans, for the criminal justice system, and for everyone in the D.C. metropolitan area. This report aims to highlight the ways in which collateral consequences leave individuals in a destructive Catch-22 and to suggest reforms designed to give individuals with criminal histories a fair chance to become productive members of society, thereby reducing the likelihood that they will return to criminal behavior and increasing public safety.

Section II below provides a brief overview of some of the most significant collateral consequences of arrest or conviction concerning an individual’s access to housing, employment, public benefits, and civic participation under D.C., Maryland, and Virginia law. As used below, the term “collateral consequences” refers generally to legal disadvantages an individual becomes subject to as the result of an arrest or conviction, excluding restrictions explicitly imposed as a sentence for a crime or incident to the actual execution of an arrest. For instance, a search incident to arrest is not a “collateral consequence” within the meaning of this report, nor is a prison term or a restitution order imposed as part of a criminal sentence. These are all “direct” consequences of the arrest or conviction.

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<sup>21</sup> District Of Columbia Sentencing and Criminal Code Revision Commission, 2012 Annual Report, at 52 (April 26, 2013), available at [http://sdc.dc.gov/sites/default/files/dc/sites/sdc/publication/attachments/annual\\_report\\_2012.pdf](http://sdc.dc.gov/sites/default/files/dc/sites/sdc/publication/attachments/annual_report_2012.pdf).

<sup>22</sup> See M. Mauer and R. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity* 11 (Sentencing Project, July 2007) (“Mauer”).

<sup>23</sup> Uniform Crime Reporting Section, Department of State Police, “Crime in Virginia 2013” (2014), available at [http://www.vsp.state.va.us/downloads/Crime\\_in\\_Virginia/Crime\\_in\\_Virginia\\_2013.pdf](http://www.vsp.state.va.us/downloads/Crime_in_Virginia/Crime_in_Virginia_2013.pdf). (“Virginia report”) at 64-65

<sup>24</sup> Virginia report at 64, 73.

<sup>25</sup> U.S. Census Bureau: State and County QuickFacts.

<sup>26</sup> Justice Policy Institute, *Billion Dollar Divide: Virginia’s Sentencing, Corrections, and Criminal Justice Challenge* 21-22 (2014), available at <http://www.justicepolicy.org/uploads/justicepolicy/documents/billiondollardivide.pdf>.

<sup>27</sup> Martin O’Malley, Anthony G. Brown, Gary D. Maynard and Michael Stouffer, *Annual Report Fiscal Year 2013*, at 31 (Maryland Division of Correction), available at [www.dpscs.maryland.gov/publicinfo/publications/pdfs/DOC2013AnnualRpt.pdf](http://www.dpscs.maryland.gov/publicinfo/publications/pdfs/DOC2013AnnualRpt.pdf).

<sup>28</sup> U.S. Census Bureau: State and County QuickFacts.

“Collateral consequences,” in contrast, are triggered by arrests or convictions but are not a formal consequence of an arrest or sentence or penal statute.<sup>29</sup> Some collateral consequences are mandatory, such as a prohibition on receiving certain types of housing assistance after a conviction for certain offenses.<sup>30</sup> Other collateral consequences are discretionary; for example, licensing boards often are permitted but not required to deny a license to an individual on the basis of an arrest or conviction, as are public and private employers and landlords in the absence of statutory restriction.<sup>31</sup> Both forms of collateral consequences result in individuals facing built-in legal disadvantages based on the mere fact of an arrest or conviction. Section III below outlines proposed reforms designed to mitigate these effects by ensuring that collateral consequences do not impose unnecessary and counterproductive burdens.

A more comprehensive inventory of collateral consequences under federal law and the laws of each state and the District of Columbia is maintained by the American Bar Association.<sup>32</sup> The National Association of Criminal Defense Lawyers (NACDL) has provided extensive information and suggestions about methods by which individuals can seek relief from collateral consequences through requesting expungement or sealing of records or a pardon or restoration of rights.<sup>33</sup> Although Section III contains a general recommendation that all area jurisdictions should review and consider improvements to their laws in this area, that subject is not discussed in this report, and the Washington Lawyers’ Committee is hopeful that it can be considered in more detail in a subsequent report.

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<sup>29</sup> Although often considered to be collateral consequences, sanctions and restrictions that are imposed on sex offenders, sometimes dependent on the terms of particular sentences, are not discussed in this report.

<sup>30</sup> Such mandatory collateral consequences are sometimes referred to as “collateral sanctions.” See Uniform Collateral Consequences of Conviction Act, Prefatory Note at 2 (2010), available at [http://www.uniformlaws.org/shared/docs/collateral\\_consequences/uccca\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf).

<sup>31</sup> Such discretionary consequences are sometimes referred to as “disqualifications.” See *id.*

<sup>32</sup> See American Bar Association, National Inventory of the Collateral Consequences of Conviction, available at <http://www.abacollateralconsequences.org>. This report discusses some federal laws and regulations that impose collateral consequences that depend on subsequent decisions by D.C., Maryland, Virginia, and other state and local jurisdictions, such as laws concerning housing, welfare, and food stamps. This report does not discuss in detail collateral consequences imposed solely by federal law, such as mandatory restitution, which are included in the National Inventory..

<sup>33</sup> See NACDL Report at 42-46, 54-61; M. Love, NACDL Restoration of Rights Project, available at <https://nacdl.org/rightsrestoration> (“NACDL Restoration”). See, e.g. Criminal Record Sealing Act of 2006, 16 D.C. Code 16-801 *et seq.* The NACDL Report and Restoration of Rights project also discuss efforts across the nation, including in the three area jurisdictions, to utilize court-managed dispositions that do not result in a conviction and can achieve important benefits. See NACDL Report at 50-52.

## II. Collateral Consequences of Arrest or Conviction in D.C., Maryland, and Virginia

### A. Employment

A criminal history can have significant consequences for an individual’s ability to obtain or keep a job, particularly in fields that require occupational licenses, even years or decades after a conviction or arrest. This impact is widespread despite the fact that research shows that criminal history is often a poor predictor of negative work behaviors.<sup>34</sup> Given the known racial disparities in arrests and convictions, such employment barriers have an unavoidable and disproportionate impact on minority communities. In recent years, several jurisdictions have sought to reduce these barriers through legislation limiting the role criminal history may play in public (and in some cases private) employment decisions. Advocates also have sought to challenge these barriers in court. For instance, the Washington Lawyers’ Committee, along with the firm of Arnold and Porter LLP and the NAACP Legal Defense and Education Fund, recently filed suit against the Washington Metropolitan Area Transit Authority (WMATA), alleging that WMATA’s “overly broad, unjustifiably rigid and unduly harsh” background check policy “unfairly and disproportionately limits opportunity for qualified African-American employees and applicants in violation of federal and local antidiscrimination laws.”<sup>35</sup>

When employers obtain current or potential employees’ criminal history information through consumer reporting agencies, the federal Fair Credit Reporting Act provides certain limited protections. FCRA requires that employers who take an adverse action based on criminal history information provide the job applicant with a copy of the consumer report the employer relied upon and a notice about the applicant’s right to dispute the accuracy of the information.<sup>36</sup> In addition, consumer reporting agencies may not include information about arrests more than seven years old (or for which the statute of limitations has expired, if that period is longer).<sup>37</sup> However, the time limit on reporting arrest information does not apply when the information is to be used to consider an individual for employment in a job paying at least \$75,000 a year,<sup>38</sup> and FCRA imposes no substantive limit on how long or in what way employers may use accurate information about any conviction.<sup>39</sup>

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<sup>34</sup> See D.C. Report, *supra* note 2, at 4-5.

<sup>35</sup> *Little v. Washington Metropolitan Area Transit Auth.*, Case No. 1:14-CV-01289-RMC, Complaint at ¶¶ 1, 4 (D.D.C. filed July 30, 2014).

<sup>36</sup> 15 U.S.C. §§ 1681b(b)(3), 1681g(c).

<sup>37</sup> 15 U.S.C. § 1681c(a)(2).

<sup>38</sup> 15 U.S.C. § 1681c(b)(3).

<sup>39</sup> 15 U.S.C. § 1681c(a)(5).



## 1. D.C.

In order to obtain a professional license in D.C.—which is required for many different occupations and professions<sup>40</sup>—an individual must not have been convicted of “an offense which bears directly on the fitness of the person to be licensed.”<sup>41</sup> This restriction bears on occupations as varied as commercial drivers, elevator mechanics, and property managers.<sup>42</sup> Moreover, the breadth of this language leaves employers with significant discretion to determine what can serve as the basis for denying employment to an individual with a past conviction. D.C. law also states:

No application for any license shall be denied and no licensee shall have his or her license suspended or revoked, for any license listed in subsection 114.7, by reason of the applicant or licensee having been convicted of one or more criminal offenses in the District of Columbia or another jurisdiction, or by reason of a finding of lack of “good moral character,” when such finding is based upon the fact that the applicant or licensee has been convicted of one or more criminal offenses in any jurisdiction, unless the board with jurisdiction over the matter first shows that:

- a) There is a potential direct relationship between the nature of one or more of the criminal offenses and the specific license sought or held; or
- b) The issuance or retention of the license could involve an unreasonable risk to property, safety, or welfare of specific individuals or the general public.<sup>43</sup>

Despite the general prohibition, the scope of the language “potential direct relationship” and “could involve an unreasonable risk to property, safety, or welfare” is broad, which in turn allows the suspension and revocation of business licenses to be a discretionary decision.

Over the last several years, D.C. has considered and enacted legislation seeking to limit public and private employers’ use of criminal histories in making job decisions. An important step was a so-called “ban the box” provision similar to those in a growing number of states and municipalities around the country, which prohibits inquiries into an individual’s criminal history on application forms for municipal employment.<sup>44</sup> Although this law took effect in June 2013, research has shown that it has already produced positive results. D.C.’s Office of Human Resources found that 76% of post-law applicants for municipal jobs who had a criminal

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<sup>40</sup> See *id.* § 47-2853.04.

<sup>41</sup> *Id.* § 47-2853.12.

<sup>42</sup> See *id.* § 47-2853.04; § 47-2853.12.

<sup>43</sup> D.C. MUN. REGS. tit. 17 § 114.2.

<sup>44</sup> D.C. Code § 1-620.42(c). “Ban the box” refers to effectively requiring employers to remove the usual “box” to be checked on job application forms indicating whether the applicant has a criminal history. The D.C. law does continue to permit public employers to ask about past criminal history on job applications when a criminal background check is required by law. *Id.* D.C. law directs each personnel authority to determine which D.C. government positions require a criminal background check, “[b]ased on the duties of the position, or if required by law or regulation.” D.C. MUN. REGS. tit. 6-B § 405.3.

record were in fact suitable for government employment, but would likely have been disqualified from consideration for employment if the D.C. law were not in place.<sup>45</sup> This statistic reflects the extent to which criminal histories bear on hiring decisions in jurisdictions without a “ban the box” law.

As demonstrated by the case studies of **Chearie Phelps-El** and **Erick Little**, however, “banning the box” on initial job applications is insufficient.<sup>46</sup> Past records have produced job rejections well past the initial stage, sometimes even after a tentative job offer is made.

These cases show that employers continue to rely on criminal histories to exclude applicants after the initial application, sometimes even after a tentative job offer is made. The D.C. law permits any public employer to inquire about an applicant’s past conviction after the initial screening, although it requires that applicants be permitted to explain their record and that a public employer “shall consider” the following seven factors in determining the extent to which it will take criminal history into account in making a hiring or retention decision:

- (1) The specific duties and responsibilities necessarily related to the employment sought or held by the applicant;
- (2) The bearing, if any, of the criminal offense for which the applicant was previously convicted will have on his or her fitness or ability to perform one or more such duties or responsibilities;

**Chearie Phelps-El** is a 51-year-old African-American mother of three children and grandmother of two, who lives in Washington, D.C. In September 2012, she applied for a job with a company to do housekeeping and related work at the D.C. Convention Center. On her application, she disclosed that she had a criminal record: she had been convicted of felony assault arising out of fights with several other women. The application process was moving forward, and she complied with the company’s requests for routine testing for drug use. She then received a letter from a company official dated November 24, 2012, however, stating that she was rejected because of information in a consumer report. The only negative information in the report was her prior criminal record, which she had already disclosed. This outcome occurred despite the fact that she had previously worked for the same

company for over three years between 2003 and 2007 *after* she had already served time in prison for assault.

Ms. Phelps-El is currently a volunteer with Bread for the City in D.C., where her job includes working with other ex-offenders. She received a certificate in 2012 for her training in housekeeping and has applied for, but has not been able to obtain, jobs with D.C. hotels, Metro, Amtrak, and other employers. She has been turned down each time, she believes, because of her previous criminal record. Even after serving time in prison, she commented, “You have to serve time in society” due to the collateral consequences of arrests and convictions. She is hopeful that D.C.’s new “ban the box” law will help her—and many other D.C. residents—obtain a good job.

<sup>45</sup> D.C. Report, *supra* note 2, at 6.

<sup>46</sup> These two case studies, as well as the others in this report, represent only a few of the literally dozens of such individuals with past criminal records who have been interviewed by lawyers at Covington and Burling and the Washington Lawyers Committee and who have suffered collateral consequences concerning employment, housing, and other areas.

- (3) The time which has elapsed since the occurrence of the criminal offense;
- (4) The age of the applicant at the time of the occurrence of the criminal offense;
- (5) The frequency and seriousness of the criminal offense;
- (6) Any information produced by the applicant, or produced on his or her behalf, in regard to his or her rehabilitation and good conduct since the occurrence of the criminal offense; and
- (7) The public policy that it is generally beneficial for ex-offenders to obtain employment.<sup>47</sup>

This law does not include any provision to enforce the requirement of careful consideration of the relevance of a person’s criminal history, and does not currently extend to private employers. The D.C. Council has, however, recently approved B20-0642, known as the Fair Criminal Record Screening Act of 2014, which would expand the “ban the box” policy to private employers with more than 10 employees in D.C. That legislation is now under Congressional review and is takes effect on October 21, 2014.<sup>48</sup>

**Erick Little** is a 47 year-old African-American man who lives in Germantown, Maryland. He describes himself as the proud father of four children, and spends several hours a week coaching little league sports in his community. In the summer of 2013, he applied for a job as a bus driver for the Washington Metropolitan Area Transit Authority (WMATA), which operates in D.C., Maryland, and Virginia. He was then working as a bus operator for Montgomery County, Maryland, and was interested in the better pay and opportunities for advancement he could receive at WMATA. At his job interview, he told the interviewer that he had been convicted of a crime, which involved simple drug possession, over 25 years ago when he was 19. The interviewer said “I don’t think they should hold that against you since it was 27 years ago,” and in fact Mr. Little then received a conditional offer of a job with WMATA.

Shortly after, however, that offer was revoked by WMATA. Mr. Little was turned down for the job because of his decades-old conviction.

He now works as a truck driver for the Montgomery County Department of Liquor Control, for whom he delivers alcohol and collects cash—a position that further displays his qualifications and trustworthiness.

He and eight other African-American men who were previously convicted of a crime have filed a class action lawsuit against WMATA, contending that WMATA’s policy of refusing to hire or firing ex-offenders has a racially discriminatory effect and is not justified by business necessity, thus violating Title VII of the 1964 Civil Rights Act. WMATA’s policy effectively makes all of its 10,000 area jobs off-limits to people convicted of any offense. The stories of the eight other named plaintiffs are notably similar to Mr. Little’s. One D.C. man, for example, was fired from a job for a WMATA contractor because of a conviction that took place more than 24 years ago, even though he had been performing his job successfully for over five years. The case is now pending in federal district court in Washington, D.C.

<sup>47</sup> D.C. Code §§ 1-620.42(c), 1-620.43.

<sup>48</sup> See Council of the District of Columbia, B20-0642, Fair Criminal Record Screening Act of 2014, <http://lims.dccouncil.us/Legislation/B20-0642>.

The new legislation generally would prohibit any inquiry into arrests or charges that are not pending and that did not result in a conviction, and would bar employers from considering an applicant’s criminal convictions until after the employer has extended a conditional offer of employment. An employer may withdraw a conditional offer of employment based on an applicant’s conviction history, but only for a “legitimate business reason” that is “reasonable” in light of the seven factors outlined above. If an offer is withdrawn, the applicant is entitled to request within 30 days and receive a written statement explaining the legitimate business reason for the action in light of the seven factors. The applicant may also file a complaint with the D.C. Office of Human Rights (OHR), which can bring administrative proceedings against an employer that it believes has violated the law and levy fines. A portion of these fines may go to the job applicant. In contrast with other matters brought to OHR, however, the new law specifically states that it does not authorize the filing of lawsuits alleging improper denials to job applicants.<sup>49</sup>

Although the new D.C. bill makes important progress, critics have pointed to several important limitations, including the exemption of employers with fewer than 10 employees and the unavailability of a judicial remedy. In light of OHR’s limited time and resources, and the low compensation available to applicants who can show they were injured by a potential employer’s violation of the law, the law’s limitations may seriously impede effective enforcement of the law’s protections.<sup>50</sup> Several other cities (including Baltimore, Maryland and Buffalo and Rochester, New York) have provided for judicial enforcement of “ban the box” prohibitions, either through direct civil actions or review of administrative decisions.<sup>51</sup>

D.C. has implemented similar regulations for private entities providing services as a covered provider of child or youth services. These employers are required to obtain records of criminal history to investigate individuals applying for employment—in either a compensated or an unsupervised volunteer position—as well as its current employees and unsupervised volunteers.<sup>52</sup> When this information is assessed, however, the regulations provide that it “shall not create a disqualification or presumption against employment or volunteer status” for the applicant unless it is determined that “the applicant poses a present danger to children or youth.”<sup>53</sup> The D.C. regulation identifies the same seven factors that are outlined above as relevant, although it does not include any administrative or judicial enforcement mechanisms.

## 2. Maryland

Maryland law extends some protection to shield individuals from inquiries into their arrest histories by employers but allows for severe collateral consequences concerning employment for individuals with a past conviction. Under Maryland law, employers may not obtain information about an individual’s non-conviction criminal history from the Maryland

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<sup>49</sup> Bill 20-642 As with its predecessor, the proposed law does not apply to jobs as to which a criminal background check is required by law

<sup>50</sup> See, e.g., D.C. Jobs Council, “Urge the D.C. Council to Make a Real Difference for Returning Citizens” (June 1, 2014).

<sup>51</sup> See National Employment Law Project, “Ban the Box” (Sept. 2014)(“NELP Report”), at 22, 23, 49 and underlying ordinances.

<sup>52</sup> D.C. MUN. REGS. tit. 27 § 500.

<sup>53</sup> *Id.* § 503.

Central Repository unless expressly authorized by statute.<sup>54</sup> Similarly, Maryland law provides that an employer may not require an individual to disclose a criminal charge that did not result in a conviction, and may not refuse to hire an individual merely because she has refused to disclose information about a criminal charge that has been formally expunged.<sup>55</sup>

The effects of these protections is limited, however, by the fact that employers are free to obtain information about applicants' arrest and conviction histories from private sources. Maryland law does expand on the federal Fair Credit Reporting Act by prohibiting consumer reporting agencies from including in their reports "[r]ecords of arrest, indictment, or conviction of crime" if more than seven years have passed since the date of disposition, release or parole.<sup>56</sup> However, that time limitation does not apply to reports used in connection with "[t]he employment of any individual at an annual salary which equals, or which may reasonably be expected to equal, \$20,000 or more."<sup>57</sup> Thus, although these provisions may reduce the likelihood that old convictions<sup>58</sup> will pose a barrier to an individual's employment in an entry-level position, those same old convictions may limit the individual's opportunity for career advancement.

Maryland law provides additional protections for individuals with a past conviction by prohibiting private employers from obtaining criminal conviction information about prospective employees from the Maryland Central Repository unless they can demonstrate the employee would, if hired, have the capacity to jeopardize the life or safety of others, cause significant loss by illegally accessing or misusing the employer's assets, or engage in criminal conduct.

Maryland's licensing regime specifically allows for the consideration of an individual's criminal history. First, the state has adopted an overarching rule providing that any individual convicted of "a drug crime" after January 1991 must disclose this crime when applying for or renewing any license.<sup>59</sup> Following this disclosure, a licensing board may deny an application or impose sanctions on a current license holder, provided the board considers four enumerated factors: the relationship between the drug crime and the license, the nature and circumstances of the drug crime, the date of the crime, and other relevant information.<sup>60</sup> Second, Maryland law allows a number of particular Maryland licensing boards, for occupations as varied as cosmetology and architecture, to deny or suspend a license if the applicant has been

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<sup>54</sup> MD. CODE REGS. 12.15.01.13; MD. CODE ANN., CRIM. PROC. § 10-219.

<sup>55</sup> MD. CODE ANN., CRIM. PROC. § 10-109.

<sup>56</sup> MD. CODE ANN., COMM. LAW § 14-1203(a)(5). As discussed above, FCRA does not place any limit on the inclusion of old convictions on consumer reports.

<sup>57</sup> *Id.* § 14-1203(b)(3).

<sup>58</sup> As noted above, federal law is more protective with respect to non-conviction criminal history information more than seven years old, which under FCRA may not be included on consumer reports used to consider individuals for employment in positions paying less than \$75,000 per year.

<sup>59</sup> MD. CODE ANN., art. 41 § 1-502 (repealed and recodified without substantive change by 2014 Maryland Laws Ch. 106 (H.B. 999)).

<sup>60</sup> MD. CODE ANN., art. 41 § 1-502 (repealed and recodified without substantive change by 2014 Maryland Laws Ch. 106 (H.B. 999)). Moreover, if an individual holds any license upon conviction of a "drug crime," a court must make a prima facie finding of fact as to whether a relationship exists between the conviction and the license, and report its conclusion to the licensing authority. *See* MD. CODE ANN., CRIM. LAW § 5-810.

convicted of any felony or “a misdemeanor that is directly related to the fitness and qualification of the applicant or licensee” for the task at issue.<sup>61</sup>

In 2013, Maryland adopted a limited “ban the box” bill applicable to state employment positions, except for positions in the Department of Corrections, sheriff’s offices, any position for which a background check is required by law, and any designated state personnel management position. The law provides that no other state public employers may inquire into an applicant’s criminal history until after an initial interview. It does not contain any criteria or limitations on such later consideration, does not apply to private employers, and does not contain any administrative or judicial enforcement mechanisms.<sup>62</sup>

In the D.C. area, Maryland’s Montgomery County is actively considering its own “ban the box” legislation: Bill 36-14, entitled “Human Rights and Civil Liberties – Fair Criminal Record Screening Standards,” which would prohibit public and private employers from inquiring into, or otherwise actively obtaining, the criminal history of an applicant for a job in the county before making a conditional offer of employment. The bill would also require the employer, if making an employment decision about an applicant or employee based on the applicant’s or employee’s arrest or conviction record, to conduct an individualized assessment based only on specific offenses that may demonstrate unfitness to perform the duties of the position sought by the applicant or held by the employee, the time elapsed since the specific offenses, and any evidence of inaccuracy in the record. Like the current D.C. ordinance, the bill does not contain any administrative or judicial enforcement mechanisms.

### 3. Virginia

Despite the existence of some statutory protections, a past conviction can have significant collateral consequences relating to an individual’s employment prospects in Virginia. The state limits an applicant’s obligation to disclose arrest records to potential employers and restricts government agencies from seeking such information for most employment, licensing, and similar purposes.<sup>63</sup> State law, however, is more permissive in allowing disclosure and consideration of criminal convictions. Virginia law provides an exclusive list of qualifying employers that are entitled to information about an individual’s convictions without advance permission from the individual who is the target of the request.<sup>64</sup> This list includes entities ranging from public service companies to licensed nursing homes and adult day-care centers. Under Virginia law, any other employer seeking information on an individual’s past conviction may do so if the individual about whom this information is sought provides written consent to

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<sup>61</sup> See MD. CODE ANN., BUS. OCC. & PROF. § 5-314 (cosmetology); § 3-311 (architecture).

<sup>62</sup> Maryland SB 4 (2013), Article 2-203, Chapter 10, Maryland Code. See NELP Report, *supra* note 51, at 6. The NELP Report also points out Baltimore’s “ban the box” legislation.

<sup>63</sup> See VA. CODE ANN. § 19.2-392.4 (providing that an employer may not require any applicant to disclose an arrest or criminal charge against him that has been expunged, and an applicant is under no obligation to answer any question concerning an arrest or criminal charge if neither resulted in a conviction). This provision also restricts “[a]gencies, officials, and employees of the state and local governments” from seeking such information in relation to an “application for a license, permit, registration, or governmental service . . . .” See also VA. CODE ANN. § 19.2-392.1 (acknowledging that “arrest records can be a hindrance to an innocent citizen’s ability to obtain employment” and accordingly instituting rules aimed at “protect[ing] such persons from the unwarranted damage which may occur” as the result of an unjustified arrest).

<sup>64</sup> See VA. CODE ANN. § 19.2-389.

the request and presents the employer with photo identification.<sup>65</sup> Employers can, of course, obtain such information from other sources, such as commercial credit reports.

Virginia law provides moderate protection for individuals with past convictions when applying for occupational or professional licenses, but nonetheless provides that under some circumstances, a criminal conviction can justify denial of a license. Virginia Code Section 54.1-204 provides that a person “shall not be refused a license, certificate or registration to practice, pursue, or engage in any regulated occupation or profession solely because of a prior criminal conviction . . . .”<sup>66</sup> The statute also specifies, however, that criminal conviction can nonetheless be the sole basis for refusal when that conviction “directly relates to the occupation or profession for which the license, certificate or registration is sought.”<sup>67</sup> In determining whether a conviction “directly relates” to the occupation in question, the statute directs regulatory boards to employ a nine-factor test, which includes factors such as the seriousness of the crime, the extent to which the occupation being sought offers opportunities to engage in the same type of crime, and the length of time since the past conviction.<sup>68</sup> The sheer breadth of statutory factors available for consideration by regulatory agencies provides enormous discretion in prohibiting past offenders from obtaining licenses. Moreover, because Section 54.1-204 is a general rule that applies to virtually all occupational licensing, this relatively unfettered discretion with no enforcement mechanism affects a number of the post-conviction employment opportunities available to Virginia citizens.<sup>69</sup>

One community in the Washington area has adopted a limited “ban the box” policy in Virginia. In March 2014, the Alexandria City Manager issued a policy memorandum announcing a policy that with respect to non-public safety city jobs, applicants would be asked about criminal history only after a job offer is made. The memorandum noted that the state General Assembly was considering legislation that would authorize municipalities to adopt such policies, but that the city manager had concluded that no such authorization from the state was necessary. The policy applies only to city jobs and neither contains any criteria or limitations on later consideration of criminal history nor includes any administrative or other enforcement.<sup>70</sup>

A recent controversy that emerged in Fairfax County illustrates that the collateral consequences of a felony conviction can have a lasting effect that extends beyond the conviction itself. A teacher at Madison High School, who is described as having a “respected history” with the school, was discovered to have a felony conviction—which she had disclosed on her application and raised to the school several years later to inquire whether the conviction would

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<sup>65</sup> *Id.* § 19.2-389(H).

<sup>66</sup> *Id.* § 54.1-204(A).

<sup>67</sup> *Id.* The statute further provides that a regulatory board “shall have the authority to refuse a license, certificate or registration if, based upon all the information available, including the applicant’s record of prior convictions, it finds that the applicant is unfit or unsuited to engage in such occupation or profession.” *Id.*

<sup>68</sup> *Id.* § 54.1-204(B).

<sup>69</sup> Section 54.1-204 applies to occupations as diverse as home inspection, auto repair, cosmetology, and construction contracting. *See generally* VA. CODE ANN. § 54.1 (listing various occupations to which the disclosure rules of § 54.1-204 apply)

<sup>70</sup> See NELP Report, *supra* note 51, at 48; Memorandum from Rashad Young, City Manager to Mayor and Members of City Council re Ban the Box (March 19, 2014). The NELP Report notes that several other municipalities in other parts of the state, such as Newport News, have adopted limited ban the box policies.

bear on a possible promotion to position within the administration—and was subsequently fired from the school.<sup>71</sup> This development resulted in a comprehensive review of employees hired between 1996 and 2009, when Fairfax schools began using an online application that automatically disqualified applicants who disclose felonies, and led to the firing of six additional employees with felony convictions.<sup>72</sup> The Fairfax school system’s superintendent attributes the hiring of these former employees in part to “[h]uman error.”<sup>73</sup>

## **B. Housing**

Arrests and convictions can have serious consequences for an individual’s ability to obtain private or public housing. As then-Housing and Urban Development (HUD) Secretary Shaun Donovan wrote in urging public housing authorities to use their discretion to help returning citizens, ex-offenders face “significant barriers” in obtaining housing, which contributes to problems of recidivism.<sup>74</sup> None of the three jurisdictions covered in this report restricts private landlords from denying housing based on criminal history, and several specifically authorize it. Federal statutes and regulations issued by HUD require that a public housing authority (“PHA”) or other owner of assisted housing have the authority to decide to reject applicants based on convictions for “criminal acts which would adversely affect the health, safety or welfare of other tenants,” including “crimes of physical violence” and “drug-related criminal activity” and “illegal use of a drug.”<sup>75</sup> The regulations define “drug-related criminal activity” to mean “the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug.”<sup>76</sup> Rent assistance is similarly subject to considerations of such criminal activity.<sup>77</sup> HUD also requires PHA leases to allow (though not require) the PHA to terminate a lease if the PHA determines (with or without an arrest or conviction) that a tenant or tenant’s guest has engaged in drug-related criminal activity “on or off the premises,” or if the PHA determines a household member is “illegally using a drug.”<sup>78</sup> Although federal regulations require PHAs to have the authority to consider at least some forms of criminal history, local authorities and owners have significant discretion with respect to how an individual’s criminal history should affect his or her eligibility for benefits.

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<sup>71</sup> T.R. Shapiro and J. Jouvenal, *Fairfax Schools Finds Seven Felons Among Employees, Including Heroin Smuggler*, THE WASHINGTON POST (Jan. 27, 2014).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Letter from Secretary Shaun Donovan and Assistant Secretary Sandra Henriquez to public housing authority executive directors (June 17, 2011).

<sup>75</sup> 24 C.F.R. § 960.203(c)(3), 204. *See* 42 U.S.C. 13661(c). For a more extensive discussion of federal restrictions on access to subsidized housing based on criminal history, see National HIRE Network Legal Action Center, *Safe at Home* (2003).

<sup>76</sup> *Id.* § 5.100.

<sup>77</sup> *See, e.g., id.* § 982.553(c).

<sup>78</sup> *Id.* § 966.4(1)(5).



## 1. D.C.

D.C. Municipal Regulations indicate that the D.C. Housing Authority will use different methods to determine whether an applicant for public housing is eligible for admission, such as “reviewing police reports and/or criminal background checks of each member of the applicant family, including juveniles, as may be permitted by law.”<sup>79</sup> D.C. law dictates that information considered relevant in this admission process includes “[t]he conviction of any applicant family member for a crime involving physical violence against persons or property or other criminal convictions that may adversely affect the health, safety, or welfare of other DCHA residents, staff, or other members of the community, e.g., distribution or manufacture of illegal drugs or controlled substances . . . .”<sup>80</sup> If “unfavorable” information is received about an applicant, however, the DCHA must consider the time, nature, and extent of the conduct, as well as mitigating circumstances such as “[e]vidence of favorable changes in the applicant’s pattern of behavior including the length of time since an offense or behavior was committed” and “evidence of successful rehabilitation.”<sup>81</sup>

Although private owners of housing subsidized by the D.C. Housing Authority are permitted by law to exclude applicants for specified offenses, the case of **Maurice Alexander** shows that they sometimes go well beyond that discretion. The denial of housing as a result of even minor past convictions in DC is a painful reality.

**Maurice Alexander** is a 68-year old African-American man who is a life-long resident of Washington D.C. Until the spring of 2013, he and his brother lived in a house owned by his brother, which was being sold as his brother prepared to move to Chicago. Because of his age and limited income, Mr. Alexander is eligible for subsidized housing, and was referred by the DC Housing Authority to three apartment communities with subsidized units that he was eligible for: The Overlook at Oxon Run Apartments, Edgewood Seniors: The View, and Capitol Gateway Senior. All three rejected his application, however, citing a seven-year old misdemeanor for which he was sentenced to only 10 days.

Mr. Alexander came to the Legal Aid Society of the District of Columbia for help. His Legal Aid attorney wrote to all three complexes in June, 2014, pointing out that denying Mr. Alexander’s application violated HUD statutes that limit such exclusions to convictions for drug-related, violent, or potentially endangering criminal activity. (Mr. Alexander’s offense had been an attempted threat to

do bodily harm after he, as he put it, wagged his finger at a policeman who he believed was targeting young black men for arrest). Two of the complexes had adopted specific policies that limited exclusions to convictions within the last three years or felonies or drug or sex offenses, which clearly did not apply to Mr. Alexander, but they rejected him in apparent violation of their own policies. None of the complexes has responded to Legal Aid’s letters asking that they reconsider his rejection.

As a result, Mr. Alexander has been forced to live with friends or to find beds in homeless shelters. This is particularly harmful because he has been unable to continue doing homework and spending quiet time with his young son, who has learning disabilities. Mr. Alexander has previously worked with organizations that help prisoners and people with criminal records in DC, and is only too aware that his problems are just one example of the unfair collateral consequences faced by many in housing, employment, and other areas. He remains high on the DC Housing Authority waiting list and is continuing his efforts to find housing

<sup>79</sup> D.C. MUN. REGS. tit. 14 § 6109.3.

<sup>80</sup> *Id.* § 6109.4(d).

<sup>81</sup> *Id.* § 6109.6.

With respect to private or privately owned assisted housing, D.C. has no provision limiting the ability of private agents or landlords to inquire into or reject applicants based on criminal history, although the D.C. Council has been urged to consider such legislation, as other municipalities have done.<sup>82</sup> As demonstrated by the story of **Dontieia Green** and her family, private landlords do in fact deny housing based on criminal histories, even when some of the background information is inaccurate.

## 2. Maryland

Maryland law explicitly makes exceptions from its general prohibition on non-discrimination in housing with respect to criminal history. The state specifically permits landlords to discriminate against any individual convicted of manufacturing or distributing a controlled substance in violation of federal or Maryland law.<sup>83</sup> The law also provides a broad basis for discrimination based on a past conviction, allowing an individual to refuse a dwelling to any person “whose tenancy would . . . constitute a direct threat to the health or safety of other individuals [or] result in substantial physical damage to the property of others . . . .”<sup>84</sup>

Individuals’ past conviction can also have an adverse impact on their ability to obtain public housing assistance in Maryland. For instance, Montgomery County’s Admissions and Continued Occupancy Policy indicates that the county’s Housing Opportunities Commission considers an applicant’s “suitability” for public housing.<sup>85</sup> This determination includes the “[h]istory of criminal activity by any household member in the past three years that would adversely affect the health, safety, or well being of other tenants or staff or cause damage to the property . . . .”<sup>86</sup> Similarly, the website for the Housing Authority of Prince George’s County provides that following a mandatory background check, “[a]pplicants who are found to have a criminal background meeting the criteria of the established policy will be denied assistance.”<sup>87</sup>

**Dontieia Green** and her husband tried to rent an apartment at Brookland Manor in Washington, D.C. in 2013 for themselves and two children. She was initially accepted and received a letter to that effect, but a few days later, received another letter stating that she and her husband could not rent an apartment as a result of a criminal background check. Six years before, she had been convicted of a misdemeanor offense (assault) and was sentenced to 180 days, 20 of which were taken off for good behavior. She explained this information to the rental agent, who stated that the concern was her husband’s record. Charges against him, however, were “no papered” and dismissed, so he had no record of conviction at all. An attorney with the Washington Legal Clinic for the Homeless looked into the matter for the Greens and discovered the convictions about which there was concern actually belonged to a *different* “D. Green.” Nevertheless, Brookland Manor continued to refuse to rent an apartment to the Greens. Ms. Green explained that this outcome has frustrated their search for a “better, cleaner and safer” place to live in D.C.

<sup>82</sup> See D.C. Report, *supra* note 2, at 13-15 (testimony from D.C. Jobs with Justice, Bread for the City, Washington Lawyers’ Committee, Washington Legal Clinic for the Homeless, and Legal Aid Society of the District of Columbia). NELP Report, *supra* note 51, at 17 (discussing San Francisco ordinance).

<sup>83</sup> MD. CODE ANN., STATE GOV’T § 20-703(6). See also MD. CODE REGS. 14.03.04.02.

<sup>84</sup> MD. CODE ANN., STATE GOV’T § 20-703(7).

<sup>85</sup> ADMISSIONS AND CONTINUED OCCUPANCY POLICY, HOUSING OPPORTUNITIES COMM’N OF MONTGOMERY COUNTY § 8.3(C)(3) (2013), available at <http://www.hocmc.org/data/files/forourcustomers/acop2012%20final%20april%202013.pdf>.

<sup>86</sup> *Id.*

<sup>87</sup> Prince George’s County Maryland, Housing Authority: For our Tenants, <http://www.princegeorgescountymd.gov/sites/HousingAuthority/Resources/ForOurTenants/Pages/default.aspx#criminal>

As of 2007, this policy disqualified an offender for seven years after one criminal conviction—either felony or misdemeanor—or after three criminal charges, even without a single finding of guilt.<sup>88</sup>

### 3. Virginia

A past arrest or conviction can have a significant effect on an individual’s access to both private and public housing in Virginia. Although the state generally requires nondiscrimination by private parties when renting or selling property to the general public,

**Adryann Glenn**, a 35-year-old African American man, was preparing to move in with his partially disabled 59-year-old mother in public housing in Fairfax County. He was scheduled to be released from prison in November 2013 after serving a sentence for possession of cocaine, and wanted to be able to assist his mother and be close to his church, where he was to resume volunteer work as a youth minister as he looked for a job. He learned from his mother in October, however, that he would not be allowed to live with her because of his felony conviction. Due to this restriction, he has instead had to live with friends in Alexandria, which requires a long commute to see his mother and attend church.

Mr. Glenn has also applied for a number of jobs in D.C. and Virginia, but has been told several times that he was turned down because of his record. With the help of Offender Aid and Restoration (OAR) in northern Virginia, he has received help from the Virginia Department of Rehabilitative Services and is interning at a barber shop while he is going to school and obtaining a cosmetology license. He also volunteers at OAR, serves as an instructor for Opportunities for Change computer skills classes, and is involved in mentoring in Alexandria, in addition to serving as a youth minister in his church. He remains hopeful and determined, but has seen concrete evidence that his record has harmed his efforts to get a second chance.

Virginia law provides for an exception to this rule when an individual seeking to rent or purchase property from a private landlord has a conviction. A landlord may require individuals applying for housing to consent to disclosure of convictions.<sup>89</sup> Virginia law also permits a landlord to refuse to rent or sell to an individual solely on the basis of a conviction for illegal manufacture or distribution of controlled substances.<sup>90</sup> Even more broadly, a landlord may refuse to rent to any individual who the landlord *believes* “based on a prior record of criminal convictions involving harm to persons or property . . . pose[s] a clear and present threat of substantial harm to others or to the dwelling itself.”<sup>91</sup>

Under Virginia law, the discretion to shape public housing policies is vested at the county level for communities surrounding the District of Columbia. For example, when administering the Housing Choice Voucher rental subsidy program (formerly known as Section 8), Fairfax County performs criminal record checks on each applicant, and participants are screened by the county for prior criminal activity.<sup>92</sup> An individual is ineligible for any form of housing

<sup>88</sup> THE REENTRY OF EX-OFFENDERS CLINIC, UNIVERSITY OF MARYLAND SCHOOL OF LAW, A REPORT ON THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN MARYLAND 20 (revised 2007), available at [http://www.sentencingproject.org/doc/publications/cc\\_report2007.pdf](http://www.sentencingproject.org/doc/publications/cc_report2007.pdf) (citing telephone interview with Alvin Coley, Housing Management Specialist, Prince George’s County Housing Authority (Oct. 5, 2005)).

<sup>89</sup> VA. CODE ANN. § 36-96.2(F).

<sup>90</sup> *Id.* § 36-96.2(D).

<sup>91</sup> *Id.* § 36-96.2(F). See also JEROME P. FRIEDLANDER, VA. PRAC. LANDLORD-TENANT § 15:7 (2013) (interpreting this provision as allowing a landlord to refuse to rent to someone based on his prior criminal record).

<sup>92</sup> FAIRFAX COUNTY VIRGINIA, HOUSING CHOICE VOUCHER PROGRAM, <http://www.fairfaxcounty.gov/rha/rentalhousingprograms/hcv.htm>.

assistance if she “has been convicted of a serious criminal offense.”<sup>93</sup> The decision of what qualifies as a “serious criminal offense,” however, is left open—both by Fairfax County and under Virginia law, allowing this decision to be discretionary. An example of the effects of such restrictions imposed by Fairfax County is illustrated by the case of **Adryann Glenn**.

### **C. Public Benefits Other Than Housing**

A past arrest or conviction can also have collateral consequences concerning an individual’s access to public benefits. Most notably, the federal welfare reform law enacted in 1996 bars individuals convicted of drug-related felonies from receiving benefits under the federally funded “food stamp” or Supplemental Nutrition Assistance Program (SNAP) and the Temporary Assistance for Needy Families (TANF) program.<sup>94</sup> States are permitted to partially or entirely opt out of this restriction,<sup>95</sup> and D.C., Maryland, and Virginia all have narrowed the scope of this restriction to varying degrees. D.C. has opted out of the ban entirely,<sup>96</sup> while in Maryland an individual convicted of a drug-related felony may receive these benefits so long as he or she submits to substance-abuse treatment and testing for a two-year period.<sup>97</sup> Virginia permits those with drug-felony convictions to receive SNAP benefits,<sup>98</sup> but it has not enacted legislation allowing these individuals to receive TANF benefits.

A person’s criminal history can affect eligibility for other benefits, as well. For instance, any individual loses eligibility to receive federal student aid for some period of time — ranging from one year to an indefinite suspension of eligibility — if the individual is convicted of a drug-related felony or misdemeanor that took place while the individual was receiving federal student aid.<sup>99</sup> Even a first-time conviction for illegal drug possession results in one year of ineligibility, although this period can be shortened if the individual completes an approved rehabilitation program or otherwise passes two unannounced drug tests. This collateral consequence can significantly disrupt an individual’s studies — for instance, if the individual must drop out of school until he or she can reestablish eligibility.

### **D. Civic and Political Participation**

The most well-known collateral consequence affecting an individual’s political rights is that most jurisdictions disenfranchise individuals convicted of a felony for at least some period of time, usually while they are serving their sentence and often for years — or indefinitely — after the sentence is complete. An increasing body of scholarship has indicated that felon

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<sup>93</sup> FAIRFAX COUNTY VIRGINIA, APPLY FOR RENTAL HOUSING: GENERAL INFORMATION, <http://www.fairfaxcounty.gov/rha/apply1.htm>.

<sup>94</sup> 42 U.S.C. § 862a.

<sup>95</sup> § 862a(d).

<sup>96</sup> D.C. Code §§ 4-205.71 (stating that individuals will not be denied TANF benefits on the basis of drug-felony convictions), 4-261.01 (making individuals enrolled in TANF funded programs categorically eligible for food stamps).

<sup>97</sup> Md. Human Servs. Code Ann. § 5-601(b), (c).

<sup>98</sup> VA. CODE ANN. § 63.2-505.2.

<sup>99</sup> Office of Nat’l Drug Control Policy & U.S. Dep’t of Educ., “FAFSA Facts,” <http://www.whitehouse.gov/sites/default/files/ondcp/recovery/fafsa.pdf>.

disenfranchisement laws, which proliferated during the Reconstruction era after the Civil War, were tailored to limit African-American voting rights.<sup>100</sup>

Among jurisdictions in metropolitan Washington, Virginia imposes the harshest limits based on convictions. Art. II, § 1 of the Virginia Constitution provides that “[n]o person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.”<sup>101</sup> Unlike the majority of states, which automatically restore voting rights and other civil rights upon completion of a criminal sentence, Virginia’s constitution places it in a small category of states that permanently restrict these rights for some class of criminal convictions unless an individual’s rights are affirmatively restored.<sup>102</sup> As in many other jurisdictions, these individuals also cannot run for public office until their voting rights are restored.<sup>103</sup> Only the governor or another executive-designated authority can restore these rights.<sup>104</sup> In recent years, governors of Virginia have sought to streamline the restoration process. For instance, former governor Bob McDonnell made the restoration of voting rights and other civil rights virtually automatic upon request for any individual who had been convicted of a non-violent felony (with the exception of drug crimes), so long as that individual served the required sentence, paid any outstanding fines, and was not subject to a pending felony charge.<sup>105</sup> Gov. Terry McAuliffe has continued this trend by now including drug offenses in the category of non-violent offenses for which near-automatic restoration is available.<sup>106</sup> Governor McAuliffe has also reduced the waiting period for petitioning for restoration after the commission of a violent or more serious felony from five years to three years.<sup>107</sup> Nonetheless, this streamlined process is fully a product of gubernatorial discretion, and even the streamlined process may pose significant barriers, particularly for individuals with limited means to pay fines and court costs.

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<sup>100</sup> See, e.g., Michael Pinard, “Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity,” 85 N.Y.U. L. REV. 457, 512-13 (2010); Gabriel J. Chin, “Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?,” 92 GEO. L.J. 259, 305 (2004).

<sup>101</sup> Va. Const. art. II, § 1

<sup>102</sup> See BRENNAN CENTER FOR JUSTICE, REPORT ON CRIMINAL DISENFRANCHISEMENT LAWS ACROSS THE UNITED STATES (2014), available at <http://www.brennancenter.org/analysis/restoring-right-vote-state> (noting that Virginia is one of only eleven states that permanently disenfranchise citizens with felony convictions or a more specific class of criminal convictions unless the government approves the restoration of the individual’s rights).

<sup>103</sup> VA. CODE ANN. § 24.2-500 (“In order to qualify as a candidate for any office of the Commonwealth, or of its governmental units, a person must be qualified to vote for and hold that office.”).

<sup>104</sup> See *In re Phillips*, 265 Va. 81, 87 (2003) (upholding the constitutionality of a statute providing additional procedural rules for restoring voter rights to persons convicted of a felony on the grounds that “the power to remove the felon’s political disabilities remains vested solely in the Governor, who may grant or deny any request without explanation”); 1999 Va. Op. Att’y Gen. 48 (1999) (stating that “other appropriate authority” as used in Article II, § 1 does not include the General Assembly, but instead only “the President, other Governors, and pardoning boards” and citing earlier statements affirming that view).

<sup>105</sup> See Letter from Gov. Bob McDonnell to Janet V. Kelly, Secretary of the Commonwealth of Virginia (May 20, 2013), available at <https://commonwealth.virginia.gov/media/1803/2013GovernorLettertoSOC.pdf>. See also Errin Whack, *Va. Ramps Up Restoration of Voting Rights for Some Ex-Felons*, WASHINGTON POST, July 15, 2013, [http://www.washingtonpost.com/local/virginia-politics/restoring-voting-rights-of-some-va-ex-felons-ramping-up-at-end-of-mcdonnells-term/2013/07/15/62455f4a-ed69-11e2-a1f9-aa873b7e0424\\_story.html](http://www.washingtonpost.com/local/virginia-politics/restoring-voting-rights-of-some-va-ex-felons-ramping-up-at-end-of-mcdonnells-term/2013/07/15/62455f4a-ed69-11e2-a1f9-aa873b7e0424_story.html). McDonnell also instituted a self-imposed 60 day deadline for all restoration requests from persons convicted of a non-violent felony. *Id.*

<sup>106</sup> See *Governor McAuliffe Announces Changes to Virginia’s Restoration of Rights Policy*, GOVERNOR TERRY MCAULIFFE: COMMON GROUND FOR VIRGINIA (Apr. 18, 2014), <https://governor.virginia.gov/news/newsarticle?articleId=3880>; Olympia Meola, *McAuliffe to Speed Rights Restoration*, RICHMOND TIMES-DISPATCH (Apr. 17, 2014, 10:30 PM), [http://www.timesdispatch.com/news/state-regional/mcauliffe-to-speed-rights-restoration/article\\_661befcf-b8c9-5ca3-ba60-05b75812c9a3.html](http://www.timesdispatch.com/news/state-regional/mcauliffe-to-speed-rights-restoration/article_661befcf-b8c9-5ca3-ba60-05b75812c9a3.html).

<sup>107</sup> *Governor McAuliffe Announces Changes*, *supra* note 17; Meola, *supra* note 17.

Maryland enacted significant reforms in 2007, which ended the possibility of lifetime disenfranchisement under the prior system and replaced it with a rule that automatically restored voting rights for all citizens upon completion of a required sentence, including any period of parole or probation.<sup>108</sup> Under the prior regime, the African American disenfranchisement rate was more than twice that of the overall population.<sup>109</sup> The 2007 reforms made 50,000 citizens who were formerly disenfranchised eligible to vote.<sup>110</sup>

In contrast, D.C. restores individuals' voting rights immediately after they are released from incarceration, even if they continue to be on parole, and does not restrict the voting rights of individuals who are in pretrial detention or have been sentenced to probation.<sup>111</sup> Individuals who have been convicted of crimes that constitute felonies in D.C., however, do lose their right to vote while they are incarcerated.<sup>112</sup>

Individuals who have been convicted of a felony also lose other rights in addition to their right to vote. D.C., Maryland, and Virginia all restrict individuals who have been convicted from serving on juries, although in D.C. individuals who are disqualified based on a felony conviction may qualify for jury service after a waiting period of at least ten years after completion of their incarceration, probation or parole.<sup>113</sup> Virginia law also renders individuals convicted of any felony ineligible to acquire any firearms,<sup>114</sup> and an individual convicted of any drug offense, including marijuana possession, is ineligible to receive a concealed handgun permit for three years.<sup>115</sup> Similar provisions have been enacted in D.C. and Maryland. D.C. law specifies categories of individuals who are not permitted to own or keep a firearm, or to have a firearm in her possession or under her control; among these categories are individuals who have been convicted "in any court of a crime punishable by imprisonment for a term exceeding one year."<sup>116</sup> Maryland law prohibits a person from possessing a firearm if the person has been convicted of a "disqualifying crime," which includes any crime of violence as well as any crime that would be classified as a felony or punishable by more than two years in prison under Maryland law.<sup>117</sup> Participation in a knowing violation of this restriction is a misdemeanor

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<sup>108</sup> See *Restoration of Voting Rights in Maryland*, STATE BD. OF ELEC., [http://www.elections.state.md.us/voter\\_registration/restoration.html](http://www.elections.state.md.us/voter_registration/restoration.html) (last visited July 2, 2014) (stating that persons convicted of a felony are eligible to register to vote once sentencing term, including probation or parole, has been completed).

<sup>109</sup> See Fact Sheet, Brennan Center for Justice, *Maryland Voter Registration Protection Act of 2007* (Apr. 24, 2007), available at <http://www.brennancenter.org/legislation/maryland-voter-protection-act-2007-fact-sheet>.

<sup>110</sup> Andrew Green, *Felons Gain Right to Vote*, BALT. SUN, Apr. 15, 2007, [http://articles.baltimoresun.com/2007-04-25/news/0704250234\\_1\\_vote-in-maryland-sentences-felons](http://articles.baltimoresun.com/2007-04-25/news/0704250234_1_vote-in-maryland-sentences-felons); Letter from Michael Waldman, Exec. Director of Brennan Center for Justice, to Martin O'Malley, Governor of Maryland (March 27, 2014), available at <http://www.brennancenter.org/analysis/letter-urging-governor-omalley-sign-voter-registration-protection-act>.

<sup>111</sup> See D.C. Code § 1-1001.02(2)(D) (defining a "qualified elector" to mean, among other things, a person who "[i]s not incarcerated for a crime that is a felony in the District").

<sup>112</sup> *Id.*

<sup>113</sup> MD. CODE ANN. CTS. & JUD. PROC. § 8-103; VA. CODE ANN. § 8.01-338(2). D.C. law permits an individual to serve on a jury one year after completing his or her incarceration, probation, or parole, but the D.C. Superior Court's Jury Plan requires a 10-year waiting period. See D.C. CODE § 11-1906(b)(2); <http://www.dccourts.gov/internet/documents/Modified-Jury-Plan-09-2013.pdf>.

<sup>114</sup> VA. CODE ANN. § 18.2-308.2:1.

<sup>115</sup> Va. CODE ANN. § 18.2-308.09(19).

<sup>116</sup> D.C. Code § 22-4503.

<sup>117</sup> MD. CODE ANN., PUB. SAFETY §§ 5-101(g), 5-133(b).

punishable by up to five years in prison and a fine of up to \$10,000.<sup>118</sup> Maryland separately prohibits a person from possessing, owning, carrying, or transporting a firearm if she has been convicted of a crime that would constitute a drug felony under Maryland law, and violations of that restriction are classified as felonies (though punishable by the same maximum sentence of five years in prison and/or a \$10,000 fine).<sup>119</sup>

### III. Recommendations

Collateral consequences have the potential to profoundly impair an individual's ability to reenter society or otherwise recover from an encounter with the criminal justice system. Overuse of these collateral consequences harms not only individuals and their families but also their communities and, by increasing the risk of recidivism, society at large. Accordingly, the Committee's view is that the imposition of collateral consequences should always reflect the following principles:<sup>120</sup>

- (a) **Necessity.** All collateral consequences must be justified by a specific need based on a demonstrated relationship between the nature and time of the offense and the rights or conduct to be restricted. For instance, if an individual is convicted on embezzlement charges, restrictions on that individual's ability to serve as a certified public accountant would be appropriate, at least for some period of time. However, it would not be justifiable to impose the same restrictions based on a conviction from 20 years ago for shoplifting or even a more recent conviction for marijuana possession, as these offenses have little if any relationship to an individual's ability to serve as an accountant and the significant lapse in time makes a conviction even less relevant. Collateral consequences should not be imposed based on a general assumption that a person who has broken one law can be expected to break more laws in the future. Indeed, this expectation is often wrong, as discussed above, and imposing further restrictions on an individual based on such an assumption runs the risk of becoming a self-fulfilling prophecy if individuals who have served their sentences are prevented from supporting themselves through lawful means.
- (b) **Due Process.** Collateral consequences should rarely if ever be triggered by mere arrests or charges that have not resulted in a conviction. The law should not impose a disability on an

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<sup>118</sup> MD. CODE ANN., PUB. SAFETY § 5-144.

<sup>119</sup> MD. CODE ANN., CRIM. LAW § 5-622(b).

<sup>120</sup> These principles are broadly consistent with standards promulgated by the American Bar Association. *See* ABA Standards for Criminal Justice, Standard 19-1.2 (3d ed. 2004), *available at* [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_collateral\\_toc.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_collateral_toc.html).

individual without the state's having met its burden of proving the individual's guilt in court. In those rare instances where a jurisdiction determines that there are unique circumstances requiring restrictions on the employment of individuals accused of certain crimes in extraordinarily sensitive positions, the reasons justifying the restrictions should be made public and the limitation should be confined to the minimum number of positions and length of time allowed for such disqualification as necessary to effectuate the purpose of the policy. Individuals subject to an adverse action based on a collateral consequence triggered by unadjudicated conduct should be given clear notice of that fact and access to an effective mechanism to seek to have the consequence lifted.

- (c) **Flexibility.** To the greatest extent possible, collateral consequences should be imposed on a discretionary, rather than mandatory, basis, taking into account a particular individual's circumstances and factors such as those specified in D.C.'s ban-the-box legislation. Jurisdictions also should provide readily accessible mechanisms for individuals to seek relief from collateral consequences that are imposed.

These mechanisms should include provisions allowing individuals to obtain certificates of rehabilitation, pardons, and full restoration of rights and to seal or expunge past records where appropriate. All three area jurisdictions have some provisions in these areas but should review and consider further improving them, especially in light of recent experience around the country in this area.<sup>121</sup> For example, the DC Council is now considering legislation that would authorize persons convicted of prior marijuana offenses that have since been de-criminalized to apply to have such arrest and conviction records sealed.<sup>122</sup> The Washington Lawyers' Committee hopes to consider this general subject in more detail in a subsequent report.

- (d) **Rehabilitation.** Once an individual has completed his or her sentence, the primary goal of the criminal justice system should be to ensure the individual's successful reintegration into society, thus reducing the risk of recidivism. Even where collateral consequences are determined to be necessary (within the meaning of Principle (a)), these consequences should be designed to impose the least possible impairment on an individual's ability to reintegrate.

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<sup>121</sup> See NACDL Report at 42-46, 54-61; NACDL Restoration.

<sup>122</sup> See M. DeBonis, "Marijuana offenders could have records sealed after DC Council vote," *Washington Post* (October 8, 2014).



Consistent with these principles, which should be followed by all three area jurisdictions, the Committee makes the following recommendations regarding the specific collateral consequences discussed in this Report, along with several general recommendations that apply to these areas.

- **Employment:**

- Licensing boards often have broad discretion to exclude otherwise qualified individuals because of their criminal history, based on the board’s determination regarding whether the convictions at issue are sufficiently related to the license being sought. To the greatest extent possible, jurisdictions should seek to define more precisely which types of convictions may be the basis for a license denial, and discourage or prohibit inappropriate denials. For example, licensing policies should explicitly and strongly disfavor denials based on stale convictions or convictions for misdemeanors and other low-level, non-violent offenses, with possible exceptions for a limited class of explicitly defined offenses that directly involve key licensee responsibilities. Individuals who feel that they have been improperly denied a license should be able to contest that decision through appropriate administrative and judicial means.<sup>123</sup>
- Maryland and Virginia should enact ban-the-box laws along the lines of the law soon to take effect in D.C. Such laws have the potential to expand returning citizens’ prospects for both public and private employment. In addition, D.C. (and Maryland and Virginia) should strengthen its law by providing for judicial enforcement, as several other jurisdictions have done. D.C. should also ensure that statistical data on ban-the-box complaints is made freely available to independent researchers.<sup>124</sup>
- D.C., Maryland, and Virginia recognize the tort of “negligent hiring,” under which an employer may be held liable for hiring an employee who causes harm to others when reasonable investigation of an employee’s background would have shown the harm was foreseeable.<sup>125</sup> By statute, D.C. has limited the ability to use an employee’s criminal history as evidence in a negligent-hiring action so long as “the employer has made a reasonable, good faith determination” that the seven factors set out in the statute — which are the same as the factors set forth in D.C.’s ban-the-box law<sup>126</sup> — “favored the hiring or retention of that applicant or

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<sup>123</sup> See NACDL Report at 53-54.

<sup>124</sup> See NELP Report at 22, 23, and 49; NACDL Report at 53-45.

<sup>125</sup> See *Interim Pers. of Cent. Virginia, Inc. v. Messer*, 559 S.E.2d 704, 707 (Va. 2002) (citing *Se. Apartments Mgmt. v. Jackman*, 513 S.E.2d 395, 397 (Va. 1999)); *Evans v. Morsell*, 395 A.2d 480, 484 (Md. 1978); *Griffin v. Acacia Life Ins. Co.*, 925 A.2d 564, 575 (D.C. 2007).

<sup>126</sup> See discussion in Section II(A)(1), *supra*.

employee.”<sup>127</sup> Courts in Virginia have interpreted the tort relatively narrowly,<sup>128</sup> while Maryland courts have suggested that, although a criminal background check is not always required to avoid negligent-hiring liability, factors such as cost, availability, and the sufficiency of other sources must be considered when determining whether an employer has a duty to obtain an individual’s criminal history.<sup>129</sup> Neither jurisdiction has enacted an explicit safe harbor designed to encourage the employment of returning citizens, as D.C. has. Thus, the potential for negligent-hiring liability — even under Virginia’s relatively narrow view of the tort — may pose a significant barrier to returning citizens’ prospects for employment, effectively acting as an additional collateral consequence of conviction. Maryland and Virginia should enact safe-harbor provisions like D.C.’s.

- D.C. should adopt a provision like Maryland’s laws limiting access by most employers to official arrest and conviction records, and Virginia should strengthen its laws along similar lines.<sup>130</sup>

- **Housing:**

- Public housing authorities in the region should publish clear, publicly accessible guidance regarding what types of criminal history information they will consider and how this information will be evaluated when determining an individual’s eligibility for support. These policies should be narrowly tailored and should avoid disqualifying individuals based on convictions for misdemeanors or other minor or old offenses unless the specific circumstances of an individual’s conduct demonstrate that excluding the individual from assisted housing is necessary to protect other tenants. Individuals subject to exclusion should be given a meaningful opportunity — preferably with assistance from low-cost legal counsel or trained advocates — to demonstrate that they are suitable for public housing, notwithstanding their criminal history. To the maximum extent possible, public housing authorities should use their discretion, as former HUD Secretary Donovan has suggested, to allow ex-offenders to rejoin their families in assisted housing.<sup>131</sup>
- State and local laws now give private landlords wide discretion to exclude otherwise qualified individuals based on the individual’s criminal history,

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<sup>127</sup> Returning Citizen Public Employment Inclusion Amendment Act of 2010, § 2 (D.C. Law 19-319, codified in scattered cites in the D.C. Official Code).

<sup>128</sup> See *Messer*, 559 S.E.2d at 707; *Stansfield v. Goodyear Tire & Rubber Co.*, 50 Va. Cir. 318 (1999).

<sup>129</sup> *Cramer v. Hous. Opportunities Comm’n of Montgomery Cnty.*, 501 A.2d 35, 40-41 (1985).

<sup>130</sup> See Md. Code Ann., Crim.Proc., Sections 10-109, 10219; Md. Code Regs. 12.15.01; NACDL Report at 57-9.

<sup>131</sup> See Letter from Secretary Shaun Donovan and Assistant Secretary Sandy Henriquez to public housing authority executive directors (June 17, 2011).

with Virginia and Maryland law explicitly authorizing such exclusion. Often, this discretion is so broad that it can effectively serve as a loophole in anti-discrimination laws. Instead, area jurisdictions should enact “ban the box”-type legislation with respect to housing, as adopted in San Francisco, and should at minimum limit and more precisely define the extent to which a private landlord may deny an individual housing based solely on the applicant’s criminal history.<sup>132</sup> Generally, landlords should be prohibited from considering arrests as well as convictions past a certain number of years.<sup>133</sup> At a minimum, landlords should be required to inform applicants when any adverse decision is made based in whole or in part on the applicant’s criminal history. In addition, applicants should have access to a realistic mechanism for challenging whether a landlord’s decision comports with the statutory standard. For example, an applicant denied housing based on a ten-year-old drug possession charge should have an opportunity to prove that, under the circumstances, this charge cannot rationally support a conclusion that the applicant poses a threat to others’ health, safety, or property.

- **Public Benefits and Civic and Political Participation:**
  - Maryland and Virginia should follow D.C.’s lead in making need-based benefits fully available to otherwise qualified citizens without regard for prior drug convictions.
  - Virginia should repeal its constitutional provision disqualifying persons convicted of a felony from voting unless their rights are restored. In all three jurisdictions, voting rights should be automatically restored upon release from incarceration, as is now the case in D.C. Ex-offenders should also be eligible for jury service once they have completed their term of incarceration, probation, or parole, as in D.C.
- **General:**
  - As recommended in connection with the Committee’s previous report, a series of community forums should be convened to help educate the public and solicit community testimony on collateral consequences problems as well as further recommendations for how D.C., Maryland, and Virginia can more effectively respond to these problems.
  - Organizations that work with ex-offenders should be involved with these forums, and such organizations should receive additional support so that

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<sup>132</sup> See NELP Report at 17.

<sup>133</sup> Convictions for especially serious offenses, such as violent crimes against persons, likely should be considered for a longer period, but it is important that any such exceptions be narrowly defined.

they can expand the services that they provide to ex-offenders and their families.

- Particularly because of the difficulty of documenting precisely the role played by criminal history in specific employment, housing, and other decisions, an area-wide program of testing should be developed and implemented, to further document the extent of the problem and to serve as a basis for additional legislation or litigation as necessary. Legal representation should be provided to individuals seeking to challenge unjust collateral consequences. The Lawyers' Committee is committed to continuing monitoring and action on the issue of collateral consequences, including working with community members and groups on education, possible litigation, and legislative reform.

## ERRATA

- Page 20: On October 27, 2014, a correction was made to the description of the effect of a felony conviction on an individual's ability to serve on a jury in D.C.