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## The Use of Criminal Records for Employment Screening Background Checks: Hearing Before the Equal Employment Opportunity Commission, July 26, 2011 (Statement of Stephen A. Saltzburg, behalf of ABA & Prof. of Law, GW Law School)

Stephen A. Saltzburg  
*George Washington University Law School, ssaltz@law.gwu.edu*

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# AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1760

**Testimony of**

**STEPHEN A. SALTZBURG**

**On behalf of the**

**AMERICAN BAR ASSOCIATION**

**Before the**

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Washington, D.C.**

**July 26, 2011**

**on**

**THE USE OF CRIMINAL RECORDS FOR  
EMPLOYMENT SCREENING BACKGROUND CHECKS**

Chair Berrien and distinguished members of the Equal Employment Opportunity Commission:

Good morning. My name is Stephen Saltzburg. I am the Wallace and Beverley Woodbury University Professor at the George Washington University Law School. I recently served as Chair of the American Bar Association's Criminal Justice Section, which has over 20,000 members including prosecutors, private defense counsel, appellate and trial judges, law professors, correctional and law enforcement personnel, law students, public defenders, and other criminal justice professionals.

The American Bar Association is the world's largest voluntary professional organization, with a membership of nearly 400,000 lawyers worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President Stephen Zack to present to the Commission the views of the ABA concerning the significant barriers posed by criminal records to persons seeking employment.

Our criminal justice system faces daunting challenges. America has the highest rate of incarceration in the world and the concentration of those incarcerated relative to the rest of the population disproportionately includes men, the young, and racial and ethnic minorities. One in 12 African American men currently reside behind bars, contrasted with only one in 87 white men.<sup>1</sup> A limited education or a lack of employment characterizes a disproportionate portion of the prison population as well. One survey found that 80% of individuals in prison did not have a high school diploma.<sup>2</sup> An African American man between the ages of 20-34 years old without a high school diploma is more likely to be in prison than employed.<sup>3</sup>

In addition to the substantial economic burden current incarceration rates impose on tax payers – over \$56 billion a year, incarceration carries long lasting economic and social repercussions for ex-offenders, families, and communities. Ex-offenders fortunate enough to find employment can expect an 11 percent reduction in hourly wages and, at the age of 48, this same ex-offender will have earned \$179,000 less than if he had never served any time.<sup>4</sup> Moreover, 54% percent of inmates have juvenile children, meaning that 2.7 million children have a parent behind bars.<sup>5</sup> These same children of ex-offenders have a 19% greater chance of expulsion or suspension than their classmates.<sup>6</sup>

Collateral consequences of conviction contribute to the criminal justice system's reentry challenges. While the ABA supports reasonable restrictions on former offenders holding certain jobs where their records would raise genuine issues of public safety, not all

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<sup>1</sup> "Collateral Costs: Incarcerations Impact on Economic Mobility" *The Pew Center on the States* available at [http://www.pewcenteronthestates.org/uploadedFiles/Collateral\\_Costs.pdf?n=8653](http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653).

<sup>2</sup> National Education Association, "Dropout Statistics" available at <http://www.nea.org/home/13579.htm>.

<sup>3</sup> "Collateral Costs: Incarcerations Impact on Economic Mobility" *see note 1*.

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

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

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

collateral employment restrictions resulting from conviction are fair or effective. Many have no relationship to public safety and prevent a former offender from doing productive work to support a family and contribute to the community. Moreover, some collateral sanctions remove potential employees and workers from the employment market when both they and employers would benefit from the removal of sanctions. In some instances, collateral bars on employment prevent someone who has been trained by the government at taxpayer expense from taking the very job for which he or she has been trained – which makes no sense at all.

In response to these systemic injustices, the ABA has made finding solutions to obstacles of reentry and reducing recidivism a top priority. Our Criminal Justice Section is working to accomplish these goals through studies and research that have led to the Section's recommending policies for adoption by the ABA House of Delegates, its policy making body. I will briefly discuss some of our ongoing work and policy concerns.

### Collateral Consequences of Conviction Grant

The Collateral Consequences of Conviction Project funded by the National Institute of Justice seeks to develop a state-by-state database of all collateral consequences of convictions that exist nationwide. This ambitious project will identify and capture tens of thousands of collateral consequence statutes and the crimes that “trigger” these collateral consequences. The project hopes to provide defense attorneys with an important tool to better inform their clients about their options and how non-criminal penalties can attach upon conviction. The project will also serve as a resource for prosecutors, judges, and legislators to rely on for accurate data pertaining to the expansive impact of collateral consequences. These actors may be unaware or insufficiently aware of the collateral consequences that a defendant actually faces; knowledge of these consequences can lead to more fair and accurate discussions of plea bargains, decisions to charge and prosecute, sentencing decisions, and lawmaking.

During the initial stage of the project, ABA attorneys were tasked with gathering all of the collateral consequences nationwide. They were able to uncover over 38,000 statutes containing a collateral consequence.<sup>7</sup> Currently, ABA attorneys are working on the second stage of the project, which involves the categorization of each of the over 38,000 statutes. In particular, the attorneys determine: (1) whether a consequence applies automatically by operation of law or if there is a discretionary component to the statute; (2) the type of benefit affected<sup>8</sup>; (3) the duration of the consequence; (4) whether there is any relief specified within the statute; and (5) what crime(s) trigger each consequence.

The current data from stage two represents 17 states and shows several troubling trends indicating that employment-related collateral sanctions are widespread and pervasive.

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<sup>7</sup> Adult Collateral Consequence Project, available at <http://isrweb.isr.temple.edu/projects/accproject/index.cfm>.

<sup>8</sup> Collateral consequence categories include employment, public benefits, civic participation, family rights, individual rights, military, immigration, and those crimes subject to the Sex Offender Registration and Notification Act

Most notably, 84% of the collateral consequences relate to employment.<sup>9</sup> License applicants – ranging from a cosmetology license to a license to practice law – can be denied because of a previous criminal conviction, regardless of how long ago the incident occurred. This is true despite the fact that state correctional systems spend millions of dollars on job training programs in prison, only to then bar re-entering individuals from obtaining licenses that will allow them to work in these fields for which they were trained in prison.

The data, which track the duration of the consequences, reveal that 82% of the collateral consequences statutes fail to specify an end date for the exclusion and thus an individual may be subject to the exclusion long after he or she has served his or her sentence.<sup>10</sup> Thus, a crime committed at age 18 can ostensibly deny a former offender the ability to be a licensed barber or stylist when he or she is 65 years old. Additionally, 91% of the statutes collected provide no form of relief within the statute.<sup>11</sup> Therefore, former offenders must turn to the burdensome task of seeking a pardon or to the confusing and often limited seal/expungement process if they hope to overcome 91% of the collateral consequences that exist in the United States.

The project's final product, a user-friendly data base, will enable all stakeholders in the criminal justice system – legislators, attorneys-general, prosecutors, judges, defense counsel and individual citizens – to view real data about the employment consequences of convictions and assist legislators in developing reasonable alternatives to the thousands of statutes that eliminate employment opportunities for ex-offenders.

### The Federal Study of Collateral Consequences

In 2009, prior to the nationwide state-by-state collateral consequence project, the ABA Commission on Effective Collateral Sanctions, working with the Public Defenders Service for the District of Columbia undertook, a project to collect the collateral consequences of criminal convictions that arise under federal statutes and regulations. With respect to employment, many of these statutes contained unreasonably long duration limitations or unduly harsh punishments for minor convictions. In the Federal Deposit Insurance Act, a provision of the act imposed a ten-year bar on employment at any federally insured depository institution for a person convicted of a specific felony or misdemeanor containing an element of dishonesty and after this ten year period the individual had to receive a waiver from the Federal Deposit Insurance Commission giving “substantially good cause” for granting a waiver.<sup>12</sup> A statute governing marine mariner licensing stated that a criminal conviction of any drug law within the last ten years could suspend or revoke a person's merchant mariner's license.<sup>13</sup>

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<sup>9</sup> Adult Collateral Consequence Project, *see note 6*.

<sup>10</sup> *Id.*

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

<sup>12</sup> Internal Exile, American Bar Association & Public Defenders Service (2009) *available at* <http://www.americanbar.org/content/dam/aba/migrated/cecs/internalexile.authcheckdam.pdf>, p. 28-30.

<sup>13</sup> Internal Exile, *see note 14*, at p. 23-24.

## Justice Kennedy Commission

In 2003, Justice Kennedy addressed the American Bar Association's House of Delegates regarding the "hidden world of punishment," and called on the legal profession to direct the "energies . . . of the entire Bar. . ." to the issue of collateral consequences.<sup>14</sup> In response, ABA President Dennis Archer convened a commission of ABA members with diverse criminal justice backgrounds and substantial experience in the criminal justice system to undertake a study on a broad number of criminal justice issues including mandatory minimum sentencing schemes, disparate sentencing rates among racial and ethnic groups, and the objectives of incarceration.<sup>15</sup>

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

The Kennedy Commission made a number of important recommendations, all of which were adopted by the ABA. One finding of particular importance today was that the most significant predictor of recidivism was employment. Based on this finding, the Kennedy Commission recommended that "barriers to employment, housing, treatment, and general public benefits must be eliminated to the greatest possible extent in order to have greater opportunity for successful re-entry for those with a criminal conviction."<sup>16</sup> The finding and the recommendation should not be a surprise to anyone who has studied recidivism. If a former offender cannot support himself or herself with honest employment, criminal activity is unfortunately more likely to result. That is why re-entry (the effort to enable a former offender to return successfully to the community and to be a contributing member) is at the top of the list of criminal justice reforms that so many seasoned prosecutors, judges and defense counsel support.

I had the honor of being the Chair of the Kennedy Commission and regard it as an important contribution to reforming criminal justice in the United States.

## Second Chances in the Criminal Justice System

Following the success of the Justice Kennedy Commission Report, the American Bar Association's Commission on Effective Criminal Sanctions (CECS) expanded upon the work of the Justice Kennedy Commission to create a compendium on the topic of re-entry that focused on the fairness and proportionality of punishment and on ways in which criminal offenders may avoid or escape the permanent legal disabilities and stigma of a criminal record. The CECS report and its recommendations looked at the relationship between those with criminal records and opportunities for employment.

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<sup>14</sup> Justice Kennedy Commission: Report and Recommendations, American Bar Association (2004), p. 2.

<sup>15</sup> Justice Kennedy Commission, *see note 13*, p. 2.

<sup>16</sup> Justice Kennedy Commission, *see note 13*, at p. 7.

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

The CECS report showed that ex-offenders who were jobless after re-entry were three times more likely to return to prison; furthermore, the report also noted that 60% of former prisoners were unemployed a year after release from prison.<sup>17</sup>

The report examined the impact of a reliance on criminal background checks on the hiring process. It found that increases in the exchange of information due to technology have made it easier for employers to access background information on applicants, but the information generated is not necessarily accurate. Criminal background checks can contain inaccurate information, perhaps due to identity theft, or incomplete information, such as information on arrests that did not lead to criminal convictions.<sup>18</sup> Moreover, many employers have little knowledge of how the criminal justice system works and what a particular record actually represents, so even when completely accurate information is provided, employers can misinterpret the information contained in a background check.

The CECS report recommended limiting access to criminal background information for purposes other than law enforcement.<sup>19</sup> The report also recommended that employers and credit reporting agencies ensure that the information on a criminal history is accurate and that the information does not contain sealed or expunged records.<sup>20</sup>

The CECS recognized that offenders' lack of vocational skills often result in an ancillary barrier to employment that places them at a significant disadvantage in a competitive job market,<sup>21</sup> and, without the opportunity to develop marketable vocational skills while incarcerated, the probability of overcoming reentry barriers becomes unlikely at best. The report offered several recommendations. First, and perhaps most important, was the recommendation that disqualifications for employment should only be applied when the crime is *substantially* related to the job opportunity or where serious public safety

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<sup>17</sup> Second Chances in the Criminal Justice System, American Bar Association (2007), p. 27.

<sup>18</sup> Second Chances, *see note 18*, at p. 36.

<sup>19</sup> *Id.*, at p. 8.

<sup>20</sup> *Id.* p. 38.

<sup>21</sup> *Id.* p. 27.

concerns exist.<sup>22</sup> The CECS also recommended that, when there is a finding that a crime is substantially related to the job opportunity, there should be some process for relief, such as allowing the applicant to demonstrate his or her fitness of character.<sup>23</sup>

It recommended the adoption of federal and state laws that would require a case-by-case exemption or waiver process in order to provide persons with a criminal record an opportunity to make a showing of their fitness for the employment or license at issue, and provide a statement of reasons in writing if the opportunity is denied because of the conviction. Federal and state law should also provide for judicial or administrative review of a decision to deny employment or licensure based upon a person's criminal record. The CECS favorably noted New York law in this regard. New York's fair employment practices law extends its protections to people with a criminal record, and prohibits public and private employers and occupational licensing agencies from discriminating against employees based upon convictions and arrests that did not result in a conviction, unless disqualification is mandated by law.<sup>24</sup>

Further, the CECS recommended against automatic barriers to employment and favored discretionary factors that should be applied on a case-by-case basis.<sup>25</sup> Moreover, the CECS recommended that the barriers should expire after a reasonable period of time. Its report noted that a person who has not committed a crime in seven years is no more likely to commit a crime than a person who has never committed a crime.<sup>26</sup>

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

### ABA Support for Federal Legislation to Improve F.B.I. Records

While we recognize the necessity of criminal background checks for safety and security sensitive jobs, we are concerned that the FBI's system is so seriously flawed that it does a disservice to large numbers of U.S. workers and employers who want to enter into an

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<sup>22</sup> Id. at p. 29.

<sup>23</sup> Id. at p. 31.

<sup>24</sup> N.Y.S. Human Rights Law, N.Y.Exec. Law § 296(16).

<sup>25</sup> Second Chances, see note 18, at p. 29.

<sup>26</sup> Id. at p. 27.

employment relationship but are deterred from doing so by inaccurate FBI records. Each year, about nine million criminal background checks are generated by the FBI for civil purposes, mostly for employment. According to the Attorney General, however, nearly 50 percent of the FBI records are incomplete or inaccurate.<sup>27</sup> As a result, thousands of people are denied jobs, or face delays in receiving jobs, which often raises serious civil rights concerns given the disproportionate impact of criminal background checks on people of color. Moreover, because of the inaccurate FBI records, employers are denied workers of their choice and federal and state agencies that require criminal background checks end up diverting valuable time and resources on worker appeals challenging the accuracy of the FBI's records. For these reasons, the ABA has supported the Fairness and Accuracy in Employment Background Checks Act, legislation introduced in the past two Congresses by Representative Bobby Scott (D-VA) to improve the federal database used widely by private and public employers.

### Conclusion

The collateral consequences of criminal records for employment opportunities represent one of the more challenging issues facing our justice system and our nation. Without question, if the substantial barriers to employment for ex-offenders continue to exist, the United States will remain on top of the world in recidivism rates. Unfortunately, the solution is not as simple as removing the statutory barriers and the background check requirements. Many small businesses across America cannot afford a hiring mistake; a business that hires an ex-offender immediately increases its exposure to liability because of civil suits for negligent hiring. However, these concerns often result in overly broad application and result in unjustified and discriminatory barriers to persons whose criminal records are unrelated to the employment at issue or whose records maintained by government databases are inaccurate or incomplete. States like Illinois have tried to find a middle ground in the form of certificates of rehabilitation.<sup>28</sup> Ex-offenders can apply for a certificate and, if they meet a set of factors, they are awarded a certificate that immunizes employers from negligent hiring law suits. Factors that are considered are length of time that has passed since release, age at the time of the offense, nature of the offense and any actions the offender can report regarding their good conduct and rehabilitation. Without this middle ground approach, the few employers that do have discretion to hire ex-offenders without statutory licensing barriers will continue to eliminate ex-offenders from their hiring pool.

In closing, we appreciate the Commission's consideration of the ABA's perspective on these important issues and would be pleased to provide any additional information that would be helpful to the Commission. Thank you for the opportunity to address you all this morning.

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<sup>27</sup> U.S. Attorney General, *The Attorney General's Report on Criminal Background Checks* (June 2006), at page 3.

<sup>28</sup> Second Chances, see note 18, at p. 32.

