

FROM ARREST to REINTEGRATION

A Model for Mitigating Collateral Consequences of Criminal Proceedings BY J. MCGREGOR SMYTH, JR.

"There is no justification for the legal system to operate in ignorance of the effects of its actions."

(ABA CRIMINAL JUSTICE STANDARDS
COMM'N, REPORT TO THE ABA HOUSE OF
DELEGATES ON PROPOSED STANDARDS ON
COLLATERAL SANCTIONS AND DISCRETIONARY
DISQUALIFICATION OF CONVICTED PERSONS
at R-6 (3d ed. 2003).)

Collateral sanctions. Invisible punishments. Internal exile. From the moment of arrest, people are in danger of losing jobs, housing, basic public benefits, and even the right to live in this country. For many, these hardships are far more severe than the criminal charges confronting them. In New York, a plea to disorderly conduct makes a person ineligible for New York City public housing for three years, and two convictions for turnstile jumping can result in the deportation of a lawful permanent resident. Intended to improve "public safety," these punishments ultimately trap individuals in the revolving door of incarceration and poverty. By blocking the path to stable employment and housing, these barriers actually contribute to recidivism and undermine the struggle for self-sufficiency. The impact hits much deeper than individual defendants—entire families

J. MCGREGOR SMYTH, JR. is the founder and managing attorney for the Bronx Defenders' Civil Action Practice and the director of Reentry Net. The author wishes to thank Annah Boyer, Molly Kovel, and Isaac Wheeler who provided excellent advice on various drafts. For more information, go to www.bronxdefenders.org and www.reentry.net/ny.

suffer the consequences.

This article outlines a methodology for identifying, evaluating, and mitigating this collateral damage of criminal proceedings. The breadth of these collateral consequences is daunting, both to the people affected and criminal and civil justice practitioners who are faced with learning them. They are often hidden from view, scattered across federal, state, and local statutes, regulations, and administrative policies and practices. Established research and daily experience offer another way of looking at these consequences: They are a critical piece of the reentry/recidivism puzzle—and they are a way of identifying a population most in need of help.

Nature and Scope of Collateral Damage

The collateral consequences of criminal proceedings inflict damage on a breadth and scale too shocking for most lawyers and policy makers to accept. The FBI estimates that well over 14 million people were arrested nationwide in 2007. (*See Crime in the United States 2007* (FBI, Sept. 2008), available at <http://www.fbi.gov/ucr/cius2007/>.) According to Bureau of Justice Statistics, more than 650,000 people are released from prisons every year, more than 12 million pass through U.S. jails, and more than 7.3 million people were on probation, in jail or prison, or on parole at year-end 2007. (*See generally* <http://www.ojp.usdoj.gov/bjs/welcome.html> for a breakdown of statistics under "Corrections" tab.) The end result is that nearly 81 million people in the United States, or nearly one in four adults, had a criminal record as of December 31, 2006, reports the U.S. Department of Justice. (*Survey of State Criminal History Information Systems*, 2006.)

The disparate impact of the criminal justice system on communities of poverty and of color is well documented and undeniable. More than 80 percent of those charged with crimes are too poor to afford an attorney. (BJS.) African Americans and Latinos face significantly greater likelihood of being arrested, convicted, and incarcerated than whites. (See, e.g., Fran Fajana, *The Intersection of Race, Poverty, and Crime*, 41 CLEARINGHOUSE REV. 120 (July-Aug. 2007); Bruce Western, PUNISHMENT AND INEQUALITY IN AMERICA (Russell Sage Foundation 2006).) The direct effects on families illustrate a staggering multiplier effect: one in four black children born in 1990 had a parent imprisoned by age 14; only one in 25 white children were similarly situated. (See Christopher Wildeman, *Parental Imprisonment, the Prison Boom, and the Concentration of Childhood Disadvantage*, DEMOGRAPHY (Vol. 46, No. 2, May 2009) at 265-80.) By age 14, more than half of African-American children born in 1990 to high school dropouts had a father imprisoned. (*Id.*)

Common Ground for a Solution

The scale of this vicious cycle of poverty, crime, collateral consequences, and recidivism has the potential to cut through traditional criminal justice battle lines and point to policies that are smarter on crime and public safety—and to policies that are more equitable to people charged with crimes, their families, and their communities. Indeed, the Bush administration recognized that public safety required attention to this problem. In his 2004 State of the Union Address, George W. Bush introduced a new reentry initiative for people leaving prison, stating: “This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can’t find work, or a home, or help, they are much more likely to commit more crimes and return to prison.”

Law enforcement leaders have also recognized the self-defeating and unfair nature of collateral consequences. In 2001, the president of the National District Attorneys Association (NDAA) told prosecutors that they “must comprehend this full range of consequences that flow from a crucial conviction” and asked: “[h]ow can we ignore a consequence of our prosecution that we know will surely be imposed by the operation of law? These collateral consequences are simply a new form of mandated sentences.” (Robert M.A. Johnson, *Message from the President, Collateral Consequences*, THE PROSECUTOR (May/June 2001).) The NDAA officially acknowledged the prosecutor’s role in reentry in 2005:

[People] reenter our communities in need of housing, medical and mental health treatment, employment, counseling and a variety of other services.

Communities are often overwhelmed by these increased demands and, due to budget constraints, unable to provide minimum services to [people with criminal records]. As a result, the safety of our communities and citizens is jeopardized when releasees, who are unable to acquire employment, housing and needed services, revert to a life of crime.

(NDAA, Policy Positions on Prisoner Reentry Issues at 2 (adopted July 17, 2005), available at http://www.ndaa.org/pdf/policy_position_prisoner_reentry_july_17_05.pdf.)

Unfortunately, this recognition of the link between reentry, collateral consequences, and recidivism too frequently fails to influence daily decisions by prosecutors, policy makers, judges, defenders, and government agencies.

Underlying Themes

A number of important patterns emerge from any serious inquiry into collateral consequences. These themes should guide your strategy from intake and client interviews through briefing and trial advocacy. (J. McGregor Smyth, *The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records* (The Bronx Defenders 2000, April 2009 ed.)

“Collateral” consequences are not actually collateral. Courts have segregated these sanctions from “direct” consequences as a way to remove them from the constitutional protections in criminal law. (See, e.g., Gabriel J. Chin and Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002).) While often hidden from practitioners, these consequences inflict predictable and measurable damage to clients and their families after a criminal charge.

These sanctions are not limited to felony convictions. Although felony charges draw the most intense individual focus within the criminal justice system, many of the most draconian civil punishments result from misdemeanor and petty offense cases. For example, two convictions for turnstile jumping make a “green card” holder (a lawful permanent resident) deportable. (INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii).) Simple possession of a marijuana cigarette (a noncriminal offense in New York) cuts off federal student loans for a year. (20 U.S.C. § 1091(r)(1).) To put this in context, in 2008 in New York State, more than 87 percent of adult convictions were for misdemeanors or petty offenses. (N.Y. Division of Criminal Justice Services (DCJS), *Dispositions of Adult Arrests by County and Region* (6/18/2009).) Nationwide, only 4.2 percent of the 14 million annual adult arrests

charged violent crimes. (See *Crime in the United States 2007* (FBI, Sept. 2008).)

The punishments are not even limited to convictions. Among the most damaging types of records are not convictions at all—they are arrest records where the person charged has received a favorable disposition such as a dismissal or acquittal. Tragic consequences can result from an arrest or charge alone. For example, an arrest by itself often triggers termination proceedings in publicly subsidized housing, without regard to the eventual criminal disposition. (See, e.g., 24 C.F.R. § 966.4(l)5(iii)(A) (stating that in conventional public housing, a Public Housing Authority may terminate assistance “regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction”); 24 C.F.R. § 982.553(c) (analogous provision for Section 8 voucher).) Do not mistake this for a trivial phenomenon—in New York, for example, more than one in three people who are arrested are never convicted of any crime or offense, but they still suffer drastic consequences. That translates to more than 200,000 nonconviction dispositions per year in New York alone.

A perfect storm hits. In the past decade, this landscape has changed drastically for the worse. The steady accumulation of collateral sanctions has combined with the exponential increase in the availability of criminal history information to create a “perfect storm.” This storm overwhelmingly affects communities of poverty and of color.

Defining the problem, of course, is the first step to crafting solutions. Collateral consequences actually outline the structure that traps many low-income clients in recurring encounters with the criminal justice system. Many stakeholders, from prosecutors to Justice Kennedy, from the ABA to the Council of State Governments, have recognized that the cycle of crime is perpetuated in significant part by the collateral damage inflicted by the criminal justice system. Experience on the ground from around the country now demonstrates that timely and targeted services can help stabilize a family during the crisis of a criminal case and address many of the underlying social problems (such as addiction and homelessness) that contribute to the cycle of poverty and crime. By mitigating the collateral damage of criminal proceedings (such as eviction or job loss), these services can address the root problems that lead to crime and help individuals reenter society as productive citizens. (See McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. Tol. L. Rev. 479 (2005).)

Never Accept a Rap Sheet at Face Value

Criminal background checks have become routine for employment, housing, and public benefits applicants. A 2005 survey of human resource professionals by the Society for Human Resource Management found that 96 percent of businesses perform a background check on all job applicants. Over 100 employment licenses in New York State require criminal history review. Research in Ohio found nearly 300 statutory or administrative employment barriers. (See Kimberly R. Mossoney & Cara A. Roecker, *Ohio Collateral Consequences Project*, 36 U. Tol. L. Rev. 611, 615 (2005).) Every public housing, Section 8, and public assistance applicant undergoes a mandatory criminal history screening. Private landlords increasingly do the same. The resulting barriers can often prevent people from securing jobs, finding stable housing, and reuniting with their families. The problems arising from increased availability of criminal history data are only compounded by serious questions about reliability.

The Birth and Immortality of a Criminal Record

Criminal records are easy to create and nearly impossible to destroy. Every step in the criminal justice process—from arrest to prosecutor review, state and federal criminal history inquiry, arraignment, disposition, sentencing, and incarceration—creates a new record at multiple agencies. The FBI maintains its own criminal history files for federal proceedings and “serious and/or significant” state proceedings. (28 U.S.C. § 534; 28 C.F.R. §§ 20.30–20.38.) Each state has its own official criminal history repository. (See Bureau of Justice Statistics, U.S. Dep’t of Justice, *Compendium of State Security and Privacy Legislation: Overview 2002* (2003).) Most courts and law enforcement agencies compile their own independent versions. In New York State alone, dozens of agencies maintain their own computerized records of arrests and prosecutions, including the Division of Criminal Justice Services, Office of Court Administration, New York State Police, and local law enforcement.

Technology now provides unparalleled access to this ever-increasing range of criminal history data. Nearly all state criminal history repositories, courts, and law enforcement agencies sell their data (or provide it for free online). Hundreds of private, commercial background screening businesses access these data sources and create their own repositories. (SEARCH, The National Consortium for Justice Information and Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (December 2005).) A recent report found that “several companies compile and manage criminal history databases with well in excess of 100 million criminal history records.” (*Id.*) A tremendous market for these services drives its expansion.

Ubiquitous and Inaccurate Is a Dangerous Combination

Background checks are routine, but they often return inaccurate information. A recent report conducted for the National Association of Professional Background Screeners found a litany of serious problems with FBI reports, including failure to report dispositions of arrests, lack of timeliness in reporting dispositions, and ineffective linking of the proper individual and case. Perhaps the most damning finding was that of 174 million arrests on file, only 45 percent have dispositions. (Craig N. Winston, *The National Crime Information Center: A Review and Evaluation* (August 3, 2005).) Significant problems with the background check industry include criminal identity theft leading to improperly attributed convictions, false positives, and mismatches based on nonbiometric background checks, and negligence by commercial vendors. (Sharon Dietrich, *Expanded Use of Criminal Records and Its Impact on Reentry*, presented to the American Bar Association Commission on Effective

out the error patterns present in their own jurisdiction. Defender-based rap sheet initiatives, in particular, are critical tools to improve rap sheet accuracy and thereby reduce widespread barriers to employment and housing. Because defenders receive copies of each client's official criminal history, in-house rap sheet services are efficient and effective. In addition, the scale of the problem and the depth of impact on communities of poverty argue for making rap sheet review a standard service at civil legal aid organizations. Excellent programs implementing both models exist in New York (The Bronx Defenders, Legal Action Center, Community Service Society), Pennsylvania (Community Legal Services of Philadelphia), Michigan (Legal Aid of Western Michigan), Massachusetts, Illinois (Sargent Shriver National Center on Poverty Law), California (East Bay Community Law Center, San Francisco Public Defender), and many other states. (See Sharon Dietrich, *When "Your Permanent Record" Is a Permanent Barrier: Helping Legal Aid Clients Reduce the Stigma of Criminal Records*, 41 CLEARINGHOUSE REV. 139 (July-August 2007).

Problems arising from the greater availability of criminal history data are only compounded by serious questions about reliability.

Criminal Sanctions (March 3, 2006).)

In 2007, the Bronx Defenders partnered with a major New York law firm in a pilot project to review and correct rap sheets. After extensive training, a pro bono attorney and paralegal reviewed a random sample of 266 official state rap sheets from recent Bronx arrests. Their paper review focused on three significant potential errors, each of which is likely to lead to the denial of housing, employment, and public benefits applications: (1) missing disposition information, (2) cases incorrectly left unsealed, and (3) unrecorded vacatur of warrants. The results revealed one of the most significant gaps in services in New York. Fully 62 percent of the random sample of official state rap sheets contained at least one significant error; 32 percent had multiple errors. The number of errors ranged from one to nine, with a median of two.

Criminal history errors can cause adverse consequences both during a criminal case and postconviction. While a criminal case is pending, a rap sheet error can significantly impact bail, plea, and sentencing decisions. Knowing the serious incidence of inaccuracy outlined above and the serious consequences, prosecutors, defenders, and judges have a duty to find and root

Collateral Consequences Begin at Arrest, and so Must Services

Individuals and families begin to suffer collateral consequences from the moment of arrest—missed days of work, the loss of a job or home after the reporting of an arrest to a licensing agency or public housing authority, the removal of one's children. These early and long-lasting punishments create significant barriers to successful reentry from the criminal justice system, be it prison, jail, or short-term detention. Recognizing this landscape, we must redefine "reentry" as a process that begins at arrest and continues through community reintegration. This shift in the paradigm of reentry and collateral consequences highlights the substantial role that all stakeholders can play and expands the focus beyond incarceration, so that it encompasses the consequences of criminalization individuals face from the moment they come in contact with the criminal justice system. (Smyth, *supra*, 36 U. TOL. L. REV. at 501.)

The Bronx Defenders' experience in providing integrated criminal and civil legal services for the past nine years proves that knowledge of these collateral conse-

quences is a critical direct advocacy tool in criminal cases. (*See id.*) Proper consideration of collateral sanctions results in more productive criminal dispositions; more equitable discovery; and direct benefits to people charged with crimes and their families.

As a starting point, examine your state's criminal code for the legal leverage to include collateral consequences in the calculus of a criminal case. For example, in New York in 2006, the legislature amended Penal Law § 1.05(6) to add a new goal, "the promotion of [the convicted person's] successful and productive reentry and reintegration into society," to the four traditional sentencing goals of deterrence, rehabilitation, retribution, and incapacitation. (2006 N.Y. Laws 98.) For a national model, the aspirational ABA *Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons* require sentencing courts to consider collateral sanctions in determining the overall sentence. (Standard 19-2.4(a) (3d ed. 2004) [hereinafter ABA Standards].) In the context of far-reaching and se-

More Productive Criminal Dispositions

The vast majority of people cycling through the criminal justice system are released without a term of incarceration—but the mark of a criminal record remains. For this group, a brief interaction with a defense attorney, the prosecutor, and the court system can lead to life-long consequences. In this process, courts, prosecutors, and defenders have significant potential for positive impact, but also for great harm. With tremendous authority over bail decisions, the ability to influence plea negotiations, and at least some discretion over sentencing, criminal court judges have many tools to craft outcomes that promote successful reentry. Many prosecutors question the relevance of collateral consequences to their criminal justice calculus and may fear appearing weak on crime. In a world of mandatory minimums and determinate sentences, however, prosecutors hold a tremendous amount of power. In decisions to charge, demand bail, offer plea deals, and agree to diversion programs, pros-

Examine a state's criminal code for legal leverage to include collateral consequences in the calculus of a criminal case.

vere hidden sanctions, the ABA wanted the court to ensure that the "totality of the penalty is not unduly severe and that it does not give rise to undue disparity." (ABA, *Criminal Justice Standards Comm'n, Report to the ABA House of Delegates on Proposed Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons* at R-11 n.21 (3d ed. 2003).) The ABA has also recommended that all criminal justice professionals who exercise discretion in the justice system should participate in training that will give them greater understanding of what elements, including reentry issues, should be considered in the exercise of their discretion. (ABA Commission on Effective Criminal Sanctions, *Second Chances in the Criminal Justice System: Alternatives to Incarceration and Reentry Strategies* (ABA 2007).)

Similarly, in July 2009 the Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws) approved the Uniform Collateral Consequences of Conviction Act and recommended enactment by each state. The Act requires collection of all collateral consequences in a single document or code provision; proper notice to all defendants; and reasonable processes for obtaining relief from the consequences. (For additional information, *see* www.nccusl.org.)

ecutors have the discretion to choose more productive reentry outcomes—or not. These stakeholders, however, generally lack the training and resources to be smart on crime.

Experience has taught that defenders can be successful at leveraging creative and more productive (and often more favorable) bail, plea, and sentencing results—or even outright dismissals—when they are able to educate prosecutors and judges on specific and severe consequences for clients and their families. The first step? The defender must prove that these consequences are real. Many prosecutors, judges, and even defenders simply do not believe that so many irrational and draconian punishments exist. I spent many years at the beginning of my work in the Bronx printing out various statutes, regulations, and policy statements as evidence. Proof of the likelihood of the specific collateral consequence leads logically to the next step: convincing the prosecutor and judge that they should include it in their decision making. A serious collateral sanction undermines many of the goals of the criminal justice system and destroys any notion of sentencing equity. Intelligent justice stakeholders will recognize that ignoring collateral consequences leads only to a self-defeating cycle of recidivism, and

that the loss often falls most heavily on innocent family members.

In our experience, prosecutors and judges respond best to consequences that affect their basic sense of fairness—consequences that are absurd, disproportionate, or affect innocent family members. Although a discussion of the substantive areas of collateral consequences is beyond the scope of this article (and could be the subject of its own book), the following four areas of impact should guide strategy and intake interviews. (For concrete examples of these advocacy strategies in action, see Smyth, 36 U. Tol. L. Rev. at 495-96.)

Immigration

The 1996 overhaul of federal immigration law created a Byzantine, rigid, and stunningly harsh legal framework for noncitizens accused of crimes. Long-term residents can be stripped of their green card and deported for a single minor conviction that carries no jail time, without regard to their family ties in the United States or their lack of support in their countries of origin. Once a non-citizen has been convicted, his or her fate is often sealed and nothing can be done to stop deportation. (See, e.g., Alina Das, *Avoiding Unintended Consequences in Civil Advocacy for Criminal Charged Immigrants*, 41 CLEARINGHOUSE REV. 228 (July-Aug. 2007).)

The immigration laws, however, are so complex and counterintuitive that with early collaboration between an immigration lawyer, the criminal defense lawyer, and the client, defenders can often negotiate dispositions that will protect their clients from deportation and keep their families intact. Last year, the integrated immigration services of the Civil Action Practice at The Bronx Defenders resulted in safe or mitigated plea dispositions for our clients in 88 percent of the plea consultations.

For extensive practical resources for advocates in this area, contact the Immigrant Defense Project (www.immigrantdefenseproject.org); the Defending Immigrants Partnership (<http://defendingimmigrants.org>); the Immigration Advocates Network (www.immigrationadvocates.org); and Reentry Net (www.reentry.net/ny).

Housing

The loss of a family's home as a result of an arrest or incarceration is a tragically common event. Any involvement in the criminal justice system creates a substantial risk of homelessness. Loss of existing, stable housing in this context damages entire families and results in high shelter expenses and increased risk of recidivism. (See 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).) Once

evicted, people with criminal histories have an increasingly difficult time finding new, stable housing. Criminal records restrict future opportunities to qualify for federally subsidized housing, such as public housing or Section 8. (See, e.g., 42 U.S.C. § 13661.) The resultant lack of housing stability contributes substantially to the cycle of poverty and crime.

When a client can demonstrate that a particular plea offer or sentence will result in a specific loss of public housing or Section 8, or the probable denial of a pending application, better outcomes can result. (For extensive practical strategies for defending from eviction or termination a current public housing resident or Section 8 recipient who is charged with or convicted of a crime, see Lawrence R. McDonough and Mac McCreight, *Wait a Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth*, 41 CLEARINGHOUSE REV. 55 (May-June 2007). For an excellent manual regarding eligibility and the application process for federal assisted housing for individuals with criminal histories, see National Housing Law Project, *An Affordable Home on Re-entry: Federally Assisted Housing and Previously Incarcerated Individuals* (2009). Both are available at www.reentry.net/ny along with dozens of briefs, training manuals, and other advocacy materials.)

Employment

Similarly, an arrest or conviction frequently results in the loss of a current job or the denial of future job applications. Many public employers and licensing agencies receive automatic notification of new arrests, and clients frequently find themselves terminated or suspended from employment regardless of the final outcome of the criminal case. As noted above, the vast majority of employers now perform criminal background checks on all new applicants.

Studies have shown that recidivism is directly linked to lack of economic opportunity. (See, e.g., Christy A. Visher, Laura Winterfield, and Mark B. Coggeshall, *Ex-offender employment programs and recidivism: A meta-analysis*, J. EXPERIMENTAL CRIMINOLOGY (Sept. 2005) 1:295-316.) The imminent or probable loss of a job or employment license (or a specific employment opportunity), particularly for a breadwinner, can provide powerful leverage for a more productive plea or sentence in a criminal case.

In 2008, Community Legal Services of Philadelphia (CLS) (www.clsphila.org), a pioneer in employment advocacy for people with criminal records, received funding from the Open Society Institute to spearhead the Litigation-Based Project on Criminal Records and Employment with the goal of creating legal precedents and raising public consciousness nationally of the legal violations

that lead to people with criminal records being unable to access employment. Over the three years of the project, CLS will bring impact litigation with private cocounsel on employment issues related to criminal records. CLS will also provide leadership and backup support for legal advocates around the country who are working on these same issues and seeking to expand their knowledge, experience, and success with regard to litigation. They will create a document bank, create a network of potential expert witnesses, advocate with the EEOC, and collaborate with other advocates through telephone conferences and technical assistance. Advocates can also obtain helpful materials from the National Employment Law Project (www.nelp.org); the National HIRE Network (www.hirenetwork.org); and Reentry Net (www.reentry.net).

Student Loans

Federal law suspends eligibility for any grant, loan, or work assistance for students convicted of any offense under any federal or state law involving the possession or sale of a controlled substance for conduct occurring while receiving student aid. (*See* 20 U.S.C. § 1091(r)(1).) Ineligibility periods range from one year after a first conviction for simple possession to indefinite for a second conviction for sale. Under section 1091(r)(2), a student may regain eligibility before the above period expires if the student satisfactorily completes a drug rehabilitation program that meets certain criteria.

Even with the waiver opportunity, a qualifying conviction inevitably leads to a substantial delay or denial of educational opportunity. Because post-secondary education is one of the most cost-effective and successful inoculations against recidivism, the loss of a specific educational opportunity for a client can radically shift outcomes in criminal cases if used during plea and sentencing.

More Equitable Discovery

Subsidized housing, family issues, public employment or licenses—these are all situations where the client is likely to have an ancillary civil or administrative proceeding pending at the same time as the criminal case. Defense attorneys legitimately can use these civil proceedings for additional discovery not available in the criminal case. Eviction cases, employment licensing proceedings, DMV hearings, school suspension hearings, and more are all venues where an administrative or lower court judge, or an attorney, is likely to have subpoena power.

Client Priorities—Too Late Comes Too Soon

The collateral damage of being arrested often falls most heavily on family members and children. This harsh reality, when known during the pendency of the criminal

case, influences the decision making of people charged with crimes. What's more important to the client: Avoiding jail or prison? Preserving custody of their children? Avoiding deportation or eviction? The answer differs for each client and family. The only way to know the right answer is to ask, and listen. Often our job as advocates involves taking clients "out of the moment" to consider the downstream consequences or externalities of their decisions in light of their larger goals and priorities. In criminal cases, battered by high caseloads and docket demands, we have to resist the pressures to focus only on the liberty interest. Particularly with misdemeanor charges (the vast majority of criminal cases), many clients would rationally choose even a short term of incarceration to avoid these harsh "collateral" consequences. Help people caught in the system think about these long-term hidden effects of pleas before taking them. Too late comes too soon—the fact of a conviction, by itself, forecloses many opportunities to mitigate or avoid these drastic consequences.

Early, Effective Interventions with Integrated Civil Legal Services

Legal aid programs and other civil legal providers serve the very same population that the criminal justice system targets. The individuals and families caught in the criminal, child welfare, and civil justice systems come from the same communities of poverty and of color. Given the increasingly pervasive impact of the criminal justice system on these communities, every organization with a mission of combating poverty or racism should provide client services to fight the collateral consequences. (*See* Smyth, *Cross-Sector Collaboration in Reentry: Building an Infrastructure for Change*, 41 CLEARINGHOUSE REV. 245 (July-Aug. 2007).) The experience of legal services offices from around the country demonstrates the success of these services.

Co-locating civil legal services with public defense offers an innovative and proven model of service delivery to reach this at-risk population, which historically has been unable to access legal services. Since they meet individuals when their lives and communities are in crisis, defenders have a unique opportunity for early intervention. These interventions are cost-effective—they reduce the counterproductive collateral consequences and can increase access to treatment and other alternatives that are cheaper in the long term than serial incarceration.

Integrated civil and criminal legal services from the time of arrest effect critical change in at least two dimensions. First, these services can avoid or mitigate collateral consequences by working with both the criminal and civil systems for mutually productive outcomes. Second, proper services can stabilize a client or family by ad-

addressing the more traditional legal problems arising out of poverty—such as nonpayment of rent—that become overwhelming in light of the crisis of the criminal case.

Experience has shown that families caught in the disruption of pending criminal cases or incarceration are less likely to seek other needed legal services at a separate office. They often let the first and second notices from their landlord or welfare agency go unaddressed. For those who do navigate the labyrinth of traditional legal services intake, the delay before retaining counsel necessitates greater crisis intervention (and more work) by the providers. These problems quickly become emergencies, which are more difficult, more time-consuming, and more expensive, to resolve.

Defenders, however, are often the first to hear about these problems because of their established relationship with these families. Partnering with a defender office for civil legal services creates a unique opportunity for early intervention. This model leverages existing services for the greatest effectiveness. Advocates can often resolve a potential housing problem, such as a public assistance error that suspends rent payments, with a letter or phone call. Proper planning and client services can prevent some litigation, such as eviction proceedings, altogether. When litigation becomes necessary, advocates have immediate access to clients' existing case files and the benefit of an established relationship with client families.

Countless Bronx Defenders clients demonstrate the power of this model. Omar was a disabled, 30-year public housing resident with many health problems who had let a friend stay with him. The friend refused to move out and began to terrorize Omar, who went to his Public Housing Authority (PHA) and the police for help and advice on how to get the new roommate out. When the police came to the apartment and found the roommate's drugs, Omar was arrested. The PHA filed an administrative proceeding to evict him because of the arrest. Working closely with his defense attorneys, his civil attorneys gained early notice of the eviction, preserved Omar's right to stay in his home, and entered a probationary stipulation requiring the exclusion of the unauthorized roommate, who had already disappeared.

The most effective partnership model involves integrated criminal and civil staff in the same office. Limitations in funding and organizational design can make the execution of this model difficult. Advocates must find ways to structure collaborations that bridge the critical gap in services between traditional criminal and civil legal organizations. Bridging this gap ensures that both defenders and civil legal aid advocates can capitalize on the full range of intervention points, from arrest to postconviction. (For practical advice on structuring civil-defender collaborations, *see*

McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, 37 CLEARINGHOUSE REV. 56 (May-June 2003) and Cynthia Works, *Reentry—the Tie That Binds Civil Legal Aid Attorneys and Public Defenders*, 37 CLEARINGHOUSE REV. 328 (Sept.-Oct. 2003). For a collection of similar articles on program design, visit the Reentry Net National Research & Policy Library at www.reentry.net/library/folder.88048-Holistic_Defender_Civil_Legal_Services.) Integrating civil and criminal legal services, either in the same office or through partnerships, turns the pitched battle to alleviate collateral consequences into a more effective and efficient effort to avoid them altogether.

Outlining a Consolidated Advocacy Strategy

This section details a methodology for identifying, evaluating, and mitigating the collateral damage of criminal proceedings. This problem-solving model requires client-centered practice and a creative willingness to bridge traditional divides in civil legal work. The complexity of these problems that occupy both the criminal and civil legal worlds daunts even well-meaning advocates. In discussing the application of the model, I will highlight dozens of practical resources already available to support advocates in this work. In the process, the model itself points to the need for an infrastructure that supports advocates and promotes collaboration. (See Smyth, *supra*, *Cross-Sector Collaboration in Reentry*, 41 CLEARINGHOUSE REV. 245, for a discussion of an existing infrastructure solution supporting New York advocates.)

A CONSOLIDATED ADVOCACY STRATEGY

- Identify the legal provision or policy that creates the barrier for the client.
- Examine the criminal record and the process by which it was obtained and used.
- Consider challenges related to legal hierarchy.
- Consider state or federal constitutional challenges.
- Determine whether a state or local law protects people with criminal records.
- Challenge broad exclusionary policies as discriminatory based on race.
- Demand a reasonable accommodation if the criminal activity arose from a disability.
- Pursue restoration of rights process or certificate of rehabilitation, if available.
- Put them to their proof.
- Develop a compelling narrative.

Identifying a Barrier Provision or Policy

To assist a client fighting a collateral sanction, you must first identify the source of the barrier. It sounds simple and obvious, but this step holds surprising challenges—experts have labeled collateral consequences “invisible punishments” for a reason. Determine the statutory, regulatory, and/or policy basis for the adverse decision. Outline the hierarchy of legal provisions. Detail the procedures for decision making and appeal, including provisions that guide or limit discretion. Be certain to identify other controlling legal instruments such as employment contracts, leases, or collective bargaining agreements that set forth rights and responsibilities of all relevant parties.

Some barriers arise automatically from an arrest or conviction (the ABA and ULC call these “collateral sanctions”); other disabilities authorize, but do not require, a court, agency, or other decision maker to impose them (“discretionary disqualifications”). Common examples of the latter are licenses or other opportunities that require “good moral character,” where criminal records predictably result in denial or termination. A distinction without a difference to the families actually affected, these legal classifications will prove useful in guiding your legal strategy. For example, categorical bars more frequently contain constitutional or regulatory infirmities, while deficient procedural due process often marks discretionary disqualifications (see below).

Make sure to determine whether a waiver process exists that can overcome the adverse action upon some showing by your client. Many policies require automatic denials or terminations because of criminal records and give little to no notice of the existing waiver practices. These waiver or appeal policies are fairly common. For example, the federal Transportation Worker Identification Credential (TWIC) provides for a waiver process that takes into account evidence of rehabilitation, as well as an appeal process that allows workers to challenge inaccuracies in their background check that led to initial disqualification. (See 49 C.F.R. §§ 1515 *et seq.* and NELP’s TWIC manual at www.nelp.org.) Individuals who are (1) fleeing to avoid felony prosecution, or custody, or confinement after a felony conviction, or (2) violating a condition of probation or parole, as found by a judicial or administrative determination, may not receive an array of federally funded benefits, including TANF-funded benefits, SSI, SSDI, public and federally assisted housing, or food stamps. (See, e.g., 42 U.S.C. §§ 608(a)(9)(A) and 1382(e)(4).) For good cause shown, however, the Social Security Administration can reinstate benefits retroactively if a court of competent jurisdiction has found the individual not guilty of the criminal offense, dismissed the charges relating to the criminal offense,

vacated the warrant for arrest of the individual for the criminal offense, or took any similar exonerating action. (42 U.S.C. § 1382(e)(4)(B); POMS SI 530.015.)

Follow similar steps with private actors, making every attempt to get policies and procedures in writing. Unions can be powerful and useful allies for employment issues. Identify cross-cutting concerns of the government or private actors, such as negligent hiring liability, (see, e.g., *State-by-State Survey—Employer Legal Liability for Hiring Individuals with Criminal Records* (Commissioned by Goodwill Industries, 2007) at www.reentry.net), as they can help guide your advocacy strategy (see below).

Even with government sunshine laws, finding many policies and even regulations can be challenging. Be aggressive in using your state’s freedom of information law, where applicable. Be equally as aggressive at sharing the records that you receive with your legal community. (Reentry Net will post any materials that you submit so that they remain freely and publicly available.) Take advantage of local expertise in civil legal services offices or bar associations. Practice area experts can often point you directly to hard-to-find resources, such as the Section 8 administrative plans posted deep in the HUD Web site that detail each public housing authority’s policy on applicants with criminal histories.

Many jurisdictions have already worked to compile listings or write manuals detailing collateral consequences. Arizona, Maryland, Michigan, Minnesota, New York, Ohio, Washington, and the District of Columbia all have excellent guides. Many other resources detail consequences in particular areas. (See, e.g., Sharon Dietrich and Maurice Emsellem, *Legal Outline of Authorities & Decisions Related to Criminal Records and Employment* (2006); McDonough & McCreight, *supra*; NHLP, *supra*.) A 2009 study by the ABA Commission on Effective Criminal Sanctions and the Public Defender Service for the District of Columbia describes the collateral consequences of a felony conviction arising under federal statutes and regulations. (*Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations* (January 2009).) All of these resources are posted on Reentry Net (www.reentry.net), in particular in “Find Out About Collateral Consequences of Criminal Charges, Proceedings, and Convictions in Your State: Collateral Sanctions Around the United States.” Finally, the National Institute of Justice will fund a comprehensive survey of collateral consequences in every U.S. jurisdiction in the next year. (See Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 510 (2008).)

Examine the criminal record and the process by which it was obtained and used. As discussed in detail above, even official criminal history records routinely contain errors. The private sector practice of buying and compiling these

records in bulk only exacerbates the problem. Worse, the vast majority of background checks go through a private sector proxy rather than an official repository. To be effective, you have to see what records the employer, landlord, or other party used to make its decision. Review the records immediately for errors. With surprising regularity, a legal, factual, or interpretive correction will solve the problem because of an error in the rap sheet or an error in reading it. Determine whether any of the records qualify for expungement or sealing under state law. For example, Maria was rejected for a job because of arrest charges from 1989 that appeared on her rap sheet without a disposition. She knew that she had never been convicted of any offense. Our staff investigated, discovering that the district attorney had declined to prosecute within hours of the arrest. We obtained documentation and had all records of the arrest correctly sealed. With

include a requirement that, prior to taking adverse action based in part on a consumer background report, an employer provide the applicant with a copy of the report. (*See* 15 U.S.C. § 1681b(b)(3)(a)(i) and (ii).) Section 1681e(b) requires CRAs to implement “reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.” FCRA establishes liability for both negligent and willful noncompliance (including statutory damages) and provides for attorney fees. (*Id.* at § 1681n, 1681o; *Dalton v. Capital Associated Industries*, 257 F.3d 409 (4th Cir. 2001).)

Note that state versions of FCRA can provide more protection. In New York, for example, no CRA may report any conviction for noncriminal offenses. (N.Y. Gen. Bus. L. § 380-j(a)(1).) Although frequently ignored by national CRAs doing business in New York, this provi-

Many clients would rationally choose a term of incarceration to avoid harsh collateral consequences.

this proof in hand, Maria got the job.

Federal and state law provide both substantive and procedural rights relating to criminal histories. The Criminal Justice Information Systems Regulations, 28 C.F.R. Part 20, set national standards in this area. Their stated purpose is to ensure that criminal history record information “is collected, stored, and disseminated in a manner to ensure the accuracy, completeness, currency, integrity, and security of such information and to protect individual privacy.” (28 C.F.R. § 20.1.) Each state has passed its own statutes and regulations to implement the federal standards. Use these legal provisions to challenge the use of criminal history information from official government sources.

The use of criminal history information from private sources (any background checking company), triggers the protections of the Fair Credit Reporting Act (FCRA). (*See* 15 U.S.C. §§ 1681 *et seq.*) FCRA governs the reporting and use of credit and public record information by consumer reporting agencies (CRAs). Substantive provisions include prohibiting CRAs from reporting arrests or other adverse information (other than convictions of crimes) that are more than seven years old, unless the report is in connection with an employment position that pays an annual salary of \$75,000 or more. (*See* 15 U.S.C. §§ 1681c(a)(2), (a)(5), and (b)(3).) Procedural provisions

should have significant impact—in 2008, more than 42 percent (145,278) of all convictions in New York were for noncriminal offenses. (DCJS, *Dispositions of Adult Arrests by County and Region* (6/18/2009).)

Consider challenges related to legal hierarchy. After charting the hierarchy of legal provisions, examine them for procedural or substantive problems related to that hierarchy. Determine whether the relevant state or local provision conflicts with federal law (preemption). Similarly, consider whether the local law or policy violates state law or policy. Compare the policy or regulation to the enabling statute to determine whether it is entitled to *Chevron* deference or is ultra vires. (*See, e.g., Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).) For example, numerous Florida appellate courts have found that in the absence of legislative authority, state agencies may not require that a person with a felony conviction obtain the restoration of his or her civil rights to obtain an occupational license. (*Yeoman v. Construction Industry Licensing Board, State of Florida Department of Business and Professional Regulation*, 919 So. 2d 542, 31 Fla. L. Weekly D48 (Fla. 1st DCA Dec. 22, 2005); *Vetter v. Department of Business and Professional Regulation, Electrical Contractors Licensing Board*, 920 So. 2d 44, 30 Fla. L. Weekly D2807 (Fla. 2d DCA Dec. 14, 2005); *Daniel Scherer v. Depart-*

ment of Business and Professional, 919 So. 2d 662, 31 Fla. L. Weekly D320 (Fla. 5th DCA Jan. 27, 2006).) Examine whether the promulgation of the regulation or policy complied with the state or federal Administrative Procedure Act. (*See, e.g.*, 5 U.S.C. §§ 500 *et seq.*)

Consider state or federal constitutional challenges.

Although constitutional law does not categorize people with criminal records as a protected class for equal protection analysis, constitutional challenges to the imposition of collateral consequences have met with surprising success. Courts have used rational basis review to invalidate laws that categorically bar large groups of people with criminal records, but courts have generally upheld laws where the relationship between the offense and the opportunity is more carefully tailored. (Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. Soc’y 18 (2005) (collecting cases and evaluating constitutional challenges).) As a general rule, look for broad or automatic barriers that do not distinguish relevant and irrelevant offenses and do not provide for individualized review. (*See, e.g.*, *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957); *Lewis v. Alabama Dep’t of Public Safety*, 831 F. Supp. 824, 826-27 (D. Ala. 1993).)

Because many collateral consequences occur through administrative agency action, consider carefully whether the procedures for challenging an adverse action provide due process. The Legal Aid Society of New York City, for example, has successfully battled the city for decades over its unconstitutional procedures surrounding the seizure and attempted civil forfeiture of vehicles incident to an arrest. The financial consequences of losing the car often paled in comparison to the lost wages and lost jobs resulting from the lack of transportation. Through this litigation, the Second Circuit Court of Appeals has repeatedly set due process standards that protect people charged with crimes from the loss of their property. (*See, e.g.*, *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002) (holding that due process requires a prompt hearing before a neutral fact finder to test the probable validity of the deprivation *pendente lite*, including the probable cause for the initial warrantless seizure and the necessity and legitimacy of continued impoundment).)

Many state constitutions provide more protection, either procedural or substantive, than the U.S. Constitution. Advocates around the country have used state constitutional provisions to strike down laws limiting opportunities for people with criminal records. In Pennsylvania, for example, the Older Adults Protective Services Act (OAPSA), created a lifetime bar preventing most people with criminal records from working in nursing

homes, home health care agencies, and other long-term care facilities. The law summarily unemployed many people who had worked safely in long-term care facilities for decades. With private cocounsel, Community Legal Services of Philadelphia successfully challenged OAPSA under the state constitution. The court found that the lifetime ban violated Article I, Section 1, of the Pennsylvania Constitution because no “real and substantial” relationship existed between a lifetime prohibition from employment in elder care and a legitimate governmental purpose. (*Nixon v. Commonwealth of PA*, 839 A.2d 277, 289 (Pa. 2003).) In Massachusetts, the court in *Cronin v. O’Leary*, 13 Mass. L. Rep. 405 (Mass. Super. Ct. 2001), struck down a lifetime ban on employment with the state department of human services as a violation of procedural due process under Article 12 of the Massachusetts Declaration of Rights.

Determine whether a state or local law protects people with criminal records. While no federal civil rights statute explicitly protects people with criminal records, many state and local laws take a more progressive view. At least five states—Hawaii, Kansas, New York, Pennsylvania, and Wisconsin—prohibit private employers from having complete bars against hiring persons with a conviction record. (*See* Dietrich and Emsellem, *supra*, *Legal Outline of Authorities* at 6-7 (collecting statutes).) The New York State Human Rights Law, for example, forbids public and private employers and occupational licensing agencies from denying any individual a job or license (or otherwise discriminating against that person) because of arrests that did not result in a conviction, confidential youthful offender adjudications, and sealed convictions for noncriminal offenses. (*See* N.Y. Exec. L. § 296(16).) Employers and licensing agencies may not have a policy of denying every person with a criminal history—they must consider each applicant individually. (N.Y. Corr. L. Article 23-A.) Employers and licensing agencies may not deny any person a job or license because of past conviction(s) unless (a) the conviction(s) are “directly related” to the job in question, or (b) hiring or licensing that person would create an “unreasonable risk” to the safety of people or property. (N.Y. Corr. L. § 752.) Section 753 lists factors that must be considered in determining whether a conviction meets the above criteria.

Do not overlook local laws—the New York City Human Rights Law mirrors the state law but covers more private actors and provides for attorney fees. (*See, e.g.*, NYC Admin. Code § 8-107.) Several other urban areas across the United States (including Boston, Chicago, Minneapolis, San Francisco, St. Paul, and the counties of Alameda and Multnomah) have recently implemented policies that limit discrimination in city and county jobs

against people with criminal records. (See www.nelp.org/site/issues/category/city_and_county_hiring_reforms.) For more information on state and local laws, see the Legal Action Center's Advocacy Toolkit Package Twelve, "Enforce Anti-Discrimination Laws" available at www.lac.org/toolkits/titlevii/title_vii.htm.

Challenge broad exclusionary policies as discriminatory based on race. The disparate racial impact of arrests and convictions is well documented. Employment, housing, and other policies or practices that impose broad exclusions on the basis of arrests or convictions, in turn, have disparate racial impact. Consider using existing federal, state, and local civil rights statutes to challenge these practices.

For example, the EEOC has determined that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records, absent business necessity, has an adverse impact on African Americans and Latinos in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population. An employ-

disability under federal and state law. In these situations, demand that covered entities provide a reasonable accommodation for the disability by creating exceptions to their criminal record exclusion or termination policies. (See, e.g., 29 U.S.C. § 705(20)(C)(ii) (defining people recovered and recovering from substance abuse as disabled).) Note that a demand for reasonable accommodation shifts the burden to the covered entity to demonstrate that no accommodation will eliminate or acceptably minimize a direct and serious risk to the safety of others posed by the behavior of the person with a disability. (See *Roe v. City of Boulder*, 909 F. Supp. 814, 823-24 (D. Col. 1995); *Roe v. Sugar River Mills Assoc.*, 820 F. Supp. 636, 640 (D.N.H. 1993).)

Advocates in New York have used the disability provisions of the FHA to protect people with criminal records. When the Rochester Housing Authority refused to modify its criminal history bar for an applicant with a past substance abuse problem, the Monroe County Legal Assistance Center (MCLAC) and Empire Justice Center sued for disability discrimination and failure to provide

Advocates around the country have used provisions within state constitutions to strike down laws limiting opportunities for people with criminal records.

er can show business necessity when the applicant is engaged in conduct that is particularly egregious or related to the position in question. (See, e.g., EEOC COMPLIANCE MANUAL, Vol. II, § 15(IV)(B)(2) and Appendices 604-A ("Conviction Records") and 604-B ("Conviction Records—Statistics").) As described above, Community Legal Services in Philadelphia runs a national resource center supporting this type of litigation.

Similarly, a landlord's policy or practice of excluding persons with conviction records has a disparate impact on African Americans and Latinos. (See 42 U.S.C. § 3604(f); N.Y. Exec. L. §§ 290 *et seq.*; N.Y. Civ. Rights L. §§ 18-a to 19-b.) For a practical description of using federal and state fair housing laws to challenge such a policy, see the Legal Action Center's Advocacy Toolkit Package Five: "Making a Claim of Racial Discrimination Under the Federal Fair Housing Act" at www.lac.org/toolkits/housing/package5.htm.

Demand a reasonable accommodation if the criminal activity arose from a disability. Criminal activity often arises from mental illness and substance abuse. In many circumstances, these conditions meet the definition of

reasonable accommodation. A separate case brought by MCLAC won a consent decree that orders the Rochester Housing Authority to implement policies that reflect the legal status of recovered substance abusers as persons with disabilities, and enjoining the authority from discriminating against them (pursuant to the Fair Housing Act, 42 U.S.C. § 3604(f)).

Pursue restoration of rights process or certificate of rehabilitation, if available. Many jurisdictions have mechanisms to restore certain rights to people with conviction histories. While often limited in scope, these devices can be critical tools in avoiding or mitigating collateral consequences. Even where they do not actually lift a barrier, do not discount the rhetorical leverage of any official imprimatur in proving rehabilitation when advocating in a discretionary process. Margaret Colgate Love, former director of the ABA Commission on Effective Criminal Sanctions and U.S. pardon attorney, has compiled a state-by-state reference guide describing laws and practices relating to restoration of rights and obtaining relief from the collateral disabilities and penalties that accompany a criminal conviction. (*Relief from the Collateral*

Consequences of a Criminal Conviction: A State-by-State Resource Guide (2005), available at www.sentencingproject.com.) The ABA and Uniform Law Commissioners have recommended that all jurisdictions enact procedures for comprehensive restorations of rights.

New York, for example, has two critical tools—certificates of relief from disabilities (CRDs) and certificates of good conduct (CGCs)—that lift automatic barriers to housing and employment. These certificates promote rehabilitation by removing statutory collateral bars imposed because of convictions and providing a rebuttable “presumption of rehabilitation” for employment applications. (N.Y. Corr. L. §§ 701-703; 703-a and 703-b.) They are, however, vastly underutilized, and few advocates or people with criminal records even know to apply. According to DCJS, between 1972 and 2003, fewer than 100,000 CRDs were issued. On average, that is fewer than 3,200 a year. To provide some context, in 2004 in New York City alone there were more than 44,000 guilty pleas to the petty offense of disorderly conduct.

Put them to their proof. Sometimes your client must

process. Explore potential constitutional evidentiary arguments, such as the exclusionary rule, where there is a government decision maker. (*See, e.g., Matter of Tejada v. Christian*, 422 N.Y.S.2d 957, 71 A.D.2d 527 (N.Y. App. Div., 1st Dep’t 1979).)

Develop a compelling narrative. Never define a person by his or her worst act, or allow it to happen to your client. Develop a narrative of your client as a member of a family and a community who has the fundamental fitness to perform in the opportunity. Work with your client to identify the goals that motivated his or her desire for the denied opportunity (and drove them to seek legal services).

Use the factors that define your decision maker’s discretion to frame your advocacy. In general, the following factors (compiled from the EEOC, N.Y. Corr. L. 753, and case law) can guide your advocacy because they resonate with decision makers: (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; (3) the nature of the opportunity held or sought; (4) the bearing, if any,

The informality of many administrative forums result in routine due process violations.

pursue affirmative relief, and other times he or she has the defensive posture. Examine the governing law and procedure and know the elements of all relevant claims and defenses. (*See, e.g., McDonough & McCreight, supra*, at 58-67.) If the barrier requires proof that a specific crime was committed, undermine the elements of the crime. Use this tactic where the client has a conviction for a lesser or different offense than the trigger or for the significant number of criminal cases that terminate in noncriminal (e.g., petty offenses) or nonconviction dispositions. Pay close attention to the rights, responsibilities, and procedures detailed in binding legal instruments such as employment contracts, leases, and collective bargaining agreements.

Decision makers in this area are unaccustomed to challenges by represented parties, and the informality of many administrative forums result in routine due process violations. Many agencies fail to follow their own procedures for proper notice or access to evidence. (*See, e.g., 42 U.S.C. § 1437d(k), (l)(7); 24 C.F.R. § 966.4(l)(3).*) Be on the watch for rank hearsay (such as unsubstantiated and unauthenticated charging instruments from criminal court) and challenge them as violations of basic due

the criminal offense(s) will have on the person’s fitness or ability relevant to the opportunity (e.g., to perform the job, to be a good tenant); (5) the age of the person at the time of occurrence of the criminal offense(s); (6) any information produced by the person, or produced on his or her behalf, in regard to rehabilitation and good conduct. This framework can prove particularly useful when battling a decision based on a highly discretionary “good moral character” standard.

The narrative should contain many elements of a redemption story: a descent (from a good life or hard life); a fall (the conviction(s)); experiences that triggered a turning point; remorse for past actions; the long road towards restoration (where collateral consequences are roadblocks to success). Use established mitigation techniques from sentencing advocacy to describe the descent and fall. A credible delineation of and explanation for the turning point can be critical to distance your client from the offense and assure the decision maker that the future risk is low. Turning points are inherently personal yet familiar—treatment, a horrible jail or prison experience, loss of reputation with friends and family, religion, family intervention, becoming a parent, get-

ting married. We have also found in our direct client work that decision makers often overvalue a showing of remorse.

Be particularly assertive and creative in collecting evidence of rehabilitation. Get documentation of employment history, job training, educational certificates, and relevant courses of treatment or counseling. Particularly when defending a client from the loss of a current benefit (such as public housing), encourage him or her at your first meeting to begin a relevant treatment, counseling, or training program—the sooner the better. Collect letters of support from neighbors, clergy, family members, volunteer opportunities, probation or parole officers, and colleagues. (See, e.g., Legal Action Center, *How to Gather Evidence of Rehabilitation*.)

Through it all, be cognizant of the demons that you battle: outsized stigmas against people with criminal records and inflated fears of lawsuits if the decision makers associate with people with criminal records. Use your narrative to humanize, with the hope of deflating the stigma. Structure your evidence with an eye towards creating a future shield from liability (e.g., negligent hiring) for the decision maker. Undermine the fear of future risk or harm with the person's rehabilitation story. Include, if possible and relevant, the important context of the most recent research on desistance, which demonstrates conclusively

that as time increases from the commission of a crime, the less likely it is that the individual will reoffend. (See, e.g., Megan Kurlychek, Robert Brame, and Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, (March 2006).)

Conclusion

For decades, collateral consequences accumulated quickly and quietly in scattered areas of the law. The relative difficulty of obtaining criminal histories further hid the impending storm from view. Exacerbating existing pressures of poverty, these consequences drove communities deeper into a cycle of crime and virtually ensured that they could never break free. Collateral consequences degrade the institutions that implement them and undermine the fabric of whole communities. The storm has hit, but we have been too slow to adjust our practice to weather it. With consistent national attention to collateral consequences and the ready availability of practical strategies to address them, no reasonable excuse remains for the continuation of the traditional myopic approach that balkanizes criminal and civil practice. We have a responsibility to deliver services that reflect reality—to educate ourselves and the people affected, to bridge the criminal-civil divide, and to incorporate an awareness of collateral consequences in our daily work. ■