



AMERICAN BAR ASSOCIATION

**Criminal Justice
Section**

The unified voice of criminal justice

National Summit on
Collateral Consequences

Conference Report

February 27, 2015





The National Summit on Collateral Consequences

February 27, 2015

Washington, D.C.

REPORT

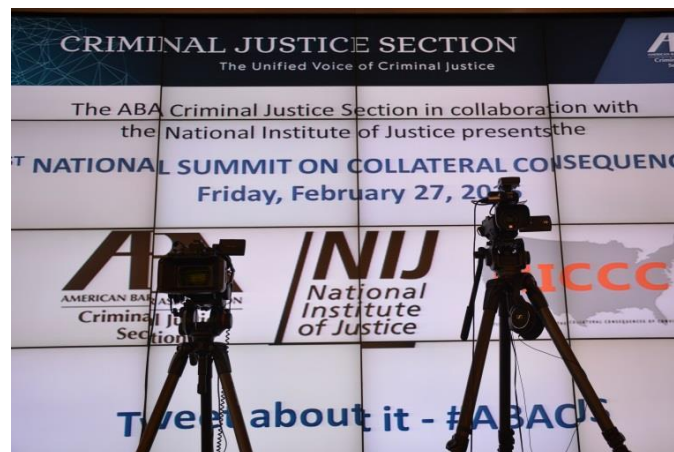


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I. Purpose of the National Summit on Collateral Consequences

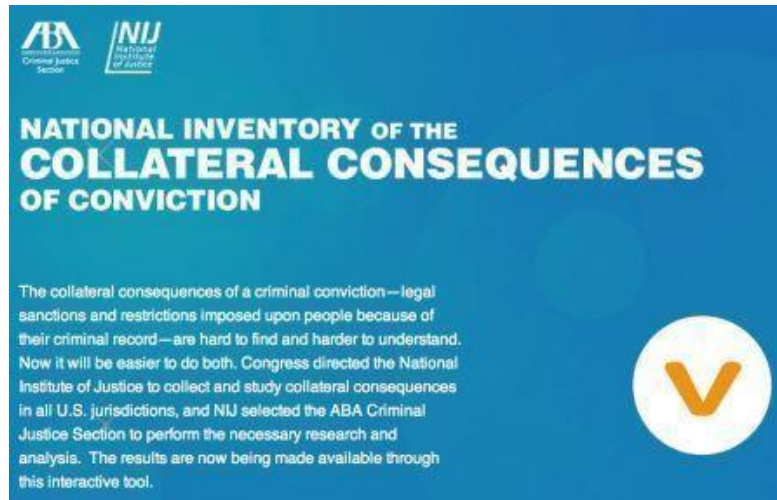
The ABA Criminal Justice Section has a history of engaging in meaningful dialogue with policymakers and other groups regarding the use and impact of collateral consequences. Collateral consequences too often prevent successful reintegration into society of formerly incarcerated individuals. When applied thoughtfully and judiciously, some collateral consequences may well be appropriate. However, individuals who have convictions must be able to access employment, housing, and education benefits and other opportunities that empower them to succeed after completing their sentences and to avoid recidivating. It is up to the criminal justice community to help ensure that the criminal justice system itself does not perpetuate recidivism via arbitrary and draconian sentencing and collateral consequences.

Recognizing the mutual responsibility of those in the criminal justice community to close the opportunity gap created by collateral consequences, the ABA Criminal Justice Section brought together the collective minds of the leadership of myriad distinguished organizations. Their purpose was to examine and debate potential solutions, to further the dialogue on systemic reform, and to find new ways to collaborate with one another on the local, state, and national levels. The major themes and ideas that emerged from the summit are captured in this report, and it is the hope of the Criminal Justice Section that this report will be shared and discussed, thereby continuing the dialogue started on this day.



II. ABA National Inventory of the Collateral Consequences of Conviction

Also highlighted at the summit was the **ABA National Inventory of the Collateral Consequences of Conviction**.



The National Inventory of the Collateral Consequences of Conviction (NICCC) is available to the public free of charge cataloging each jurisdiction's laws and rules imposing collateral consequences. This resource, authorized by the Court Security Act of 2007 and funded by the Justice Department (NIJ/OJP), for the first time make it possible for criminal and civil lawyers and the public to determine the collateral consequences that are triggered by particular categories of offenses, for affected individuals to understand the limits collateral consequences impose on their rights, benefits, and opportunities, and for lawmakers and policy advocates to understand the full measure of a jurisdiction's collateral sanctions and disqualifications.

The NICCC database is accessible online at www.abacollateralconsequences.org. It facilitates searches of state and federal databases by categories of consequences, common keywords, and creates the potential for academic and policy engagement through inter-jurisdictional comparison and national analysis. However, a disclaimer makes clear that information available through the Inventory website is solely for educational and informational purposes, and does not constitute legal advice. Furthermore, the construction of the Inventory database does not include an examination of judicial interpretations that may affect the territorial-specific application of a collateral consequence. Links are provided to the free, online databases of each jurisdiction's code of laws and regulations so that users may compare the data in the NICCC database against an official source so as to clarify any ambiguities that may exist.

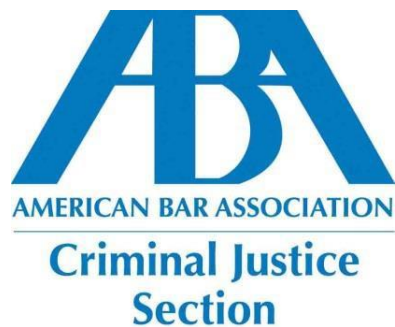
There are approximately 45,000 distinct collateral consequences identified and catalogued in the NICCC database, this number is variable as the database is continually updated to reflect changes in each jurisdiction's laws and rules. About 62% of all identified collateral consequences affect employment or occupational and professional licensing opportunities. The rest affect business opportunities, housing and residency, public benefits (including grants and loans), family

relationships, education, motor vehicle licensure and registration, and civic participation. Many of these consequences have been enacted or adopted in the past 10 years, and more are coming online every year, making the task of maintaining the NICCC database an ongoing challenge.

The NICCC data describes each consequence, identifies who it is imposed on and for how long, and specifies whether there is relief provided. The categories of crimes that trigger each consequence are identified, and more specific information about triggering offenses is included where appropriate. In many cases the statute imposing a consequence specifically extends it to dispositions not resulting in conviction, including juvenile adjudications. In many cases the statute or rule imposing a consequence specifically extends it to dispositions not resulting in conviction, including juvenile adjudications and convictions that have been sealed. In a surprisingly large proportion of cases, consequences are imposed as a result of minor misdemeanors as well as felonies, and even noncriminal dispositions like infractions may result in collateral penalties.



III. About the Contributing Organizations



Founded in 1920, the **Criminal Justice Section** of the **American Bar Association** 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. With its diverse, multi-disciplinary membership, the Criminal Justice Section is uniquely situated to address the pressing issues facing today's criminal justice system.

The Criminal Justice Section has primary responsibility for the American Bar Association's work on solutions to issues involving crime, criminal law, and the administration of criminal and juvenile justice. The Section plays an active leadership role in bringing the views of the ABA to the attention of federal and state courts, Congress, and other federal and state judicial, legislative, and executive policy-making bodies. The Section also serves as a resource to its members on issues in the forefront of change in the criminal justice arena.

To accomplish these goals, the Criminal Justice Section initiates studies and research; publishes reports, articles, and other widely-disseminated materials; reviews and makes recommendations concerning legislative, administrative, and judicial proposals relating to the criminal law and the administration of criminal justice; and authors amicus curiae briefs, filed with the United States Supreme Court, on behalf of the ABA in matters concerning the criminal law. As the primary voice on criminal justice issues within the ABA, the Section identifies emerging criminal justice issues which necessitate an appropriate response from the ABA, and coordinates the development of that response.

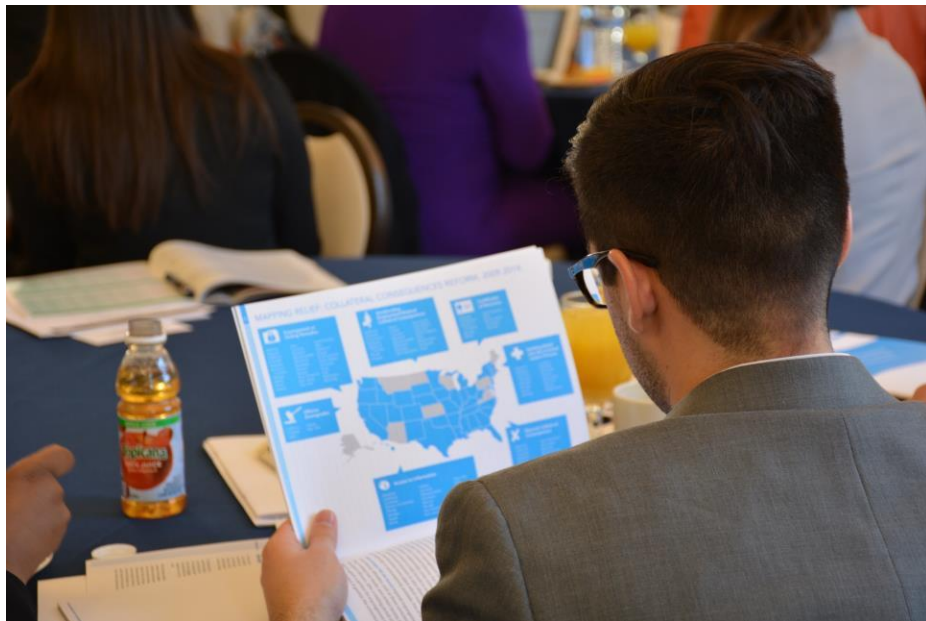


The **National Institute of Justice** — the research, development and evaluation agency of the U.S. Department of Justice — is dedicated to improving knowledge and understanding of crime and justice issues through science. NIJ provides objective and independent knowledge and tools to reduce crime and promote justice, particularly at the state and local levels.

NIJ's pursuit of this mission is guided by the following principles:

- Research can make a difference in individual lives, in the safety of communities and in creating a more effective and fair justice system.
- Government-funded research must adhere to processes of fair and open competition guided by rigorous peer review.

- NIJ's research agenda must respond to the real world needs of victims, communities and criminal justice professionals.
- NIJ must encourage and support innovative and rigorous research methods that can provide answers to basic research questions as well as practical, applied solutions to crime.
- Partnerships with other agencies and organizations, public and private, are essential to NIJ's success.



IV. Opening

ABA Criminal Justice Section Co-Chair **James Felman** opened the summit with the following remarks.



“It’s just common sense to those of us in the trenches that we want people, when they’ve done their time or served their probation, when they’ve completed their debt to society, we want them to be productive law-abiding members of society,” Felman said. “But so often there are laws that are well-intentioned and well thought at the beginning when they’re enacted but have the unintended consequence of

shooting ourselves in the foot because they cause people not to be able to get back on their feet, not to be able to be law abiding, not to be productive.”

Felman commented that there are some collateral consequences that everyone is aware of, like not being able to vote, serve on a jury, or hold public office, not being able to own a gun, and the possibility of deportation. “But there are so many consequences out there that we don’t know about,” Felman said. “And there are 65 million of us who have to worry about it who have a criminal record of some kind in this country.” Felman pointed out that the internet age has made it such that the record can be found forever.

This is the backdrop against which the National Institute of Justice offered the grant that funded the development of the National Inventory of the Collateral Consequences of Conviction. “As a result of this project, now we *do* know what the collateral consequences are,” Felman said. “And what that means is that now we can stop. We can and we must do better. And we start now, and we start today. Doing better.”

V. Remarks by ABA President William C. Hubbard

Good morning. It is very exciting to be at this first ever National Summit on Collateral Consequences. This is a topic on which the ABA has been a leader for years, and this meeting is an additional way in which we are demonstrating our dedication to this critical issue.

I'd like to thank Cynthia Orr and Jim Felman not only for the warm introduction but also for all of the hard and important work they perform as chairs of the ABA Criminal Justice Section.

This summit is historic and culminates five years of effort by the ABA Criminal Justice Section, with the support of the National Institute of Justice, to produce a National Inventory of the collateral consequences of criminal convictions throughout the entire United States.



Let me remind you of how the ABA got involved with this project. Under the leadership of Senator Patrick Leahy, Congress provided funding for the National Institute of Justice to award a grant to conduct what is now available as the National Inventory. The NIJ awarded a \$750,000 grant to the Criminal Justice Section of the ABA.

Since then, the Criminal Justice Section has spent almost \$1 million of its own funds to develop the Inventory and to make it as complete, accurate, and accessible as possible. In the end, the Inventory compiled more than 45,000 different consequences of conviction.

This enormous undertaking could create a sea change in the way legislatures, judges, lawyers, and the public think about the kind of dispositions of criminal cases that promote public safety. At the same time, it can improve the chances of offenders to become contributing public members once they complete their sentences.

Why was the Criminal Justice Section willing to spend the money and do the herculean work required to make the National Inventory a reality? Some numbers may help to explain. In the early 1970s many states and the federal government sought to attack rising crime rates by getting "tough on crime." Prosecutions and the length of jail and prison sentences increased. In 1974, 1.3 percent of the adult population or 1.8 million people had served time in prison. The percentage increased to 2.7 percent or 5.6 million people by 2001.



In 2013, the number of adults under correctional supervision -- that is adults who are on probation, in jail or prison, and on parole -- was 6.9 million. That includes almost 4.8 million people on probation or parole, or, in other words, living in our communities.

While the correctional supervision rate has trended downward in the past six years, it has grown 275 percent since 1980. So what do these numbers have to do with the National Inventory and collateral consequences? Everything.

Supreme Court Justice Anthony Kennedy explained why when he gave the keynote address at the Annual Meeting of the American Bar Association in San Francisco on August 9, 2003.

He reminded American lawyers and the American people that 95 percent of those who are incarcerated will be released, and made the point that if they return to their communities unable to find jobs and housing, they have little chance of turning their lives around. They were likely to find themselves back in jail or prison. He did not have to make the obvious point that those placed on probation also need jobs, housing, and access to education.

The ABA responded to Justice Kennedy's speech by creating the ABA Justice Kennedy Commission, chaired by our own Steve Saltzburg. A year to the day after Justice Kennedy spoke, the ABA House of Delegates approved four resolutions from the Kennedy Commission. That was followed by the ABA Commission on Effective Criminal Sanctions, which produced six resolutions approved by the House of Delegates in 2007.

The resolutions addressed many aspects of American criminal justice. One in particular was recognition of the huge impact that harsh sentencing practices had on minority communities. Approximately two-thirds of those serving time were African-American or Hispanic. In some cities or neighborhoods, the percentage of young males of color who were convicted felons approached 50 percent. In these places an entire generation of young men was at risk.

Both the Kennedy Commission and the Commission on Effective Criminal Sanctions noted the rate of recidivism among those convicted. The criminal justice system was convicting and incarcerating more and more people, and these people too often committed additional offenses upon release. There was a cycle of crime in which millions of people were caught and communities were devastated.

The ABA House of Delegates resolutions recognized that the revolving door -- of conviction, incarceration, release, re-arrest, re-conviction and re-incarceration -- was not reducing recidivism and that only by reducing recidivism could we reduce crime and the number of crime victims. This philosophy has come to be known as “smart on crime.”

Justice Kennedy pointed out that “when someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest.”

He challenged us saying, “As a profession, and as a people, we should know what happens after the prisoner is taken away.”

We accepted this responsibility and sought to recognize not only that ex-offenders are part of the family humankind, but also that they are part of their communities and often have families that love them and want them to succeed.

Throughout the country, we saw how drug treatment programs, drug courts, veterans’ courts and similar innovations can work to deal with problems like addiction that are associated with criminal behavior and to decrease the probability of recidivism.

Throughout the country, we saw savvy prosecutors supporting re-entry programs in the belief that they hold out a greater promise of reducing crime and making their communities safer than by repeatedly sending individuals to jail and prison. We saw judges adopting creative alternatives to jail and prison.

But we also saw one obstacle that threatens to stifle innovation and frustrate efforts to assure that former offenders have a real chance to become successful members of their communities. That obstacle is the collateral consequences that attach to many convictions.

Maurice Alexander was a 61-year-old resident of the District of Columbia. He was caught up in a police roundup of some young males and forced to lay face down on the sidewalk. As Mr. Alexander described it, “I became perturbed and I shook my finger at the police and said something to the effect of ‘shame on you.’” A jury found Alexander guilty of attempted threat to do bodily harm, a misdemeanor in D.C. He served 10 days in jail, and the conviction is on his record permanently.

Six years later, it would cost him a chance at affordable housing and leave him homeless for nearly seven months. The collateral consequences laws mean he can be evicted from low-income housing and barred him from a myriad of jobs ranging from barber to security officer.

Let us be clear about what collateral consequences are. When an individual is convicted, a judge (or in a few states a jury) determines whether to impose a sentence of incarceration. At sentencing, a determination also is made whether to impose a fine or a restitution obligation upon a defendant. These are the direct consequences of a conviction, and they have limits.

Once an individual has served whatever jail or prison sentence is imposed, completed any probationary, parole or supervised release term and paid any monetary obligations, the punishment period ends.

This is not so with collateral consequences. These are disqualifications or disadvantages imposed by statute or regulation that prevent former offenders from obtaining public benefits, holding certain jobs, pursuing certain professions, obtaining educational benefits or living in public housing. The shocking thing is that in many places these consequences are never-ending.

A person who is convicted and placed on probation for 30 days may be burdened by collateral consequences for 30 years or even for life.

Most people in America believe in the expression “paying your dues.”

Well, Maurice Alexander and millions of other in America have been paying their dues and a whole lot more.

The general belief is that when sentences are served, people have, in fact, paid their dues. But because of collateral consequences, a conviction continues to exact dues every day.

In my home state of South Carolina, almost 700 collateral consequences are on the books. They range from being ineligible to vote, hold a commercial driver’s license or obtain food stamps, to being barred from obtaining a barber’s license.

Certainly, there are good reasons why a criminal conviction should be a factor in deciding whether or not a former offender should be able to hold certain jobs. No one would require a day care center to hire an individual convicted of child molestation.

But most people would expect that if we offer educational opportunities to someone in jail or prison so that he or she would have the qualifications to perform a job upon release, we would not by statute or regulation disqualify that person from the very job he or she trained to perform.

The truth is that in most jurisdictions, collateral consequences may be imposed automatically upon conviction. Often, there is no mechanism by which to obtain relief from them. The result is that these collateral consequences become a life sentence harsher than whatever sentence a court actually imposed upon conviction.

Many states bar ex-offenders from public employment. Since many private firms decide not to hire ex-offenders, they are left with little or no options.

No wonder that approximately 60 percent of formerly incarcerated individuals remain unemployed one year after their release.

Federal law includes a mandatory ban on access to public housing for people with certain types of convictions and grants discretion to local housing authorities to deny housing based on any criminal activity. Entire households may be evicted based on the arrest or pending criminal charge of one member.

This one-strike provision has a profound impact on family structure. Many families residing in public housing have to sign agreements that ex-offender family members cannot live with or even visit them at their public housing unit. It is no wonder, then, that nearly one-third of individuals released from incarceration expect to go to homeless shelters.

Did Maurice Alexander's crime deserve a sentence of homelessness?

In a majority of states, persons with felony drug convictions face a lifetime ban on receiving public assistance. In 2013, approximately 180,000 women were subject to the ban on such assistance in the 12 states with the most punitive policies.

A study of persons recently released from incarceration in Texas, California, and Connecticut likened their level of food insecurity to that in developing countries. This barrier to accessing critical public assistance not only contributes to hunger and malnutrition, but also restricts access to mental health and substance abuse treatment programs.

For those ex-offenders fortunate enough to seek higher education, the barriers do not end. Many former offenders are ineligible for student loans.

The National Inventory brings transparency to what was a complex and largely hidden part of criminal justice. Now, for the first time, there is reason to believe that conscientious judges and lawyers will pay attention to collateral consequences as they dispose of criminal cases. Before defendants plead guilty to an offense, they can see the full effect of what that plea may cost them.

While many people in trouble with the law are most interested in the immediate concern of staying out of jail or prison, the long-lasting consequences can also be evaluated by lawyers and judges in determining punishment and the defendant will at least know, up front, what is at stake.

There is reason to hope that conscientious legislators and agency officials will examine the collateral consequences and eliminate or modify those that unnecessarily stand in the way of an individual being able to reclaim his or her place as a lawful, contributing member of a community.

This is important to the ABA because it is a matter of justice. It is important to America because it is a matter of fairness. And it is important to every person in the United States because it is a matter of morality.

As the ABA Kennedy Commission so succinctly stated: “Once society has exacted its price from an individual, there is a strong case to be made that society should not only permit, but should encourage, that person to make a positive contribution to society.”

I look forward to joining you in this important summit, I thank you for your hard work and attention, and I hope we can continue to pursue the causes of justice and fairness.



VI. Remarks by Amy Solomon, Senior Advisor to the Assistant Attorney General, U.S. Department of Justice

Amy Solomon, Senior Advisor to the Assistant Attorney General offered remarks on the progress that has been made in bringing to light the hidden consequences that accompany conviction. She remarked that with the launch of the ABA’s National Inventory of the Collateral Consequences of Conviction, the ABA has made public thousands of these consequences, and the Inventory is a practical tool that can inform the decisions of judges, lawyers, and defendants.



Today, 1 in 3 adults has a criminal record. These records keep many people from obtaining employment and accessing housing and education, even if they have paid their dues and turned their lives around. Research has shown that the likelihood of reoffending for convicted individuals who remain crime free for a number of years is almost indistinguishable from that of individuals who have never committed a crime.

Solomon informed the audience that more than 20 agencies are working together as part of the Federal Interagency Reentry Council to reduce the broad set of collateral consequences and expressed her department’s view on this issue as a matter of public safety.

*“By helping justice-involved individuals succeed,
we improve public safety.”*

“At the Justice Department, we believe there are substantial opportunities to simultaneously hold people accountable, improve public safety and to help motivated individuals — who have served their time and paid their debts

— to compete for a job, attain stable housing, support their children and be productive, contributing members of our communities,” Solomon said. “Not only are these things not mutually exclusive — they actually go hand-in-hand. By helping justice-involved individuals succeed, we improve public safety.”

Solomon outlined four government initiatives to eliminate or tailor barriers without compromising public safety.

1. The Equal Employment Opportunity Commission, the Department of Labor and the Office of Personnel Management took actions to amplify and clarify good hiring policy for those with arrest or conviction histories. More recently, the Small Business Administration proposed to amend their eligibility rules for a micro loan, so that people on probation and parole are not automatically excluded.
2. The Department of Health and Human Services is looking at the barriers faced by individuals with a criminal record who are trying to enter the health care workforce.
3. The DOJ's Second Chance grants and DOL's Reintegration of Ex-Offender grants now allow for the use of federal funds to pay for legal assistance to expunge criminal records, secure driver's licenses, modify child support orders and litigate inappropriate denials of housing or employment and violations of the FAIR Credit Reporting Act.
4. The DOJ's Office of Juvenile Justice and Delinquency Prevention provided the Department of Housing and Urban Development with funding to implement a Juvenile Reentry Legal Assistance Program with public housing authorities in partnership with legal assistance organizations. The program will primarily focus on the expungement and sealing of juvenile records, as well as provide other civil legal services.

Finally, Solomon said DOJ looks forward to working with the ABA to create practical tools that build on the National Inventory. Solomon referenced working closely with the ABA to develop a bench book to assist judges in explaining to the accused the existence of collateral consequences prior to the entry of a plea.

"We seek to help judges, prosecutors, defense attorneys and the accused understand the full spectrum of sanctions that a conviction entails," Solomon said.

VII. Plenary Sessions

Plenary Session I – Collateral Consequences as a Barrier to Reentry, A Dialogue with Stakeholders

Moderator: Steven A. Saltzburg, Professor, George Washington University Law School, Washington, D.C.

James Cole, Former Deputy U.S. Attorney General

William C. Hubbard, President, American Bar Association

Judge Sterling Johnson, Jr., U.S. District Court, Eastern District of New York, Brooklyn, NY

Jenny Roberts, Professor and Associate Dean, Washington College of Law, American University, Washington, D.C.

David Singleton, Executive Director, Ohio Justice & Policy Center, Assistant Professor at Northern Kentucky University Chase College of Law, Cincinnati, OH

Charles B. Thornton, Director, Office of Returning Citizens Affairs, Washington, D.C.

Nadine Wettstein, Maryland Office of the Public Defender, Rockville, MD



The Summit opened with a panel discussing the scope of collateral consequences. Moderator Steven Saltzburg, Professor with George Washington University Law School, posed a series of questions to the panelists.

Professor Saltzburg first asked of Former Deputy U.S. Attorney General James Cole how the position of the Department of Justice (DOJ) with regard to

collateral consequences has moved in the last decade. Cole responded that the DOJ has launched the Smart on Crime Initiative, which focuses on what works. The DOJ used to work from the premise that locking people up for a really long time was the secret to fighting crime. But, Cole explained, every now and then you have to take a look back and evaluate what you are doing. In this case, when one looks at some of the reasons people are incarcerated, one would find that lack of family support and lack of resources are at the root. Incarcerating individuals in those circumstances for long periods of time only serves to exacerbate the conditions that resulted in incarceration in the first place. Cole found a memo from the prior administration explicitly discouraging U.S. Attorneys from engaging in reentry. “I withdrew that memo and issued a different one; every office will have a reentry coordinator and will focus on prevention,” he said. “States that have done this have found that their crime rates are going down and they are saving money. It just makes sense.”

Turning to Charles Thornton, Director of the Office of Returning Citizens, Professor Saltzburg highlighted the fact that Thornton had gone from basketball player to offender; Thornton was in and out of prison a few times, and then turned his life around. Professor Saltzburg asked how important it was that he got help and is now giving help to incarcerated individuals returning to the community.

Thornton replied that how we treat men and women who have served their time is

extremely important if we are looking to be a great country. Thornton said we should welcome incarcerated individuals back into the community and provide services to encourage them to become law abiding citizens.



Thornton further elaborated, “When we do this, we save money, we create safer communities. It’s the thing that allows us to be a city, be a community; that’s what community is all about.”

Thornton asserted that the assistance provided to every individual matters. “I’ve been an

“There are thousands of me who have committed crime, done their time, and are fortunate enough to come out and turn their lives around.”

example to thousands of formerly incarcerated individuals. That is the key.

There are thousands of me who have committed crime, done their time, and are fortunate enough to come out and turn their lives around.”

Thornton also commented that he has been proud to be involved in the development of the ABA’s National Inventory of the Collateral Consequences of Conviction.

Professor Saltzburg then asked David Singleton, Executive Director of the Ohio Justice & Policy Center and Professor at Northern Kentucky University Chase College of Law, to elaborate on the work of the Center. Professor Singleton explained that the Center represents prisoners and returning citizens, that is, individuals who have paid their debt and are returning home. The Center does policy work as well. As an example, the Center recently led a successful campaign for the enactment of a fair hiring law in Cincinnati. The city no longer asks about criminal record until later in the hiring process. And if they get to that point, now rather than treating the criminal record as an absolute bar to employment, the city asks what the offense was, how long ago it occurred, whether it is related to the job, and what rehabilitation efforts have been made.

Professor Saltzburg then referenced a speech that U.S. Supreme Court Justice Anthony Kennedy delivered to the ABA at its annual meeting in 2003. Justice Kennedy said at one point, “When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest,”¹ and called upon the ABA to start a new public discussion about these issues. Justice Kennedy’s message was that the job of the criminal justice community does not end with sentencing. Convicted individuals are going to come home and we have to figure out how to do better.

Given this backdrop, Professor Saltzburg asked Judge Sterling Johnson from the Eastern District of New York when judges began to think about collateral consequences and their importance. Judge Johnson commented that in his experience in the Eastern District of New York, judges are good, compassionate, people, and they think about collateral consequences. But the problem is they do not know what all of the collateral consequences are. Judge Johnson was amazed to learn that the ABA’s National Inventory of the Collateral Consequences of Conviction had identified 45,000 collateral consequences nationally.



Collateral consequences mean that “if you are convicted, you will pay for the rest of your life, and that’s not fair,” said Judge Johnson. Most judges look for creative ways to balance collateral consequences with the interests of justice. A judge will ask the defendant if he understands the crime and the consequences of pleading guilty. But if the defendant does not know what the potential collateral consequences might be, and if the judge also does not know, there will be legal problems down the road.

Professor Saltzburg then asked Nadine Weittstein from the Maryland Office of the State Public Defender about her views on the U.S. Supreme Court’s decision in *Padilla v. Kentucky*, which held that criminal defense attorneys must advise non-citizen clients about the deportation risks of a guilty plea.² Weittstein explained that the Court in *Padilla* said immigration is not a collateral consequence because it is direct; it is a uniquely harsh result of the conviction. She noted that many of the consequences we are discussing in this forum are not collateral. “Maybe we are using the wrong word,” Weittstein said. “Collateral indicates something you don’t have to think about. These are permanent. So maybe we should call them permanent.” When asked whether prosecutors are willing to negotiate around immigration consequences,

¹ An Address by Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, ABA Annual Meeting (August 9, 2003) available at: http://www.reentry.net/library/item.255172-Justice_Kennedy_Speech_to_ABA_August_9_2003.

² *Padilla v. Kentucky*, 559 U.S. 356 (2010).

Weittstein responded that yes, sometimes they are. Many times a client will take a plea instead of going to trial because the plea will aid in immigration consequences.



Professor Saltzburg commented that the term “collateral” is a technical term. It refers, not to things that flow directly from the sentence, but to bad things that happen *not* as a result of the sentence. One of goals of the ABA’s Nation Inventory of the Collateral Consequences of Conviction is to get people to rethink collateral consequences.

Turning to Professor Jenny Roberts from Washington College of Law, Professor Saltzburg asked what two or three changes she thought would be most important. Professor Roberts replied that there are some collateral consequences that it should be easy to eliminate, like the requirement in California to register as a sex offender following a conviction for public urination. “But it’s a much bigger issue of how do you attack this hydra that comes up in so many places,” she said. Collateral consequences appear in federal laws, state statutes, local ordinances, employer attitudes. “As director of criminal clinics, we’re finding our clients can’t get away from their record, even non-conviction records,” Professor Roberts continued. “We need a multi-pronged approach to get a handle on criminal records.”

Professor Saltzburg commented that the Criminal Justice Section has worked from the premise that if we can get prosecutors talking to defense lawyers and judges, etc., we can make real progress. Turning to ABA President Hubbard, Professor Saltzburg asked how important it is that the Section continues in this vein. President Hubbard responded that it is critically important. He is often struck by the resources that are devoted to the civil side rather than the criminal side when the consequences on the criminal side are so much more dramatic.

President Hubbard recounted that in 2010, his home state of South Carolina passed sentencing reform because a criminal defense lawyer – a democrat – took it upon himself to recruit a hard-core conservative – a sheriff – to support sentencing reform on the basis that it makes no fiscal sense to lock up people who have no propensity for violence. With that tenacity, sentencing policy was changed and recidivism rates have fallen dramatically. It starts with a conversation. “At some point there will be a kernel of something you can latch onto and expand and with that you can start to move the needle,” said President Hubbard. He commented that it is also a

matter of fiscal responsibility. And attention to fiscal conservatism can be persuasive to those who otherwise would not be inclined to care about these issues. The next step, President Hubbard said, is to engage state and local bars. If we can kick the obvious collateral consequences off the books, we can build momentum and people will see the absurdity of these laws. The ABA is a wonderful convener, but ultimately, it will take a grass roots effort by state and local bars to engender change.

Turning back to Charles Thornton, Professor Saltzburg asked if only people who have served in prison can be persuasive on the issue of collateral consequences. Thornton replied that we have to be strategic about bringing successful reentrants to the table. He noted that there is a generational problem; in some communities, there are many individuals – especially men – who have served time in prison. In some communities, the youth have never see the men get up, put on a tie, and go to work. Thornton added that as we continue this movement we must intentionally and strategically include men and women who have been through the process because they are the ones who can deliver this message. Professor Singleton added, “Society writes [returning citizens] off and ceases to see them as human beings. When you tolerate that, it’s easy to pass these laws. What Mr. Thornton and others like him can do is put a human face on this issue.”

Professor Saltzburg then noted that the data show that a large percent of incarcerated individuals are minorities and asked if that explains why it took so long for people to take notice of this issue. Judge Johnson responded that racism is alive and well in America today. He would like to see the ABA engage with legislators because reelection politics come into play here. Former Deputy U.S. Attorney General Cole commented that it is easier for politicians to be tough on crime than soft on crime. As an example, when Cole took office, the DOJ was trying to correct a mistake that had been made in the federal sentencing laws regarding good time credit calculations. The mistake shorted the good-time credit by 7 days per year. Cole noted that if the 7-day per year correction were made, it would result in an annual savings of \$41 million. Yet the DOJ has been unable to get the fix through Congress because of fears that the change will result in the release of murderers and violent offenders. But the reality is that two-thirds of the offenders in prison are drug offenders. “We’re running out of room for the really dangerous people,” Cole said. And, he noted, “the dollars going to support the prisons are dollars that are not being paid to put police officers on the streets or pay for bullet-proof vests or to invest in banking fraud.”

Given the difficulty in getting legislation passed, the DOJ has focused its efforts on the things it can do without changes in law. Former U.S. Attorney General Ashcroft had issued a memo directing DOJ attorneys to charge out the most serious crime and seek the harshest sentence; this administration abrogated that memo. Instead, DOJ attorneys are encouraged to seek sentences that are proportionate to the crime and to stop charging enhancements for minor crimes that could result in minor criminals receiving life sentences. Additionally, they are being encouraged to look for the root causes as to why individuals are in the criminal justice system

and to make sure there are programs and supports for reentry.

Professor Saltsburg asked Weittstein if, from what she has seen in Maryland, we have reached the point where most defendants are adequately advised of the collateral consequences of conviction. Weittstein highlighted that public defense attorneys are overworked, panel lawyers that work in conflict cases are not as informed, and private attorneys that may have heard about *Padilla* have not necessarily taken the steps needed, such as hiring immigration lawyers. She noted that it is not really possible to predict all of the potential consequences; the law could change; the person's situation could change. A few states are out in front of this issue and have really good advisories, but more work needs to be done.

Professor Saltzburg asked of Professor Roberts whether, realistically, there is a good probability that people have any idea of the potential collateral consequences of conviction. Professor Roberts responded no, particularly because many individuals are unrepresented. The bulk of the cases in the criminal courts in most jurisdictions are low-level cases like marijuana possession or driving without a license. The case may involve an unconstitutional search or other issues, but the individuals either have no lawyer or are encouraged to take a quick plea. Professor Roberts sees these cases in the clinics she supervises after the fact, perhaps when the individuals are trying to get a home loan and are barred because of a previous conviction. Professor Saltzburg added that in many jurisdictions there is often no right to a lawyer in misdemeanor cases. "The problem is, the consequences are the same," he said. Professor Roberts agreed, stating, "Maybe we need right to counsel *because* of these consequences."

An audience member asked what we are doing to engage prison officials so we can address reentry sooner. Cole detailed efforts being made to streamline and improve programming in the Federal Bureau of Prisons. At one point there were 13,000 programs in the federal system and each prison did its own programing. No one knew if the programming was effective. Today there are just 13 programs. An inmate can start a program in a prison in one location and can continue the program if transferred to a prison in another location.

The outcomes for each program are measured and oversight is provided to ensure the programs are resulting in good outcomes. The federal system looked to the states as models. The next step is to connect prison programming with probation and parole and to ensure that when individuals are released from prison there are enough resources to continuing the programming. Judge Johnson noted, however, that funding is a huge issue and funding is currently being cut for probation and parole.

Plenary Session II – Real Life Collateral Consequences: Stories from the Field

Moderator: Andrew S. Boutros (in his personal capacity), Assistant U.S. Attorney, N.D. of Illinois, Chicago, IL

April Frazier-Camara, Special Assistant, Law Office of Shelby County Public Defender, Memphis, TN

Charles “Joe” Hynes, Former Kings County District Attorney, Brooklyn, NY **Marcel Johnson**, Vice President of Business Development, Port Authority of San Antonio, San Antonio, TX

Runa Rajagopal, Civil Action Practice Supervising Attorney, Bronx Defenders, New York, NY

Matthew F. Redle, County and Prosecuting Attorney, Sheridan County, WY



Comprised mainly of leaders who practice in the field, the second panel of the day, drawing upon the panelists’ own experiences, discussed the real-world impacts of collateral consequences.

Former Kings County District Attorney, Joe Hynes talked about the steps he took to address collateral consequences. The most difficult step was convincing

people to take action in the wake of legitimate concern. For example, he cited a Pew report that says four of ten incarcerated individuals are rearrested within three years of release, and most of those offenses are serious enough to require re-incarceration. In some places, the re-arrest rate is greater: six or seven individuals out of ten. Hynes commented that the rates of recidivism are realities we have to deal with. But ironically, collateral consequences *contribute* to high rates of recidivism.

In 1998, Hynes explained, he decided that in order to seriously attack collateral consequences in Brooklyn, his office would have to address the reasons for recidivism. Some significant recidivism factors were alcohol and drug abuse, domestic violence, and unemployment or underemployment. The program developed by Hynes’ office engaged with social workers and drug and alcohol counselors, and invested in job skill development. The most difficult step was to



convince Brooklyn employers to hire graduates. “By the time I left office in 2013, we were offering reentry services to over 1000 formerly incarcerated [individuals and] had convinced 116 employers to offer jobs to our graduates,” Hynes said. A 22-month study of the program conducted by Bruce Western from Harvard University found that the graduates had high employment rates. The cost savings was enormous. Compared to the general recidivism rate in New York, which was six out of ten of those released from confinement, the recidivism rate for the program was two out of ten.

Hynes left the audience with this takeaway, “I would insist that having the prosecutor run the program makes the most sense because [the prosecutor] has the key to the jail cell. The prosecutor can also advocate to parole officers that infractions don’t need to result in jail.” He noted that one of the most important developments in collateral consequences has been the requirement that every U.S. Attorney have a reentry program. “If every U.S. Attorney could convince local prosecutors of the public safety benefits, cost savings benefits, effect on people and their families, on victims, we could change the world.”

Public Defender April Frazier-Camara declared that race needs to be a key component of the collateral consequences conversation.

“Historically collateral consequences have always impacted – even targeted – people of color,” she said. Many legal scholars, including Michelle Alexander have argued that we have not ended the racial caste system; we have just redesigned it. Frazier-Camara asserted that society



uses the criminal justice system to create labels that are permanently stamped on people, and

“We must recognize the devastating impact of collateral consequences on communities who have already been marginalized.”

that justify segregation of the minority population for the rest of their lives. “It has become perfectly legal to discriminate in the very areas we fought to eliminate discrimination through the civil rights movement:

employment, housing, the right to vote, educational opportunities, and jury service.”

Frazier-Camara noted that the overwhelming majority of people impacted by collateral consequences live in poorer communities. In Wards 7 and 8 of the Washington, D.C. area, for example, one in three residents live below the poverty line, and earn an average income of

\$22,000. In comparison, families in the northwest have combined incomes over six figures. “The ability to obtain a living-wage job in D.C. is already difficult. The addition of collateral consequences can make it impossible to get out of the cycle of poverty,” said Frazier-Camara.

In closing, Frazier-Camara impressed upon the audience the importance of discussing this issue in the context of poverty and race. “We must recognize the devastating impact of collateral consequences on communities who have already been marginalized,” she said. “I encourage you to confront the intentional *and* unintentional consequences. When we talk about the solutions we have to begin by talking about race.”

Marcel Johnson, Vice President of Business Development for the Port Authority in San Antonio introduced himself this way, “I happen to be a violent offender. Based on my record and my profile on paper, that’s what I am.” Johnson explained that on his eighteenth birthday, he and his friends robbed a restaurant just outside of Houston. He was charged with four counts of robbery; each one carrying a potential sentence of 5 to 99 years.

Johnson was initially sentenced to 30 years, but his sentence was later reduced to 10 years and he served just under 6 in prison. When asked why his sentence was reduced, Johnson explained a probation officer convinced his lawyer to argue for resentencing. Someone took the extra time to really look at his case and not make him another statistic.

When Johnson was released from prison, he was motivated to get back on track. But he had a lot of positives in his favor. He was young, he did not have children or other family members to supports, he had a safe environment to return to (his mother’s house), and he was not pressed to make ends meet. He also did not have the influence of people who were going to pull him back into a criminal mindset or environment. Johnson went to school and, as he reports it, was able to gain employment rather quickly. He waded through a number of rejections.

“Fortunately for me, there were a couple of people who said, ‘We don’t usually do this, but well make an exception,’” he said. Once in the door, because of his work ethic, Johnson was able to move up and achieve accomplishments of which he is proud.

Johnson explained that there have been many challenges relating to having the “Scarlet X” of conviction. He wanted to be a Big Brother, but was barred from the program because of his criminal background. Dating was a challenge. “Not everyone wants to welcome a convict into their lives,” he said. Johnson now has two children. He will want to be involved in their activities as they grow up, but he will have to disclose his background and may find that he is barred from direct participation (e.g., leading a Boy Scout troop, coaching). He worries that the parents of his children’s friends will not be comfortable allowing their kids come to his house.

Johnson advocated for employment of persons who have been released from prison. He noted that such individuals have had time to think about what they did in prison, so they probably will never do it again. They probably mentored and counseled young offenders. “There is a loyalty you will gain if you allow that person to come work for you,” he said. Individuals who have been incarcerated will make good on the opportunity for employment because they have more to lose than the average employee if they engage in bad conduct. Johnson urged the

audience to find out what employers' fears are and address them. Determine what can be done to mitigate those risks. And, he added, there should be a statute of limitations on how long collateral consequences can be applied.

Runa Rajagopal, a Supervising Attorney for the Bronx Defenders, explained that the mission of the Bronx Defenders is to address both the causes and consequences of entry into the criminal justice and family court system. They provide team-based interdisciplinary services. The team is comprised of a civil attorney, defense attorney, immigration attorney, social worker and investigator.

Rajagopal stated that it is really at the moment of arrest that these consequences are triggered, not conviction. And it is not just one thing that is impacted. It is housing, employment, and status in the country that could all be affected by the arrest. And all of these impacts occur simultaneously. As an example, Rajagopal recounted the story of Millie, a young woman who is a home health aide who lives with her husband and two children in a federally subsidized apartment. Millie's husband was arrested drug possession. After the police searched the couple's apartment and found more drugs, Millie was arrested as well. As a result of this arrest, Millie's home health aide license was suspended and she could not work. Her children were removed by family services. Proceedings were initiated for eviction and revocation of their Section 8 status. As a result of this arrest, Millie has been put in a position where she has to defend on multiple fronts at once, and yet, she has merely been accused of a crime; she has not yet been convicted.

"We have a lot to do," Rajagopal said. "I hope we will all be collaborators in raising consciousness in what's happening to communities of color and that we'll move towards progress."

Matthew Redle, a prosecutor in Sheridan County, Wyoming commented that it is helpful to hear from people like panelist Marcel Johnson who have lived with collateral consequences because there is otherwise a tendency to try to keep the conversation in the abstract. He then recounted his own experience.

One day, upon exiting a courtroom Redle noticed an 18-year-old woman he called Priscilla seated in the chairs outside the courtroom doors. He spent a few moments talking with her and learned that she was facing a probation revocation because of a positive urine test. Redle explained that he had sent Priscilla's mother and each of her mother's five siblings to the penitentiary at least once; all for drug related crimes. Recalling that, Redle asked of Priscilla whether she thought it was time for someone in her family to break the chain. After talking to Priscilla, Redle urged the prosecutor that was handling her case to request that the judge get Priscilla into drug court. A year later, Priscilla honored Redle by inviting him to her drug court graduation. "At the time I had this vague notion that at 18 she shouldn't lose the opportunity to try to get her life back on track," Redle said. But that is in fact what Priscilla did. She completed drug court successfully, then attended college, and then became a

radiology technician. Said Redle, “Priscilla still has a lot of issues that she has to deal with every day. But one issue she does not have to worry about is the issue that she might not be allowed to pursue her chosen profession.”

Redle emphasized that prosecutors are in a unique position to assist in rectifying the effects of collateral consequences. Prosecutors can do it on a grand scale like Hynes did in Brooklyn with his innovative program and they can also do it on the front end by trying to avoid the collateral consequences early on. Redle suggested that prosecutors should take a chance once in a while even when the evidence suggests it might be a leap of faith.

When asked if it is appropriate to go into schools where there are a lot of children at risk and explain to them that the consequences of conviction go far above and beyond incarceration, panelists offered mixed responses. Hynes responded that Brooklyn has a program called Project Legalized in which district attorneys visit schools to talk about the consequences of conviction. But his thought was that students would be more likely to listen to people like Johnson who had been through the experience. Johnson cautioned that it depends on how the message is delivered. For instance, he recalls police officers coming into his school to teach kids about the dangers of drugs. But their talk had the opposite effect. He recalls just learning a lot about different types of drugs. He admits the officers gave the statistics on how many of them would likely go to jail, but he never believed it would be him. Rajagopal commented that we need to have a real conversation about race and how we define crime. “We can’t turn a blind eye to how a crime is defined; *whose* drug use is criminal,” she said. Redle referenced the recent findings about juvenile brain development; for juveniles, group dynamics and peer pressure have a stronger influence on behavior. Discussions in the school can make a positive impact, but we also need parents to step in and temper those group and peer dynamics. Thornton, a panelist from the first plenary session commented that many young people are coming out of families with bad dynamics. Younger teens respect older teens because they are wearing ankle bracelets.

There is a desperate need to be honest. Thornton said that kids need to be told, “Jail is not a rite of passage; this is not a good thing; you are not a big man because of it; you will not be able to accomplish what you want to because of it.”

Plenary Session III – Criminal Records in the Digital Age

Moderator: Rebecca Green, Professor of Practice, William & Mary Law School, Williamsburg, VA

Sharon Dietrich, Litigation Director, Community Legal Services, Philadelphia, PA

Eric J. Ellman, Senior Vice President for Public Policy and Legal Affairs at the Consumer Data Industry Association, Washington, D.C.

James B. Jacobs, Warren E. Burger Professor of Law, New York University School of Law, New York, NY

Gregg Leslie, Legal Defense Director, Reporters Committee for Freedom of the Press, Washington, D.C.



The rise of the digital age substantially alters what it means to have a criminal record in this country. This panel explored the impact of a wide range of digitized criminal records information and also addressed the efficacy of federal and state regulatory structures governing the use of criminal records data for employment, education, and housing.

Professor James B. Jacobs from New York University School of Law and author of the book, *The Eternal Criminal Record*, opened the session with an overview of the criminal record infrastructure. The three major sources of criminal records are police records systems, court records systems, and private records systems. Additional sources of information about criminal records include newspaper archives and private trade associations.



Professor Jacobs noted that the complexity of the potential sources of criminal records information yields a number of potential and variable policy interventions.

Police records, Professor Jacobs explained, are created when individuals are arrested, booked, and fingerprinted, and that information is sent to state-level records repositories. The state repository is linked to the Federal Bureau of Investigation (FBI). Police officers can search nationwide to see if an individual has been arrested or convicted anywhere within the country. This nationwide information system was developed in response to the Brady law, which established the requirement for criminal background checks when making firearms purchases. “That,” Jacob stated, “was the impetus for the massive investment in the criminal records system.”

“Any proposal for policy intervention needs to take into account all of the main systems that are the means of collection and retrieval of criminal record information.”

With regard to the courts, Professor Jacobs explained that every court maintains its own records. There has been a movement towards unified state court administration

systems, resulting in the centralization and computerization of court records. There is no national database of court records; rather, to do a nationwide search, one must search the court records system of every state, or at least several closely neighboring states, because most individuals confine their activity to one or two states within a geographic region. Professor Jacobs further explained that court records have always been open in the U.S, and this results from the commitment to transparency in court proceedings.

Private information vendors, Professor Jacobs commented, have become a large sector in the criminal records market. There are numerous companies whose business it is to provide information to employers and others about credit and criminal histories. Some of these vendors download court records in bulk and develop massive databases.

Additionally, there are other entities that obtain records in order to practice a sort of shaming activity. For example, one posts photographs of perpetrators of domestic violence;

another posts photographs of individuals who have engaged in animal abuse. All of these entities are lightly regulated by Fair Credit Reporting Act. Professor Jacobs closed by stating, “Any proposal for policy intervention needs to take into account all of the main systems that are the means of collection and retrieval of criminal record information.”

Sharon Dietrich, Litigation Director of Community Legal Services in Philadelphia, recounted her experiences in representing clients who have criminal records. She noted that when she started 20 years ago, criminal records were not something that was handled by legal services. But today, criminal records are the single most common reason people come to her agency for employment help. “One client said he has a harder time getting a job now than he did when he came out of jail in the 1970s,” said Dietrich.

In the experience of Dietrich’s legal services agency, “no record is too old or too minor [to] keep people from getting work.” She referred to the phenomenon as mindless stigma; individuals applying for jobs may be rejected merely because something comes back on a background check.

Dietrich explained that the lens through which we should look at this issue is the lens of poverty. In her experience in Philadelphia, criminal records are keeping people in poverty. And her experience has been born out in research. In a paper entitled *The Impact of Mass Incarceration on Poverty*,³ Villanova Professors Robert DeFina and Lance Hannon found that poverty would have fallen 20% between 1980 and 2004 if not for mass incarceration. University of Minnesota Professor Chris Uggen and others studied the effect of low level arrests on employment and found about a 4% impact.⁴ Simply being arrested for what is essentially a citation impacts the ability of individuals to get work. But studies have also shown that the risk of repeated criminal conduct is reduced as time passes. The period of time required for previously convicted offenders to be no more likely to offend than the general population is about 4-7 years for violent offenders, 4 years for drug offenders, and 3 years for property offenders. Against this backdrop, use of criminal background checks is highly prevalent: 87% of employers do background screens, 80% of landlords, and 66% of colleges are asking in the application process.

But, Dietrich noted, things have gotten better. This issue is now on the public radar. Remedies are being put in place that fall into two categories: forgiveness and forgetting. With regard to forgiveness, the EEOC issued guidance in 2012 that increased employer awareness; they do not have unfettered discretion to turn down potential employees. Many states have enacted ban the box laws, which prohibit employers from asking about criminal records on the initial

³ DeFina, Robert H. and Hannon, Lance, *The Impact of Mass Incarceration on Poverty* (February 23, 2009). Crime and Delinquency, February 12, 2009. Available at SSRN: <http://ssrn.com/abstract=1348049>.

⁴ Christopher Uggen, Mike Vuolo, Sarah Lageson, Ebony Ruhland, and Hilary Whitham. 2014. “The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment.” Forthcoming in *Criminology*.

employment application. And some states are enacting fair hiring policies that provide standards for consideration of individuals with criminal records rather than postponing the question as is done with ban the box laws. “But,” Dietrich commented, “These laws are regularly violated where they exist and in some places don’t exist at all.”

With regard to forgetting, Dietrich noted that 30 states passed expungement legislation from 2009-2014. Indiana stands out; it has an expansive statute that requires commercial vendors to remove expunged cases from their data. Another approach Dietrich hopes states will consider is the clean slate proposal. Under this method, there would be a contract between an offender and society that if the offender stays out of trouble, the conviction would be automatically removed from the individual’s criminal record without the need for court action. “If you have a minor conviction and you stay clean for 7, 8, 9 years, why not take it off the record?” she said.

Eric Ellman, Senior Vice President for Public Policy and Legal Affairs at the Consumer Data Industry Association, commented that the most important take away from this conference from the data industry perspective is that there are too many collateral consequences; too many professions and jobs that are permanently closed to ex-offenders. But employers also have a right to know about fair and truthful information and to make a fair and truthful hiring decision based on that. The Fair Credit Reporting Act, which has been in existence since 1971, is the mediating influence. The Act requires consumer reporting agencies to maintain accurate information, and grants consumers the right to dispute the accuracy of information and the right to sue. The Act also contains specific regulations related to employment screening.



Gregg Leslie, Legal Defense Director for the Reporters Committee for Freedom of the Press, discussed the role of electronic records in reporting. Typically, reporting is done on a deadline and one story at a time. Electronic records can be used to give that one instance context; for example, how often a particular thing happens. “Electronic access has an amazing benefit to the public to really understand the greater story,” Leslie said.

“It is not something that should be taken away anytime we have a concern about how it’s used.”

With regard to access to records, Leslie commented that only making records available to the government is a mistake. This is often the case with expungement; the order to expunge the record eliminates the record from public view but retains access for government authorities

like police and prosecutors. The main purpose of public access is to hold government accountable. This does not mean the government is corrupt; but in any system, if information can be subject to abuse, there will be negligent acts – maybe even intentional acts – that public access to records can address by holding government actors accountable. Meaningful access to information must allow for the public to know what the government is doing; what the government is acting on; and how the government is using information. Banning public access to records is not the solution. Instead, Leslie pointed out, if there is information that is being used for improper purposes that harm people, that is where to start drawing the line. “Once you get into broad categorical denial of information,” he said, “it almost becomes too easy to criminalize knowledge.”

To illustrate his point, Leslie recounted a real case in which a woman in Connecticut had been arrested. The newspaper reported it accurately. Later, the conviction was expunged. The woman sued newspaper saying it was no longer true that she was ever arrested; that the article written at the time of her arrest was libelous and false. This is an example of the pendulum swinging too far in the other direction. The focus should be on penalizing the *improper* use of information, not on limiting it in the first place. And with regard to this specific situation, we should educate the public about what it means to be arrested and that an arrest does not mean the person is guilty of anything.

When the panel was asked what the state of expungement law is, Professor Jacobs explained that expungement almost never means destroy; it means seal. It is a declaration that the public cannot be trusted to use the information properly. “Are we ready to talk about massively destroying or closing down our court records because of the embarrassment of what people might see when they go into the courts?” Professor Jacobs asked. “At some future point can the government tell the private database [companies] to erase the information there because it is no longer relevant?” Professor Jacobs asserted there are numerous first amendment issues that raise a serious impediment to destroying and sealing records; especially court records. But Dietrich countered that virtually every state has an expungement remedy and that they are getting broader. She stated that while it is easy to talk about court records have been historically open and the long tradition of the first amendment, “We can’t pretend that what the founding fathers encountered is what we encounter today. The world has changed dramatically.” Dietrich noted that our values are tested severely by the new technologies that exist around us today.

An audience member asked whether people convicted of sex offenses will ever be included in the expungement remedy. The audience member noted that even the lowest offenses (i.e., Romeo and Juliet cases and public urination) consistently are excluded from expungement. Professor Jacobs acknowledged that society has treated information about sex offense convictions the most aggressively by enacting sex offender registration and notification laws, which provide the names and photos of sex offenders who live in the area. Data show that sex offenders are not high recidivists. But this is a hot button issue. Professor Jacobs asserted that

we cannot leave it to the government to decide what is or is not appropriate information for our population.

Speaking more generally about the expungement remedy, Professor Jacobs said that the most powerful case for expungement is several years of a crime-free existence. But people need the most help in the period right after conviction. Most recidivism occurs in the three years after completion of the sentence. To be really helpful then, expungement should happen immediately after the sentence is completed, not ten to fifteen years down the road. At that point a person is no longer going to present a risk to society, but by then, the person has already succeeded. Expungement should come at a time when it is more likely to assist in the furtherance of success. Building on that point, Ellman noted that the focus should not be on when expungement occurs or how long it takes for an individual to be redeemed but on employers and others using the information properly.

An audience member asked what the historical underpinnings are for these collateral consequences. Dietrich responded that collateral consequences are often put in place without any real logical underpinnings. Often something really awful happens and a bill is put forth. Professor Jacobs echoed that sentiment, stating that some collateral consequences, like voting restrictions, are purely punitive, while others, such as occupational disqualifications, stem from other motivations, such as a desire to shield a certain population from competition. There is no single answer. Each collateral consequence should be closely scrutinized and should be required to defend itself. If that were done, some would be easily eliminated, but some would be defensible.

An audience member asked what the harm is to the public of sealing records. Leslie responded that if we hide records on a large scale, we lose information about how our government is working. “Once we adopt policies that say as a rule this class of records should disappear, we lose something,” said Leslie.

Another audience member who was a former reporter shared Leslie’s concerns about closing off access, but stated that the balance seems different in an age where you no longer have to go down to the courthouse to get a record and you can find information by dabbling on the internet. Leslie responded that good journalism is about digging for information that is not readily available. If it was hidden in a courthouse, it was up to the journalist to go find it. But today, there is less money in journalism; less ability to spend time on stories. Leslie stated, “The ability to access these files is a benefit to doing good journalism, to have that kind of information without leaving your desk.”

Plenary Session IV – Judges on Justice: A Discussion of Sentencing Considerations & Collateral Consequences

Moderator: Jenny Roberts, Professor and Associate Dean, Washington College of Law, American University, Washington, D.C.

Judge Patricia A. Broderick, Superior Court of the District of Columbia

Judge Paul F. Friedman, U.S. District Court, District of Columbia

Judge Michael L. Rankin, Superior Court of the District of Columbia



Before entering a plea or going to trial, defendants have constitutional and statutory rights to information about immigration and certain other collateral consequences. The final plea and sentence often determine which collateral consequences apply. A panel of judges from the Washington, D.C. area discussed the role that judges play in this process.

In general, the judges on the panel felt there was very little they could do to directly impact collateral consequences except make sure the offender had been made aware of the consequences and that he or she had an opportunity to talk with counsel about the consequences before taking a plea. Certain consequences, such as the possibility of deportation, prohibitions against voting, and firearms restrictions, are required to be included in the courts' advisories, and they are. But as Judge Friedman posited, "Should judges be doing more?"

Panelists also commented that having a working knowledge of the consequences may be just as important as the ability to impact those consequences. For example, Judge Broderick commented with regard to drug cases that, "being aware of the potential consequences helps me deal with getting [offenders] to services or other processes that will help them get a job."

But there seemed to be mutual agreement that collateral consequences for sex offenders were expansive and debilitating. Consequences in this area can include residency restrictions, restrictions on the use of computers, and the requirement to register as a sex offender for a set number of years up to life. Following the sentence, sex offenders in many states are also subject to civil commitment. In this area, more than any other, plea negotiations are common; usually for the purpose of pleading the case away from a criminal sexual conduct charge to an offense that does not carry the same collateral consequences. Panelists mentioned that an issue percolating in the circuit courts is whether there is a duty to advise offenders about the requirement to register that rises to the level of the duty under *Padilla* to advise offenders of immigration consequences. Because the consequences for sex offenders

can be so draconian, this may be the next area most likely to lead to a U.S. Supreme Court case.

When asked specifically if they would like to have the power and authority to relieve some collateral consequences at sentencing, the judges were cautious. On the one hand, panelists expressed interest in having the ability to relieve collateral consequences. But they also expressed concern about the application of such authority. Given that relief would have to be considered on a case by case basis, panelists predict there would be questions of fairness when relief is not given. They suggested that there would need to be some type of standard to guide their decision making. For example, Judge Friedman described a provision that is being proposed for inclusion in the revised Model Penal Code. An individual could petition the court for relief from a collateral consequence any time prior to the expiration of sentence. The court could grant the relief if “it finds that the individual has demonstrated by clear and convincing evidence that the consequence imposes a substantial burden on the individual’s ability to reintegrate in to law-abiding society, and that public-safety considerations do not require mandatory imposition of the consequences.”⁵ Judge Friedman commented that it would a huge step for this to be included in the Model Penal Code.

An audience member slightly altered the question and asked whether the judges would consider lifting a particular collateral consequence if a correctional officer informed the court that the individual would have a better chance at successfully completing probation if the consequence were lifted. Judge Rankin reacted positively, stating, “If we have legislation that gives us discretion, we would benefit from opportunities to hear from [correctional officers].” But, he noted, judges do not have discretion; it is up to the legislature to set those policies.

Another audience member asked whether judges would be willing to consider having a role in relieving consequences sometime down the road, or alternatively whether another entity, like a parole board, should have that ability. Judge Broderick answered that yes, she thinks judges would be willing to take that on. Judge Friedman commented that there had been debate at the ALI about including a second look provision in the Model Penal Code.

Some felt this would be too great a burden on judges, and that so many years later, there was no guarantee the same judge would be on the bench. But there was general agreement at the ALI that this did not seem to be an appropriate function for the parole board; instead ALI members suggested creating a separate board to handle collateral consequence relief.

When asked if there is anything judges can do to creatively address collateral consequences, Judge Rankin suggested conducting the relief mechanism in public. As an example, he recounted a case in which an individual who had been convicted of two armed robberies sought to have his criminal record sealed. The judge was initially not going to consider

⁵ Model Penal Code: Sentencing, *Tentative Draft No. 3*, § 6x.04(2) (April 24, 2014).

the petition. But upon looking further into the file, he found the individual had served his time, gotten married, had children, and had learned a trade. After a series of successes, he had hit the ceiling professionally, and needed to clear his record in order to advance in his career. The judge decided to hold an evidentiary hearing. The public proceeding provides a forum so if there are people who want to speak against him, they can.

When asked whether judges have a role in the plea bargain process, most on the panel said no. One stated that the judge should not do anything that even colorably suggests to the defendant that he or she should take a plea because that same judge will later have to sentence the defendant.

Another commented that in our adversarial system, plea bargaining works well when there is a highly ethical prosecutor on one side and a defense attorney who is not overworked and has adequate time to spend with the defendant on the other. A third noted that there may be times when the judge's participation is appropriate and necessary. The judge recounted an instance when the defendant was charged with multiple counts of conspiracy. The judge pushed the prosecutor for a bill of particulars even though the defendant had not asked for one, and the resulting bill revealed there was not adequate evidence of a conspiracy. The charges ultimately pled to were very different. The judge felt this level of involvement was proper, but that further involvement would not be appropriate.

A final sentiment was that we are currently at the stage of raising awareness about the problem of collateral consequences. When an offender is facing criminal charges, direct consequences are the top priority, and collateral consequences are dealt with later, after the sentence has been served. It will take a legislative fix to change that. As Judge Rankin stated, "It's the legislative piece that got us here through expressions of policy. A lot of these collateral consequences have flowed through a ground swell of people saying 'protect us,' 'do something to protect us.' We're not looking at a one-sided coin. What you're exposing today is a pendulum that has swung this way, and some folks might say you're trying to swing it way back the other way."

VIII. Closing

ABA Criminal Justice Section Co-Chair **Cynthia Orr** delivered the closing address. Orr touched on several major points that had been discussed during the day including the need to understand which collateral consequences apply in a given conviction and the role that knowledge plays in plea negotiation, the human and monetary capital that is wasted as a result of collateral consequences, and the need find solutions to the problem of criminal records in the digital age.

Touching on the need to understand collateral consequences, Orr highlighted the potential for the National Inventory to help inform the parties and the court of the potential consequences prior to resolving the case. “If you don’t know what the collateral consequences are, you’re really giving up tools you can use to reach an appropriate resolution,” Orr said. She commented that most prosecutors, want to reach just results and not unduly burden those that have criminal convictions.



“We can’t possibly have 16,000 mandatory collateral consequences – actually, direct consequences as we heard from our speakers -- of convictions that can all be sensible or reasonable.”

from our speakers – of convictions that can all be sensible or reasonable,” she said. “We heard that many of them are not.”

Orr noted that an emerging theme from the day was the need to stop wasting human beings and human capital and we need to stop wasting money. She commented that those who administer justice know this is a safety issue as well; money is better spent in rehabilitation than in warehousing people and debilitating their ability to rehabilitate and continue with their lives.

point that of the 45,000 collateral consequences the team identified, 16,000 are mandatory, meaning they are imposed automatically. “We can’t possibly have 16,000 mandatory collateral consequences – actually, direct consequences as we heard

Orr recalled that the point had been made that electronic access to records can play a vital role in placing a breaking news story in context, but that this same electronic access to records can lead to tremendous harm to individuals trying to get their lives back on track. The “scarlet letter” and public shaming is now a permanent thing; information is too widely available. “Perhaps it’s time we started looking at placing some impediments in the way when we’re talking about private concerns,” she said. “We have to do something so that people can live and not be permanently be scarred or hobbled by even misdemeanors; minor wrongs.” Orr noted that it had been suggested that collateral consequences are necessary for deterrence. But given the high rates of recidivism, it might be appropriate to ask if collateral consequences are the cause; the tail wagging the dog. Orr suggested that even if records are not sealed, we should think about putting some steps in way to obtaining them so that only those who would use the information responsibly can get it.

“We’re much more enlightened. We know better what works. And we now know it is less expensive to rehabilitate and help people or divert them from the system [when appropriate],” Orr said. She added that along with the National Inventory of the Collateral Consequences of Conviction, we now have empirical data and information upon which legislators, individuals, and courts can act.

“We’ve heard many though-provoking and provocative things here and in an atmosphere of collegiality and in healthy debate,” Orr said in closing. “Our expectations [for this summit] were far exceeded and we’re gratified for everyone that participated and what you’ll take away from this.”

IX. Key Ideas

The rich and varied discussions that occurred throughout the day yielded numerous ideas about ways to mitigate or change the impact of collateral consequences. Following are some of the key ideas that emerged from the discussions. These ideas were not agreed upon as a formal set of recommendations, but rather, are simply a representation of the many ideas that emerged as the conversation progressed.

Collateral Consequences in General

Participants in the summit repeatedly emphasized the need for society to welcome incarcerated individual back into the community and provide services to encourage them to become law abiding citizens. We need to examine the root causes as to why individuals are in the criminal justice system and make sure there are programs and supports for reentry. Panelists also discussed the need to put a human face on the issue of collateral consequences by engaging successful reentrants to speak about their experiences.

Additionally, panelists suggested:

- Each collateral consequence should be closely scrutinized and should be required to defend itself. Those that are unduly harsh and unrelated or disproportionate to the crime should be eliminated, and only those that further the goals of public safety should be retained. State and local bars should be engaged in this effort.
- Limitations should be placed on how long collateral consequences can be applied.
- Judges should be authorized via legislation to relieve individuals of specific collateral consequences, and the decision should be guided by a legal standard such as that being suggested in the proposed revisions to the Model Penal Code that calls for balancing the burden on the individual's ability to reintegrate into society against public safety.
- Expand to other locations across the country the holistic representation model utilized by the Bronx Defenders, which assigns to the defendant a team comprised of an investigator, civil and criminal attorney, social worker, and immigration attorney, if needed, to assist the defendant in addressing not only the criminal case but also other consequences that are triggered by arrest such as eviction actions, child protection proceedings, job licensing revocation proceedings, and deportation.



Criminal Records

Another recurring theme throughout the day was the prevalence and persistence of criminal records in the digital age. Panelists asserted that we need a multi-pronged approach to get a handle on criminal records, and that any proposal for policy intervention needs to take into account the main systems of collection and retrieval of criminal record information. But no clear solutions to the prevalence of criminal records on the internet emerged. Some panelists urged that the focus should be on penalizing the improper use of information rather than limiting it in the first place. Others suggested that the records should be sealed altogether, or that we should at least put some impediments to access in place such that only those who would use the information responsibly could get it.

Employment

A few specific suggestions for employment consequences emerged.

- Efforts must be made to encourage employers to hire individuals with criminal records. This should include discussing with employers what their fears are and determining what can be done to mitigate risk.
- Encourage the enactment of fair hiring laws like that in Cincinnati, which delays the question about criminal record until later in the hiring process, and then requires the employer to delve deeper into the individual's situation by asking what the offense was, how long ago it occurred, whether it relates to the job the individual is seeking, and what rehabilitation efforts have been made.

Expungement

There was also a great deal of discussion about the use of expungement as a means of mitigating the collateral consequences of conviction. Speakers observed that expungement laws in 30 states have recently been enacted or expanded. Panelists were encouraged by this work, but had additional suggestions.

- Expungement should be available earlier so that it can assist individuals when they most need it in the furtherance of success.
- Legislators should consider enacting the clean slate proposal in which a conviction would be automatically removed from the individual's criminal record without the need for court action if the individual is able to remain crime-free for a period of years (e.g., 7 to 9 years).



Appendix A: Agenda



**The ABA Criminal Justice Section in collaboration with the National Institute of Justice
Presents the 1ST NATIONAL SUMMIT ON COLLATERAL CONSEQUENCES
Friday, February 27, 2015**

Hosted at the Law Offices of Jones Day – 300 New Jersey Avenue, NW Washington DC

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| 8:00 – 9:00 am | Registration with Coffee, Tea, Continental Breakfast & Networking |
| 9:00 – 9:10 am | Welcoming Remarks
James E. Felman , Criminal Justice Section Chair |
| 9:10 – 9:40 am | Opening Keynote Addresses
William Hubbard , President, American Bar Association
Amy Solomon , Senior Advisor to the Assistant Attorney General, U.S. Department of Justice |
| 9:40 – 11:00 am | Plenary Session I – <i>Collateral Consequences as a Barrier to Re-entry, A Dialogue with Stakeholders</i>
<i>This will be a free-ranging discussion of the scope of collateral consequences including the history and the effects on adults convicted of crime. The panelists bring law enforcement, judicial, prosecutorial, policy, and academic perspectives to the problems that collateral consequences pose for individuals trying to make successful re-entry into their communities following incarceration. Two important questions the panel will address are: (1) how to balance public safety and re-entry considerations; and (2) who should decide on the collateral consequences that are appropriate for various offenses and offenders.</i>

MODERATOR: Stephen A. Saltzburg , Professor, George Washington University Law School, Washington, DC
James Cole , Former Deputy U.S. Attorney General
Nadine Wettstein , Maryland Office of the Public Defender, Rockville, MD
William Hubbard , President, American Bar Association
Judge Sterling Johnson, Jr. , U.S. District Court, Eastern District of New York, Brooklyn, NY
Jenny Roberts , Professor and Associate Dean, Washington College of Law, American University, Washington, DC
David Singleton , Executive Director, Ohio Justice & Policy Center, Assistant Professor at Northern Kentucky University Chase College of Law, Cincinnati, OH
Charles B. Thornton , Director, Office on Returning Citizen Affairs, Washington DC |
| 11:00 – 11:20 am | Coffee & Tea Networking – Featuring: The <i>We Are All Criminals</i> Exhibit (Foyer) |

11:25 am – 12:30 pm	<p>Plenary Session II – <i>Real Life Collateral Consequence: Stories from the Field</i> <i>This panel will explore the real-world collateral consequences of criminal convictions and prosecutions. Comprised mainly of leaders who practice in the field, the panel will discuss federal, state, and local practices. Panelists will also share their own experiences with pre-trial diversion opportunities.</i></p> <p>MODERATOR: Andrew S. Boutros, (in his personal capacity) Assistant U.S. Attorney, N.D. of Illinois, Chicago, IL April Frazier-Camara, Special Assistant, Law Office of Shelby County Public Defender, Memphis, TN Charles “Joe” Hynes, former Kings County District Attorney, Brooklyn, NY Marcel Johnson, Vice President of Business Development, Port Authority of San Antonio, San Antonio, TX Cynthia Orr, Partner at Goldstein Goldstein & Hilley, San Antonio, TX Runa Rajagopal, Civil Action Practice Supervising Attorney, Bronx Defenders, New York, NY Matthew F. Redle, County and Prosecuting Attorney, Sheridan County, Wyoming</p>
12:30 – 12:40 pm	<p>Break <i>Jones Day Catering Staff will be coming by to set your tables for the luncheon.</i></p>
12:40 – 2:00 pm	<p>Luncheon & Keynote Address by Carrie Johnson, Justice Correspondent, NPR <i>Carrie Johnson is a Justice Correspondent for the Washington Desk. She covers a wide variety of stories about justice issues, law enforcement and legal affairs for NPR's flagship programs Morning Edition and All Things Considered, as well as the Newscasts and NPR.org. While in this role, Johnson has chronicled major challenges to the landmark voting rights law, a botched law enforcement operation targeting gun traffickers along the Southwest border, and the Obama administration's deadly drone program for suspected terrorists overseas.</i></p>
2:00 – 3:25 pm	<p>Plenary Session III – <i>Criminal Records in the Digital Age</i> <i>The rise of the digital age substantially alters what it means to have a criminal record in this country. This panel will explore the impact of digitized criminal records information, from mug shots to online sex offender registries, and will also explore the efficacy of federal and state regulatory structures governing the use of criminal records data for employment, education and housing.</i></p> <p>MODERATOR: Rebecca Green, Professor of Practice, William & Mary Law School, Williamsburg, VA Sharon Dietrich, Litigation Director, Community Legal Services, Philadelphia, PA Eric J. Ellman, Senior Vice President for Public Policy and Legal Affairs at the Consumer Data Industry Association, Washington, DC James B. Jacobs, Warren E. Burger Professor of Law, New York University School of Law, New York, NY Gregg Leslie, Legal Defense Director, Reporters Committee for Freedom of the Press, Washington, DC</p>

3:30 – 4:45 pm

Plenary Session IV – Judges on Justice: A Discussion of Sentencing Considerations & Collateral Consequences

Before entering a plea or going to trial, defendants have constitutional and statutory rights to information about immigration and sometimes certain other collateral consequences. The trial judge plays a central role in this process, either through direct advisement or oversight of defense counsel’s duty to advise. In some jurisdictions, the judge may also have the ability to relieve individuals of one or more collateral consequences of a conviction, or to take likely consequences into account in determining the appropriate sentence. In addition to these issues, this panel will explore collateral consequences concerning individuals convicted of sex offenses as well as how the Model Penal Code Sentencing Project is addressing Collateral consequences.

MODERATOR: Jenny Roberts, Professor and Associate Dean, Washington College of Law, American University, Washington, DC

Judge Patricia A. Broderick, Superior Court of the District of Columbia

Judge Paul L. Friedman, U.S. District Court, District of Columbia

Judge Michael L. Rankin, Superior Court of the District of Columbia

4:45 – 5:00 pm

Closing Remarks

Cynthia Orr, Criminal Justice Section Chair

5:00 – 6:30 pm

Networking Reception – Featuring: The *We Are All Criminals* Exhibit (Foyer)



Appendix B: List of Organizations Represented by Participants

Organization/Firm
89th Judicial Circuit
American Bar Association
ABA Communications and Media Relations
ABA Criminal Justice Section
ABA National Inventory of the Collateral Consequences of Conviction
ABA Rule of Law Initiative
American Bar Foundation
ACLU Washington Legislative Office
Aegis Web Development
American Legislative Exchange Council
AO, Defender Services Office
Artifice Forensic Financial Services
Association of Prosecuting Attorneys
Beadle County
Brennan Center for Justice
CLP
Columbus School of Law, Catholic Univ. of America
CoreLogic, Inc.
CSOSA Office of Legislative, Intergovernmental, and Public Affairs
DC Law Students in Court
Department of Corrections
DOJ, Civil Rights Division
DOJ, Office of Legal Policy
Drug Policy Alliance
Earley Legal Group LLC
Federal Defender
Federal Defenders of E WA
George Washington University Law School
IACP
Justice Fellowship/Prison Fellowship Ministries
King and Spalding
Law Firm of Allan Smith
Law Office of Donald LaRoche, PLLC
Law Office of Sara Elizabeth Dill
Legal Action Center
Legal Aid Society of D.C.
Maryland Public Defender's Office
NAACP Legal Defense and Educational Fund
National Association of Attorneys General
National Association of Social Workers
National Conference of State Legislatures
National Criminal Justice Association

National District Attorneys Association (NDAA)
National Employment Law Project
National Institute of Corrections
National Institute of Justice
National Judicial College
NYC Dept. of Probation
NYS Unified Court System
Office of the Public Defender for Arlington County and the City of Falls Church
OJJDP from the U.S. Dept of Ed
Public Defender Service for the District of Columbia
Reform Sex Offender Laws Inc.
Robina Institute of Criminal Law and Criminal Justice
Senate Judiciary Committee
Senator Stewart J. Greenleaf
Southern Illinois University School of Law
Squire Patton Boggs LLP
The Sentencing Project
The White House - Domestic Policy Council
U.S. Court of Appeals for the Sixth Circuit
U.S. Department of Justice Office of Justice Programs
UNH
Vera Institute of Justice
Washington College of Law
White House Domestic Policy Council

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