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Legal Aid with Conviction

How to Combat Barriers to Reentry by Using the Law

BY VIDHI SANGHAVI JOSHI

From the outside, Tim's lengthy criminal record paints him as a hardened criminal beyond redemption. The list of 50 petty charges, however, tells a different story: driving on a suspended license, criminal trespassing, theft of property under \$500, criminal trespassing (again), theft of property under \$500 (again), and so on. A police officer's affidavit accompanying one of the charges reads, "While patrolling the area, officer noticed subject slumped over covered in a blanket asleep on the bus stop bench When the officer questioned the subject about being there, the subject stated that he wasn't waiting on any buses and he was just using the bench as a place to sleep...." The police officer arrested the subject, Tim, and noted the high likelihood that the offense of criminal trespass would continue.¹

Recent media and advocacy have brought attention to the effect of mass incarceration on people such as Tim. His criminal record prevents him from accessing employment, housing, and other basic services and enmeshes him in a cycle of poverty and crime.² Rather than giving members of low-income communities social and economic support, our society chooses law enforcement and the criminal justice

system.³ Tim and other poor people of color disproportionately experience the disempowering and often violent effects of this choice.⁴ To confront these injustices, civil legal aid lawyers must engage in community-based advocacy, policy reform, and education, as well as direct legal services and impact litigation. We are uniquely positioned to combat the poverty-to-prison cycle by using the law to help people such as Tim obtain economic and social stability and to bring about systemic change.⁵

Here I give a broad overview of how civil legal aid lawyers can take on legal reentry issues and do their part to help people such as Tim.⁶ Specifically I follow the

experiences of a hypothetical client, Jane, and cover reentry legal remedies in (1) criminal record issues, (2) employment, (3) housing, (4) criminal justice debt, (5) civil rights restoration, (6) sex offender issues, and (7) health and benefits.

The Criminal Record Itself

Jane: "I'm having trouble because of my background. Can you do anything to help me?"

If Jane is convicted of a crime, or even if she is arrested for a crime, Jane has a criminal record.⁷ Her criminal record—commonly referred to as a "rap sheet" (record of arrest and prosecution)—documents all of Jane's interactions with the criminal justice system from arrest through disposition and sentencing.⁸ The first step an advocate should take in assessing Jane's case for reentry assistance is to obtain and analyze her criminal record. The advocate needs to understand Jane's record for the following reasons.

1 Tim is a current client of mine. His name has been changed to maintain confidentiality.

2 See, e.g., [Bruce Western & Becky Pettit, *Incarceration & Social Inequality*](#), 139 *DAEDALUS* 8 (2010). See generally [Karen Dolan & Jodi L. Carr, Institute for Policy Studies, *The Poor Get Prison: The Alarming Spread of the Criminalization of Poverty*](#) [2015].

3 See, e.g., [Yamiche Alcindor et al., *Chief: Officer Noticed Brown Carrying Suspected Stolen Cigars*](#), USA TODAY (Aug. 15, 2014); [Larry Buchanan et al., *What Happened in Ferguson?*](#), NEW YORK TIMES (Aug. 10, 2015); [Peter Hermann & John Woodrow Cox, *A Freddie Gray Primer: Who Was He, How Did He Die, Why Is There So Much Anger?*](#), WASHINGTON POST (April 28, 2015).

4 See [Andrew Kahn & Chris Kirk, *What It's Like to Be Black in the Criminal Justice System*](#), SLATE (Aug. 9, 2015); [Ashley Nellis, *The Sentencing Project, The Color of Justice: Racial and Ethnic Disparity in State Prisons*](#) (June 14, 2016).

5 See generally [Aneel L. Chablani, *Legal Aid's Once and Future Role for Impacting the Criminalization of Poverty and the War on the Poor*](#), 21 *MICHIGAN JOURNAL OF RACE AND LAW* 349 (2016) (how civil legal aid lawyers are uniquely positioned to fight criminalization of poverty and war on poor).

6 Legal Services Corporation (LSC) attorneys are not precluded from representing clients in most types of reentry proceedings. The National Legal Aid and Defender Association has prepared guidance on LSC funding restrictions as they apply to various reentry proceedings with a focus on criminal justice debt (see Robin C. Murphy, National Legal Aid and Defender Association, *Guidance for LSC Programs Re: Court Debt Collection* (July 2016); see also [Suzanne B. Glasow, Senior Assistant General Counsel, Legal Services Corporation, to Deirdre L. Weir, Executive Director, Legal Aid and Defender Association of Detroit](#) (March 4, 1999) (External Advisory Opinion No. 99-05)). Here I present a general reentry remedy guide and focus on remedies rather than the barriers to reentry. Neither every remedy nor remedies as they relate to special populations such as veterans or juveniles are covered. For a comprehensive resource on the legal restrictions and penalties that stem from a conviction, see MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* (2d ed. 2016).

7 A criminal record is kept by law enforcement or other governmental entities of any crimes a person has been charged with or convicted of committing; this record may include documentation of any contact a person has had with law enforcement or the criminal justice system (see [Rebecca Vallias & Sharon Dietrich, Center for American Progress, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*](#) 8 (Dec. 2014)).

8 [James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*](#), 3 *UNIVERSITY OF ST. THOMAS LAW JOURNAL* 387, 392–93 (2006) (how states acquire and store criminal record information).

First, criminal records often contain errors and incomplete information. For example, records of arrests may fail to disclose that the charges were dismissed or may classify a misdemeanor conviction as a felony.⁹ An advocate must be able to identify missing or inaccurate data so that those errors or omissions do not pose additional barriers to reentry. Record analysis is not straightforward; a person's criminal record is often opaque, especially to lay persons, and so Jane herself or others who have looked at her record may have misinterpreted it. An advocate's expertise can help correct misinformation.

Second, understanding a client's criminal record will help an advocate identify potential legal barriers and remedies, which can be specific to the charge or conviction. For example, in most states, only certain types of criminal charges and convictions are eligible for expungement.

Third, knowing the record will help an advocate understand what criminal record information potential employers, housing providers, licensing agencies, and other entities may consider when evaluating Jane as a candidate.

Fourth, understanding the record will allow an advocate to help Jane frame the information contained in the record and present it in the most favorable manner possible.

Jane: “I don’t know what’s on my record. Some stuff is old, and I’m not sure if they’re felonies or misdemeanors or what. How can I get my rap sheet?”

Obtaining the Record. A client such as Jane will often have parts of her criminal record in different locations. An advocate

9 A felony is a more serious criminal offense typically punishable by incarceration of more than one year; a misdemeanor is a minor criminal offense typically punishable by incarceration of one year or less (Vallas & Dietrich, *supra* note 7, at 8).

Criminal records often contain errors and incomplete information.

may need to request criminal record information from multiple jurisdictions.

States and counties have criminal record information that is publicly available, and nearly every state has an agency that stores publicly available criminal record information.¹⁰ Courthouses also maintain public records, and the clerk's office of the county of arrest or disposition has county-specific information.

On the federal level, the Criminal Justice Information Services Division of the Federal Bureau of Investigation (FBI) supplies criminal record information and services to law enforcement and other government agencies.¹¹ While this information is not available to the general public, individuals and their attorneys can request an “identity history summary” (i.e., a rap sheet) from the FBI.

Jane: “I want to clean up my background. Can I get anything on my record taken off?”

Expungement or Sealing. Expungement or sealing is a primary step that may be available to mitigate the impact of a criminal record.¹² Once an advocate has obtained Jane's criminal record, the advocate should review the information with Jane to see if any charges or convictions on it are eligible for expungement or sealing based on state law. If Jane is not a U.S. citizen, however, a reentry advocate

should refer her to an immigration attorney for expungement advice because of the potential impact of expunged charges and convictions on immigration proceedings.

While the terminology and legal effect may vary by state, in general, an expungement destroys the record of a criminal charge or conviction and any information pertaining to it. Sealing does not destroy the charge or record, but it limits who has access to charge or conviction information.¹³ In most states, under specific circumstances, people who have been charged with or convicted of crimes have the legal right to seal or expunge some charges or convictions on their records.¹⁴ The types of charges or crimes that can be expunged or sealed and the extent to which an individual can legally deny the existence of an expunged or sealed charge or conviction vary by state.¹⁵

For example, in Maryland, only certain nonviolent misdemeanor offenses are eligible for expungement.¹⁶ The expungement removes the record from public inspection, and an employer or educational institution cannot deny Jane a job or admission if she refuses to acknowledge the offenses on an application that requests them.¹⁷ By contrast, in Indiana all convictions—except those relating to serious violence, sexual offenses, or corruption—are eligible for ex-

13 See, e.g., *FLA. STAT. §§ 943.0585, 943.059* (2016).

14 See generally *Ram Subramanian et al., Center on Sentencing and Corrections, Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009–2014* (Dec. 2014).

15 For a state-by-state review of expungement and sealing laws, see *Margaret Love, Collateral Consequences Resource Center, 50-State Comparison: Judicial Expungement, Sealing, and Set-Aside* (May 2017).

16 *MD. CODE ANN., CRIM. PROC. §§ 10-101–109* (2017).

17 *Id.* § 10-109(a)(3).

10 See *National Center for State Courts, Privacy/Public Access to Court Records: State Links* (n.d.) (state-by-state listing of state court records websites).

11 *Federal Bureau of Investigation, Identity History Summary Checks* (n.d.).

12 *Margaret (Peggy) Stevenson, Expungement: A Gateway to Work*, CLEARINGHOUSE (April 2015).

punishment following statutorily prescribed waiting periods.¹⁸ If Jane has her eligible convictions expunged in Indiana, depending on the type of convictions, her arrest and conviction records would remain accessible to the public, but the court would order the records marked as expunged.¹⁹ Indiana law prohibits anyone from using an expunged conviction to discriminate against the person in question, including refusal to admit, employ, or grant a license for an occupation.²⁰ In the federal system, however, expungement is not available except under very limited circumstances.²¹

If Jane's arrests or convictions are in a state that allows her to seal or expunge some or all of her record, a reentry advocate should advise her on the benefits of these remedies. However, the advocate should also warn Jane about their limitations. In the age of the Internet and heavy reliance on private background-check companies that often report expunged or sealed criminal record information, the effectiveness of expungement can be limited.²²

Jane: "I thought I had my assault conviction expunged, but it keeps popping up on background checks when employers run my background."

Inaccurate or Incorrect Background Checks. Jane may have been denied

18 *IND. CODE* §§ 35-38-9-2–35-38-9-7 (2014).

19 *Id.* § 35-38-9-7(c).

20 *Id.* § 35-38-9-10(b).

21 See, e.g., 18 U.S.C. § 3607(c) (2015) (upon application of certain drug offenders who have been placed on pre-judgment probation and were under 21 at time of offense, "court shall enter an expungement order" expunging all public "references to [their] arrest for the offense, the institution of criminal proceedings against [them], and the results thereof"). See also *Doe v. United States*, 833 F.3d 192 (2d Cir. 2016) (district court lacks ancillary jurisdiction to expunge conviction solely on equitable grounds), *petition for cert. filed* (U.S. Jan. 9, 2017) (No. 16-876).

22 See Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WISCONSIN LAW REVIEW 321, 325 (2015); Logan Danielle Wayne, *Comment, The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 253, 259–62 (2012).

employment or housing as a result of an inaccurate entry on her background check. New and advancing technologies, ease of collection and maintenance, and heightened public safety concerns after the terrorist attack of September 11, 2001, all contribute to a widespread reliance on private background-check companies for criminal background information.²³ These companies buy arrest and conviction data in bulk from state systems but often do not update or verify the data.²⁴ Thus the records they report are likely to include inaccurate information, costing people jobs, homes, and their reputations.²⁵ Even FBI-issued background checks can contain these errors; an estimated 600,000 people are harmed each year by inaccurate information issued by the FBI.²⁶

Private background-screening companies conduct a majority of background checks requested by employers and landlords.²⁷ The Fair Credit Reporting Act governs the use and dissemination of consumer reports, including background checks, when these companies supply them to employers and landlords.²⁸ If an employer, housing provider, or other entity has taken an adverse action (e.g., denial of employment offer or admission into

housing) against Jane based on inaccurate information in a background check issued by a background-screening company, Jane may have a legal claim for damages against the background-check company.²⁹ Depending on whether Jane alleges willful or negligent noncompliance with the Act, her damages could include actual damages or statutory damages and even punitive damages; she would also be able to recover costs and reasonable attorney fees.³⁰

Jane should know that she has been denied housing or employment based on information contained in her background check because the Fair Credit Reporting Act entitles her to notice in these circumstances. The Act imposes certain duties on landlords and employers before they run a background check and before and after they have taken an adverse action against an applicant based on information contained in a background report.³¹ Employers or landlords, however, may not always comply with the Act's notice requirements.³² In such cases, Jane faces the challenge of showing that she was denied employment or housing because of information in her background check. She should try to recall if she signed anything giving the employer or landlord permission to run a background check or if the employer or landlord mentioned a policy to her of not hiring people with criminal backgrounds. Jane may also be able to ask the employer or landlord directly why she was rejected. Because many states have

23 See SEARCH: The National Consortium for Justice Information and Statistics, *Report of the National Task Force on the Criminal Backgrounding of America* 5 (2005).

24 See National Employment Law Project, *The "Wild West" of Employment Background Checks: A Reform Agenda to Limit Conviction and Arrest History Abuses in the Digital Age* 2 (Aug. 2014); Persis S. Yu & Sharon M. Dietrich, *National Consumer Law Center, Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses* 7 (April 2012).

25 See, e.g., Josh Brodesky, *Background Checks Prone to Mistakes, Can Shut Out Jobs*, USA TODAY (Nov. 20, 2012); Josh Marshall, *Inaccurate Background Checks Pose Problems for Renters*, KHOU (Nov. 2, 2016).

26 Madeline Neighly & Maurice Emsellem, *National Employment Law Project, Wanted: Accurate FBI Background Checks for Employment* 3 (July 2013).

27 See Sharon M. Dietrich, *Preventing Background Screeners from Reporting Expunged Criminal Cases*, CLEARINGHOUSE (April 2015).

28 15 U.S.C. § 1681a (2015) (consumer report and consumer reporting agency).

29 *Id.* §§ 1681e (consumer reporting agency duty); 1681s-2(a), (b) (furnisher duty).

30 *Id.* §§ 1681n (willful noncompliance damages and attorney fees); 1681o (negligent noncompliance damages and attorney fees). See generally NATIONAL CONSUMER LAW CENTER, *FAIR CREDIT REPORTING* §§ 10, 11 (8th ed. 2013 and Supp.).

31 15 U.S.C. §§ 1681m(a) (adverse action notice), 1681b(b) (3) (additional pre-adverse action notice required for employers).

32 See Yu & Dietrich, *supra* note 24, at 13 ("[I]t is worth noting that the first breakdown of consumer protection laws often occurs because many employers fail to comply with notice requirements.").

their own consumer reporting laws, some of which may offer broader protection than federal law, Jane may be able to pursue additional claims under state law.³³

If Jane has been denied housing, employment, or suffered other harm because a background-check company reported inaccurate information in a background check, usually the first step a reentry advocate should take is to help Jane draft a dispute letter to the background-check company with supporting documents to show that the information is inaccurate.³⁴ After the background-check company answers (or fails to answer) Jane's dispute letter, an advocate and Jane can evaluate what the next step should be.

Employment

Jane: "I haven't been able to get any jobs because of an old fraud charge. Is there anything I can do?"

Jane's interaction with the criminal justice system poses significant barriers to obtaining and sustaining employment: First, employers routinely deny jobs to applicants with any criminal history.³⁵ Second, many states disqualify people with certain types of criminal history from obtaining state occupational licenses.³⁶ Third, a criminal conviction or associated fines and fees can cause a state to revoke or suspend a person's driver's license, and this prevents access to certain types of employment and affects commuting to and from work.

33 See, e.g., CAL. CIV. CODE §§ 1785.1–1785.36 [2017].

34 See generally NATIONAL CONSUMER LAW CENTER, *supra* note 30, § 4.1.

35 See Michelle Natividad Rodriguez & Maurice Emsellem, *National Employment Law Project, 65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment 1* (March 2011); John Schmitt & Kris Warner, *Center for Economic and Policy Research, Ex-offenders and the Labor Market 9* (Nov. 2010).

36 Michelle Natividad Rodriguez & Beth Avery, *National Employment Law Project, Uncensored and Untapped: Removing Barriers to State Occupational Licenses for People with Records 1* (April 2016).

There are some legal remedies for Jane to overcome these barriers to employment.

Jane: "I have a forgery conviction from seven years ago. Will I ever get the chance to explain the circumstances surrounding the conviction before an employer rejects me solely based on my record?"

Fair Chance Laws. Job application forms often ask if an applicant has ever been charged with or convicted of a crime. When an applicant such as Jane checks "yes," an employer is likely to reject the applicant because of her criminal record.³⁷ One type of remedy that may be available to shield Jane from this type of discrimination is called

and rehabilitation information if a background check returns a conviction.⁴¹ And other laws institute a time limit after which an employer cannot consider a conviction.⁴² The purpose of these laws, regardless of their substance, is to ensure that employers make individualized assessments when considering an applicant with a criminal background.⁴³ A statewide ban-the-box or fair-chance law has been adopted by 27 states as of May 2017.⁴⁴ Similar legislation has been adopted by an additional 150 cities and counties.⁴⁵

If Jane applies for a job in a jurisdiction that has adopted a fair-chance law and is wrongly denied employment based on her criminal history, she may be able to seek

Many states disqualify people with certain types of criminal history from obtaining state occupational licenses.

a "ban-the-box" or "fair-chance" policy, so named because such a policy removes the checkbox on a job application form asking whether the applicant has been charged with or convicted of a crime.³⁸

These laws vary in terms of their design and impact.³⁹ Some laws apply only to public employers while others apply to both private and public employers.⁴⁰ Other laws delay the criminal history inquiry and require employers to consider mitigation

administrative or judicial relief. For example, Rhode Island's law includes a private right of action with the ability to recover attorney fees for violations.⁴⁶ Similarly the District of Columbia's Fair Chance Act allows for a complaint to be filed with the Office of Human Rights when an employer is alleged to have committed a violation; a violation may result in fines, half of which are required to be given to the complainant.⁴⁷

37 See Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men out of Work*, NEW YORK TIMES (Feb. 28, 2015).

38 Kyra Kudick, *Understanding What "Ban the Box" Laws Allow and Prohibit*, BUSINESS JOURNALS (Jan. 20, 2016) (origin of policy's name).

39 E.g., ban-the-box policies have recently been critiqued for encouraging discrimination on the basis of race (see Amanda Y. Agan & Sonja B. Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, UNIVERSITY OF MICHIGAN LAW AND ECONOMICS RESEARCH PAPER SERIES, Paper No. 16-012, at 1 (June 14, 2016)).

40 See, e.g., OHIO REV. CODE ANN. § 9.73 (2016) (public); Austin, Tex., Res. 20081016-012 (Oct. 16, 2008) (private and public).

41 See, e.g., VT. STAT. ANN. tit. 21, § 495j (2015) (effective July 1, 2017) (requires employer to consider mitigation and rehabilitation evidence).

42 See, e.g., PHILADELPHIA, PA., CODE § 9-3504(3) (2017) (can consider only convictions that occurred less than seven years from date of inquiry).

43 See National Employment Law Project, *"Ban the Box" Is a Fair Chance for Workers with Records 1* (May 2017); Michelle Natividad Rodriguez & Anastasia Christman, *National Employment Law Project, Fair Chance—Ban the Box Toolkit 1* (March 2015).

44 Michelle Natividad Rodriguez & Beth Avery, *National Employment Law Project, Ban the Box 1* (May 2017).

45 *Id.*

46 28 R.I. GEN. LAWS § 28-5-24(3) (2017).

47 D.C. CODE §§ 32-1341–1351 (2016).

Jane: “I wanted to renew my cosmetology license, but the board denied me because of my felony conviction. Can I ever style hair again to make a living?”

Certificates of Relief or Rehabilitation and Occupational Licensing. Many occupations—including sales, cosmetology, management, construction, nursing, and teaching—require state licensing.⁴⁸ Depending on her career choice, Jane may be required to obtain or renew a state license to practice her occupation. Passing a criminal background check is a common requirement for obtaining a state license.⁴⁹ The American Bar Association’s inventory of criminal record collateral consequences documents 27,254 state occupational licensing restrictions on those with a criminal record.⁵⁰

One statutory remedy that may be available to Jane is an employment tool called a certificate of employability. At least nine states and the District of Columbia have some sort of certificate-of-employability scheme.⁵¹ The legal effects of these certificates vary. They can remove statutorily required employment barriers based on conviction history, offer proof of rehabilitation, offer employers limited immunity from claims of negligent hiring, or require license-issuing agencies to consider mitigating and rehabilitation factors when evaluating a candidate with an otherwise disqualifying conviction.⁵² The certificates may also remove specific collateral consequences, such as registering as a sex offender.⁵³ Without this type of certificate, Jane would be barred from

numerous occupations in many states solely because of her criminal history, despite her qualifications or how much time has passed since her last criminal conviction. Eligibility to apply for a certificate depends on the type of convictions a person has on record; the certificate is normally obtained by filing a petition in court.⁵⁴

A reentry advocate can help Jane determine whether she qualifies for a certificate of relief if her state has adopted the certificate-of-employability scheme. For example, if Jane lived in North Carolina and was convicted of no more than two Class G, H, or I felonies or misdemeanors in one session of court, has no other felony or misdemeanor convictions, and met a few other criteria, she would likely be eligible to petition the court for a certificate of relief.⁵⁵ If granted, the certificate would relieve Jane of most mandatory collateral consequences, such as losing her license to work as a bail bondswoman.⁵⁶ The certificate also would limit the liability of any person who knew of the certificate and employed Jane despite her criminal record. A reentry advocate may write a letter on behalf of Jane when she applies to potential employers to explain the legal significance of Jane’s certificate and its practical implications.

If Jane is in a state, such as Oregon, that does not offer a certificate of rehabilitation but considers issuing each occupational license on an individualized basis, an advocate may help Jane prepare an application that offers mitigation and rehabilitation evidence and any other relevant supporting documents.⁵⁷ If the

application is denied, an advocate may also assist in any available appeal.

Jane: “The restaurant called and said they couldn’t hire me because they have a ‘no felon’ policy.”

Title VII of the Civil Rights Act. If an employer denies Jane employment on the basis of her criminal record, a legal remedy that would be available to Jane in any jurisdiction, unlike ban-the-box policies and certificates of employability, is a claim under Title VII of the Civil Rights Act. Title VII is a landmark federal law that prohibits public and private employers with 15 or more employees from engaging in discriminatory employment practices.⁵⁸ Title VII outlaws both intentional discrimination (“disparate treatment”) and practices that are implemented without a discriminatory purpose and have a discriminatory adverse effect (“disparate impact”) on a protected class, such as race.

Jane’s criminal record does not give her protected class status under federal law. However, people of color are disproportionately arrested for, charged with, and convicted of crimes at significantly higher rates than their white counterparts.⁵⁹ Thus employers’ use of overbroad criminal record screening policies can result in a disproportionate exclusion of people of color, such as Jane, in the workforce. Unless an employer can prove that it has a “business necessity” for the screening policy at issue, its practices violate Title VII.⁶⁰

In 2012 the U.S. Equal Employment Opportunity Commission (EEOC) issued guidance to ensure that employers do not use criminal background reports in

48 Rodriguez & Avery, *supra* note 36, at 1.

49 *Id.*

50 *Id.*

51 See Subramanian et al., *supra* note 14, at 19.

52 See, e.g., TENN. CODE ANN. § 40-29-107 (2017) (preventing state licensing boards and agencies from denying license solely based on person’s past criminal history and giving limited immunity from negligent hiring suits to employers).

53 See, e.g., CAL. PENAL CODE §§ 290.5, 4852.01 (2016).

54 For a state-by-state review of consideration of criminal records in licensing and employment, see Margaret Love, Collateral Consequences Resource Center, 50-State Comparison: Consideration of Criminal Records in Licensing and Employment (May 2017).

55 N.C. GEN. STAT. § 15A-173.2 (2017).

56 *Id.* § 58-71-80(b), (b1).

57 OR. REV. STAT. § 670.280(2) (2017).

58 42 U.S.C. §§ 2000e–2000e-17 (2015).

59 See generally Nellis, *supra* note 4.

60 42 U.S.C. § 2000e-2(k).

a discriminatory way.⁶¹ This guidance (1) prohibits employers from rejecting an application based on a nonconviction (i.e., arrest) without investigating the underlying conduct; (2) prohibits blanket felony or criminal-record bans; and (3) requires employers to consider how much time has elapsed since the conviction, the seriousness of the crime, and the relationship the offense bears to the job at issue.⁶²

If an employer to whom Title VII applies denies Jane a job because of her criminal record, a reentry advocate can use the EEOC guidance to write an advocacy letter on behalf of Jane. The letter can summarize the guidance and emphasize any relevant rehabilitation information, including letters of reference and support from the community.⁶³ Depending on the strength of the disparate impact claim, an advocate could file charges with the EEOC or cocounsel with civil rights lawyers to pursue the claim further.

Jane: “I need to be able to drive to work because there is no public transportation close to my house, but my license is revoked because of my criminal convictions. Can you help me get my license back?”

Driver’s Licenses. Many, if not most, states suspend or revoke driver’s licenses because of a criminal conviction, traffic ticket, or unpaid fines and fees stemming from

the conviction or ticket.⁶⁴ While some state laws suspend or revoke driver’s licenses as a result of a driving-related offense, many states suspend or revoke driver’s licenses for reasons unrelated to driving or public safety.⁶⁵ For example, at least 12 states and the District of Columbia suspend driver’s licenses for drug offenses unrelated to driving.⁶⁶ Some states use driver’s license revocations or suspensions as a debt-collection tool. For example, Tennessee and Virginia revoke driver’s licenses for failure to pay court-ordered fines and fees whether or not the underlying conviction was related to driving.⁶⁷ In fact, nearly 40 percent of license suspensions nationwide are a result of unpaid fines, missed child support payments, or drug offenses rather than unsafe driving practices or a failure to obtain automotive insurance.⁶⁸ With

if getting to a place of employment does not require a driver’s license, or even if the job itself does not require driving, many employers require a driver’s license as a proxy for employability.⁷⁰

Two related issues arise when people do not have a valid driver’s license but need to drive: new criminal charges for driving on a suspended or revoked license and the imposition of habitual motor vehicle offender status.⁷¹ Nineteen states have enacted some form of habitual-offender law, and the laws usually impose habitual-offender status when a person accrues a number of driving-related offenses within a set period.⁷² The status revokes or suspends a person’s driver’s license for a specified period.⁷³ Not only does this status prevent a person from driving,

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but also if a person is caught driving as a “habitual offender,” the person can face severe criminal consequences such as a felony conviction.⁷⁴ While some states offer restricted or specialized driving privileges to people who have habitual-offender status, obtaining the privileges may prove difficult without an understanding of how to navigate the process.⁷⁵ Although the status

61 See [U.S. Equal Employment Opportunity Commission, EEOC Enforcement Guidance No. 915.002](#) (April 25, 2012) (“Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as Amended, 42 U.S.C. § 2000e et seq.”).

62 *Id.* at 9–18.

63 For more information on how the guidance has worked in practice, see [Sharon M. Dietrich, Community Legal Services of Philadelphia, EEOC’s Criminal Record Guidance One Year Later: Lessons from the Community](#) (Sept. 2013).

64 See [Alicia Bannon et al., Brennan Center for Justice, Criminal Justice Debt: A Barrier to Reentry](#) 24 (2010); see also [Shaila Dewan, Driver’s License Suspensions Create Cycle of Debt](#), *NEW YORK TIMES* (April 14, 2015).

65 I use the terms “suspension” and “revocation” interchangeably, but these terms may carry different legal significance depending on the state.

66 [Joshua Aiken, Prison Policy Initiative, Reinstating Common Sense: How Driver’s License Suspensions for Drug Offenses Unrelated to Driving Are Falling out of Favor](#) (Dec. 12, 2016).

67 See, e.g., TENN. CODE ANN. § 40-24-105(b)(1) (2017) (constitutional challenges to this law are pending in Middle District of Tennessee as of April 2017); VA. CODE ANN. § 46.2-395 (2016).

68 See [Jessica Eaglin, Brennan Center for Justice, Driver’s License Suspensions Perpetuate the Challenges of Criminal Justice Debt](#) (April 30, 2015).

69 See [Brian McKenzie, U.S. Census Bureau, Who Drives to Work? Commuting by Automobile in the United States: 2013](#), at 5 (Aug. 2015).

70 See [Alana Semuels, No Driver’s License, No Job](#), *ATLANTIC* (June 15, 2016).

71 See [National Conference of State Legislatures, Driving While Revoked, Suspended or Otherwise Unlicensed: Penalties by State](#) (Oct. 27, 2016) (summary of penalties in all 50 states for driving on suspended or revoked license).

72 [National Conference of State Legislatures, Penalties for Revoked Driver’s License: Habitual Traffic Offenders \(HTO\)](#) (Feb. 16, 2017) (summary of habitual motor vehicle offender statutes in various states).

73 *Id.*

74 See, e.g., TENN. CODE ANN. § 55-10-616(b).

75 See, e.g., IND. CODE § 9-30-16-1 (2016).

can be removed at the end of a statutory waiting period, the removal is generally not automatic and usually requires filing an affirmative petition or application.⁷⁶

A reentry advocate could help Jane with driver's license problems: First, if unpaid traffic tickets or criminal fines and costs are the reason for Jane's driver's license revocation, an advocate could file an indigency motion asking a court to waive these debts on the basis of Jane's indigency.⁷⁷ Second, legal counsel would be beneficial if Jane is facing a petition to declare her a habitual offender or is considering an appeal from being declared a habitual offender. Third, an advocate could determine if Jane qualifies for a restricted or specialized license that would help her get to and from work, despite her habitual-offender classification, or if she is eligible to remove her habitual-offender status.

Housing

Jane: "I'm homeless and have been for some time. I've been denied admission into housing because of my shoplifting convictions. Can I challenge any of my denials?"

Many people with criminal records experience homelessness.⁷⁸ Jane's criminal record is likely to cause her difficulty in obtaining housing.⁷⁹ In general,

Many people with criminal records experience homelessness.

federally assisted housing providers and private landlords have discretion to reject applicants with criminal records.⁸⁰ While federally assisted housing providers and private landlords have significant discretion in their admission decisions, applicants are not completely without legal recourse when challenging admission denials based on criminal history.⁸¹

Federally Assisted Housing: Admissions.

The U.S. Department of Housing and Urban Development (HUD) guidelines generally bar federally assisted housing providers from automatically excluding an applicant on the basis of a criminal record or past drug or alcohol abuse. However, in limited circumstances, federal law requires federally assisted housing providers to reject people with certain backgrounds.

Mandatory Denials. Only two types of convictions can permanently ban a person from federally assisted housing: (1) a conviction for the manufacture or production of methamphetamine on the premises of any federally assisted housing and (2) a conviction that requires lifetime registration under a state sex offender registration program. The methamphetamine ban applies only to public housing, the Section 8 voucher program, and the

Section 8 moderate rehabilitation program.⁸² The sex offender registration ban applies to these three programs as well as other subsidized housing programs.⁸³

Moreover, if any member of an applicant household is using illegal drugs or has a history of illegal drug use or abuse of alcohol that may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents, public housing, the Section 8 voucher program, project-based Section 8, and other federally assisted housing programs must deny that applicant.⁸⁴

Presumptive Denials. If any member of an applicant's household has been evicted from certain federally assisted housing for drug-related criminal activity, that applicant will be presumptively ineligible for public housing, the Section 8 voucher program, project-based Section 8, and other federally subsidized housing.⁸⁵ This presumption can be overcome if (1) the applicant can demonstrate that the previously evicted household member completed an approved, supervised drug rehabilitation program, or (2) the threat posed by past

⁷⁶ See, e.g., [31 R.I. GEN. LAWS § 31-40-9](#)

⁷⁷ See section below on court debt for more information on indigency motions to waive costs.

⁷⁸ See [Marie Claire Tran-Leung, Sargent Shriver National Center on Poverty Law, When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing](#) (Feb. 2015); [Mark Walker, Finding a Home After Prison Tough for Released Felons](#), USA TODAY (Feb. 28, 2015).

⁷⁹ Much of this housing section was sourced from CATHERINE BISHOP, NATIONAL HOUSING LAW PROJECT, AN AFFORDABLE HOME ON RE-ENTRY: FEDERALLY ASSISTED HOUSING AND PREVIOUSLY INCARCERATED INDIVIDUALS (2008), and NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS 117-30 (4th ed. 2012 and Supp. 2014).

⁸⁰ "Federally assisted housing" encompasses public housing, the voucher program, project-based Section 8, Section 202, Section 811, Section 221(d)(3), Section 236, Section 514 and Section 515 ([42 U.S.C. § 13664\(a\)\(2\)](#); [24 C.F.R. § 5.100](#) (2017)).

⁸¹ See [24 C.F.R. §§ 882.101-882.810](#) (Section 8 moderate rehabilitation), [960.101-960.707](#) (public housing), [982.1-982.643](#) (voucher program); see also [7 C.F.R. §§ 3560.154\(j\)](#) (2017) (Rural Development multifamily housing), [3560.551-3560.600](#) (off-farm labor housing), [3560.601-3560.650](#) (on-farm labor housing); [24 C.F.R. §§ 5.850-5.861](#) (all other housing assisted by U.S. Department of Housing and Urban Development (HUD)).

⁸² [42 U.S.C. § 1437n\(f\)\(1\)](#); [24 C.F.R. §§ 882.518\(a\)\(1\)\(ii\)](#) (Section 8 moderate rehabilitation), [960.204\(a\)\(3\)](#) (public housing), [982.553\(a\)\(1\)\(ii\)\(c\)](#) (Section 8 voucher).

⁸³ [42 U.S.C. § 13663](#); [24 C.F.R. §§ 5.856](#) (project-based Section 8 and other federally assisted housing), [882.518\(a\)\(2\)](#) (Section 8 moderate rehabilitation), [960.204\(a\)\(4\)](#) (public housing), [982.553\(a\)\(2\)\(i\)](#) (Section 8 voucher).

⁸⁴ [42 U.S.C. § 13661\(b\)](#); [24 C.F.R. §§ 5.857](#) (project-based Section 8), [882.518\(a\)\(1\)\(iii\)](#), (4) (Section 8 moderate rehabilitation), [960.204\(a\)\(2\)](#), (b) (public housing), [982.553\(a\)\(1\)\(ii\)\(A\),\(B\)](#), and (a)(3) (Section 8 vouchers).

⁸⁵ [42 U.S.C. 13664](#); [24 C.F.R. §§ 5.854](#) (project-based Section 8 and other federally assisted housing), [882.518\(a\)\(1\)\(i\)](#) (Section 8 moderate rehabilitation), [960.204\(a\)\(1\)](#) (public housing), [982.553\(a\)\(1\)\(i\)](#) (Section 8 voucher).

behavior no longer exists.⁸⁶ Because the determination of whether the threat still exists is left up to the housing provider, a reentry advocate can assist in successfully rebutting the presumption of ineligibility.

Discretionary Denials. A majority of admission denial cases do not fall into the mandatory or presumptive denial categories. With the exception of the limited permanent or automatic bars on admission noted above, housing providers may exercise their discretion when considering applicants for admission.⁸⁷ This discretion comes with some constraints. First, public housing authorities and owners of major federally assisted developments must have written admission policies available to applicants.⁸⁸ These housing providers and owners may reject an applicant only for drug-related criminal activity, violent criminal activity, or other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or that would threaten the health or safety of the owner or local housing agency staff or contractors.⁸⁹ Thus these housing providers

Only two types of convictions can permanently ban a person from federally assisted housing.

have discretion to deny housing on the basis only of these specified crimes, and not all crimes. The relevant criminal activity must have occurred within a “reasonable period” before the admission decision.⁹⁰

With respect to evidentiary standards, conviction of a crime is not required for an admission denial based on criminal activity. What the standard of proof is remains unresolved in admission-denial cases; however, HUD has made clear that public housing authorities and owners of federally assisted housing properties cannot use arrest records alone to deny admission into housing.⁹¹

Federally Assisted Housing: Points of Advocacy. Different regulations govern each federally assisted program, resulting in variations in the procedural protections an applicant receives and in the substance of the applicable admission policy.⁹² If Jane is denied admission into housing as a result of her criminal record, a reentry advocate can procedurally and substan-

tively challenge the denial.⁹³ With respect to a procedural challenge, depending on the particular federal subsidy involved, a housing provider may be required to give Jane specific information in the notice of denial she received, a copy of her criminal record the housing provider relied on in denying her admission, and an opportunity to contest any proposed adverse action. An advocate may be able to argue substantively that the elements of the crime(s) of which Jane was convicted do not fall within the parameters of the denial criteria outlined in the admission policy.

For example, if a public housing authority denies Jane admission into public housing as a result of her criminal history, Jane’s procedural protections include a right to prompt notice of the ineligibility determination, the basis for such determination, a copy of her criminal record, and an opportunity to dispute the accuracy and relevance of that record at an informal hearing.⁹⁴ Substantively a reentry advocate may review the public housing authority’s admission policy and determine that Jane’s criminal activity is not the type that fits within the screening criteria. For example, if Jane has shoplifting convictions on her criminal record and the admission policy states that the housing authority may deny individuals who have engaged in criminal activity that would threaten the health,

86 [42 U.S.C. § 13661\(a\)](#); [24 C.F.R. §§ 5.850\(c\)](#) (excludes rural development housing), [5.854\(a\)](#) (project-based Section 8 and other federally assisted housing), [882.518\(a\)\(1\)\(i\)](#) (Section 8 moderate rehabilitation), [960.204\(a\)\(1\)](#) (public housing), [982.553\(a\)\(1\)\(i\)](#) (Section 8 voucher).

87 See, e.g., [42 U.S.C. § 13662\(c\)](#); [24 C.F.R. §§ 5.854](#) (other federally assisted housing), [5.855](#) (project-based Section 8), [882.518](#) (Section 8 moderate rehabilitation), [960.204\(a\)\(1\)](#) (public housing), [982.553](#) (Section 8 voucher). Low Income Housing Tax Credit properties, Shelter Plus Care, Supporting Housing Program, and Housing Opportunities for People with AIDS do not have any federal restrictions.

88 [24 C.F.R. §§ 5.655\(b\)\(2\)](#) (project-based Section 8), [960.202\(a\)](#) (public housing), [982.54\(d\)](#) (voucher program). See [24 C.F.R. §§ 108.1–108.50, 200.600–200.640](#) (applicable to all subsidized and unsubsidized housing programs administered by HUD); see also [7 C.F.R. § 3560.102\(b\)](#) (management plan must include admission policy).

89 See [42 U.S.C. §§ 1437a\(b\)\(9\), 13661\(c\)](#); [24 C.F.R. §§ 5.100](#) (definition of drug-related criminal activity and violent criminal activity), [5.855\(a\)–\(c\)](#) (project-based Section 8 and other federally assisted housing), [882.518](#) (Section 8 moderate rehabilitation), [960.203\(c\)](#) (public housing), [982.553\(a\)\(2\)\(ii\)](#) (Section 8 voucher).

90 [42 U.S.C. § 13661\(c\)\(2\)](#). See [24 C.F.R. §§ 5.855\(c\), 882.518\(b\)\(3\), 982.553\(a\)\(2\)\(ii\)\(C\)](#). “Reasonable period” is not defined.

91 See [U.S. Department of Housing and Urban Development, Guidance for Public Housing Agencies \(PHAs\) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions](#), HUD Notice PIH 2015-19, at 3 (Nov. 2, 2015).

92 A person can be evicted or have assistance terminated from a federally assisted housing program if the person violates a condition of parole or probation or is considered a “fleeing felon” (i.e., has an open felony warrant) ([42 U.S.C. § 1437d\(l\)\(9\)](#)). Thus attorneys may want to advise applicants to clear up parole or probation violation charges and any open felony warrants before being admitted into federally assisted housing.

93 The process used to challenge a rejection based on a criminal record depends on the type of housing involved and could include a meeting, an informal grievance procedure, a state administrative procedure act appeal, or a Section 1983 claim in state or federal court.

94 See [24 C.F.R. §§ 960.204, 960.208](#).

safety, or right to peaceful enjoyment of the premises by other residents, an advocate might successfully argue that these crimes do not satisfy these criteria. Alternatively, if Jane has only one assault conviction on her criminal record and the public housing authority's admission policy states that it may deny an applicant on the basis of a pattern of violent behavior, an advocate might argue that one isolated instance is not a pattern.⁹⁵ Federal regulations also require a public housing authority to consider mitigating factors in its admission decision.⁹⁶ If Jane has several assault convictions, an advocate could help her present mitigation evidence such as her assault convictions being the result of defending herself from an abusive spouse. If the public housing authority does not consider the presented mitigation information in its decision as it is required to, an advocate would have a procedural challenge to her denial on this basis as well.

If Jane's criminal history is associated with a disability and Jane is rehabilitated or her circumstances have changed, she may be able to request a reasonable accommodation under the Fair Housing Amendments Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act, which would require a housing provider to modify its criminal records policy for Jane.⁹⁷ Situations in which a disability may be related to a crime include a psychiatric disorder that causes loud outbursts or threats that resulted in an assault conviction or a

substance abuse addiction that resulted in several convictions for possession of a controlled substance. These types of reasonable accommodation requests can be made to private housing providers as well.⁹⁸

Private Housing Providers: Admissions and Potential for Affirmative Litigation.

While private landlords are generally free to turn down prospective tenants on the basis of their criminal records, HUD recently issued guidance demonstrating how admission denials and other adverse actions based on criminal background checks could violate fair housing laws under a disparate impact theory of discrimination.⁹⁹ The guidance sets forth a multipronged test to determine if a criminal background check violates fair housing laws, and it outlines a road map for potential affirmative litigation.¹⁰⁰ Armed with this guidance, a reentry advocate could write a demand letter citing the guidance and request a reconsideration of the denial decision. An advocate also could pursue affirmative litigation depending on the strength of the disparate impact claim.

Court Debt

Jane: "I owe \$5,000 from my charges. I can't vote or get a driver's license until I pay it off, but I'm on SSI and can't afford to pay."

Jane's encounter with the criminal justice system will likely result in her owing court-ordered monetary obligations that

stem from her criminal charges or convictions.¹⁰¹ These obligations are referred to as "legal financial obligations" or "criminal justice debt" and include fines, fees, surcharges, and restitution in addition to interest and late-payment penalties on those assessments.¹⁰² Legal financial obligations are imposed on a substantial majority of those who are convicted of felonies or misdemeanors.¹⁰³ Assessed at every stage of a criminal proceeding, from pretrial through postincarceration, these legal financial obligations can total over thousands of dollars.¹⁰⁴

To avoid taxing the public at-large, cash-strapped states have begun to increase the amount of court fees and surcharges that defendants are assessed to fund the criminal justice system and be a general revenue source.¹⁰⁵ However, approximately 80 percent of criminal defendants are indigent, and thus the vast majority of the people who are assessed these legal financial obligations cannot afford to pay them.¹⁰⁶

This debt has a more severe effect on the poor compared to those with monetary means because the debt can accrue late fees, interest charges, payment plan fees, and collection fees when a

95 See, e.g., Metropolitan Development and Housing Agency, Admission to and Continued Occupancy Policy 29 (June 2015) (ineligibility for admission based on "[h]istory of [s]erious [c]riminal [a]ctivity" or "[p]attern of [v]iolent [b]ehavior").

96 24 C.F.R. § 960.203(d).

97 See 29 U.S.C. § 794 (2015) (Section 504 of Rehabilitation Act); 42 U.S.C. §§ 3601–3631 (Fair Housing Amendments Act), 12131–12134 (Americans with Disabilities Act).

98 Case law on criminal activity reasonable accommodation requests has trended negatively (see, e.g., *Stoick v. McCorvey*, No. 10-1030 (D. Minn. July 29, 2011)). But these types of requests have been successful in an informal setting and should still be made.

99 See U.S. Department of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate–Related Transactions 2 (April 4, 2016).

100 *Id.* at 3–7.

101 See generally Nick Allen et al., *Tackling Criminal Justice Debt: Efforts by Restricted and Unrestricted Civil Legal Aid Programs to End Practices that Unjustly Target the Poor*, CLEARINGHOUSE (May 2017); Bannon et al., *supra* note 64.

102 Harvard Law School Criminal Justice Policy Program, *Confronting Criminal Justice Debt: A Guide for Policy Reform* 1, 6 (Sept. 2016).

103 Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AMERICAN JOURNAL OF SOCIOLOGY 1753, 1756 (2010).

104 See generally Bannon et al., *supra* note 64.

105 See *id.* at 4; see also *my Sentenced to Debt: The True Cost of Raising Revenue Through Tennessee's Criminal Courts*, TENNESSEE BAR JOURNAL (May 1, 2017); Marie Claire Tran-Leung, Sargent Shriver National Center on Poverty Law, *Debt Arising from Illinois' Criminal Justice System: Making Sense of the Ad Hoc Accumulation of Financial Obligations* 29–31 (Nov. 2009).

106 See John Pfaff, *A Mockery of Justice for the Poor*, NEW YORK TIMES (April 29, 2016).

Cash-strapped states have begun to increase the amount of court fees and surcharges that defendants are assessed to fund the criminal justice system and be a general revenue source.

person cannot pay it off immediately.¹⁰⁷ The repercussions of owing this debt are harsher for criminal debtors than for civil debtors. Criminal justice debt also can lead to arrest warrants and incarceration, extension of parole or probation, and suspension or revocation of a person's driver's license.¹⁰⁸ Until this debt is paid in full, it can damage credit scores—limiting housing and employment options—and may prevent restoration of the right to vote.¹⁰⁹

Waivers and Payment Plans. A reentry advocate could assist Jane with her criminal justice debt by seeing if a statute allows a tribunal to waive or reduce her debt based on indigency or seeing if she is eligible for a payment plan or modification of an existing payment plan. Because states differ in what types of legal obligations are waivable or eligible for reductions or payment plans, a reentry advocate must understand what types of legal financial obligations are outstanding—state, municipal, or federal; fines, restitution, or costs—and then research which ones are waivable or eligible for payment plans. For example, in Michigan minimum state costs, crime victims' rights assessments,

and restitution cannot be waived, but other types of legal financial obligations may be waived.¹¹⁰ In North Carolina attorney-appointment fees cannot be waived.¹¹¹

Even though many states offer criminal justice debt relief, understanding what relief is available and obtaining it without legal assistance can be difficult.¹¹² For example, in Massachusetts waiver of the probation fee and victim services surcharge requires a written finding of “undue hardship,” whereas waiver of an offense-specific operating-under-the-influence fee may be reduced, paid over time, or waived if it would cause “grave

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and serious hardship” to the defendant or the defendant's family.¹¹³ Furthermore, some judges may be more inclined to place people on payment plans rather than waive their debt.¹¹⁴ Depending on the state,

effective legal advocacy can be critical to Jane obtaining a full waiver or reduction.

Defending Against Incarceration as a Result of Unpaid Criminal Justice Debt.

Owing criminal justice debt may subject Jane to imprisonment. People who owe such debt often face warrants, arrest, probation revocation, jail stays, and prison admission for failure to pay.¹¹⁵ This type of incarceration persists despite established law that jailing a person for failure to pay criminal justice debt without careful consideration of that person's ability to pay and of alternative methods of punishment violates the equal protection clause.¹¹⁶ Whether these proceedings are defined as civil or criminal and whether there is a constitutional or statutory right to counsel during them vary by jurisdiction. However, a reentry advocate should ensure that Jane has proper counsel to raise this defense vigorously

if she is facing incarceration on the basis of her inability to pay criminal justice debt.

Discharging the Debt Through Bankruptcy and Defending Against Collection.

Bankruptcy could offer relief to Jane. However, the precise relief available to her depends on the type of legal financial

107 See, e.g., *Sentenced to Debt*, *supra* note 105.

108 Probation and parole are both types of criminal sentences. Parole is the release of a prisoner from confinement, before the completion of the prisoner's sentence, conditioned on certain court-mandated requirements; a violation of any of these parole conditions can result in reincarceration. Probation, a type of criminal sentence subject to court-mandated requirements, releases a person to the community rather than sending the person to incarceration; a violation of probation conditions can result in incarceration (Vallas & Dietrich, *supra* note 7, at 8).

109 See Bannon et al., *supra* note 64, for a thorough discussion of the consequences of criminal justice debt.

110 See Sarah Alexander et al., *American Civil Liberties Union, In for a Penny: The Rise of America's New Debtors' Prisons* 34 (Oct. 2010).

111 N.C. GEN. STAT. § 7A-455.1(b).

112 See, e.g., DEL. CODE ANN. tit. 10, § 8601(d) (2017); GA. CODE ANN. § 42-8-102(e) (2016); Haw. Rev. Stat. §§ 706-605(6), 706-648 (2017); Nev. Rev. Stat. § 178.3975 (3) (2017). See also Roopal Patel & Meghna Philip, Brennan Center for Justice, *Criminal Justice Debt: A Toolkit for Action* 14 (2012).

113 MASS. GEN. LAWS ch. 90, § 24D, ch. 276, § 87A (2017).

114 See Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014).

115 Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY AND PUBLIC POLICY 509, 524 (2011) (“nonpayment of monetary sanctions leads to a significant number of warrants, arrests, probation revocations, jail stays, and prison admissions in locales across the country”).

116 See *Bearden v. Georgia*, 461 U.S. 660 (1983); *Tate v. Short*, 401 U.S. 395 (1971); see also Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARVARD LAW REVIEW 1024 (2016) (constitutional protections against criminal justice debt collection).

obligation she owes and the type of bankruptcy she uses.¹¹⁷ If Jane is in a jurisdiction where waivers or reductions are not available, she cannot afford a payment plan, and bankruptcy is not a feasible option for her, a reentry advocate might be able to help her protect her assets, wages, and benefits from involuntary collection by asserting a defense based on statutes of limitations, statutes of repose, or laches.¹¹⁸

Restoration of Civil Rights

Jane: “I want my voting rights back. Can you help?”

If Jane has a felony conviction and is not from Maine or Vermont, her conviction has affected her right to vote and otherwise to participate in the democratic process.¹¹⁹ As of 2016, states have stripped 6.1 million Americans of their right to vote as a result of their felony convictions, with Florida, Kentucky, Mississippi, and Tennessee having the highest rates of felon disenfranchisement.¹²⁰ This 6.1 million number roughly translates to 2.5 percent of the total U.S. voting age population—1 out of every 40 adults—disenfranchised as a result of a felony conviction.¹²¹ Felony convictions can strip a person

As of 2016, states have stripped 6.1 million Americans of their right to vote as a result of their felony convictions.

of other citizenship rights than voting rights.¹²² Citizenship rights (sometimes called civil rights) usually include voting, sitting on a jury, running for or holding public office, and firearm privileges.¹²³

States typically have some process to restore some or all citizenship rights revoked as a result of a conviction.¹²⁴ If Jane is interested in restoring her full citizenship rights or just her right to vote, she may need legal assistance depending on where she lives.¹²⁵ Some states, such as North Carolina, Nebraska, Ohio, and Idaho, have automatic restoration, and she may not need legal assistance in those states.¹²⁶ However, if she is in a state, such as Arizona or Florida, with complex restoration laws, she may need a reentry advocate.¹²⁷ Restoration of citizenship rights is crime- and sentence-specific, and the procedure can vary considerably with what individual citizenship rights a person

would like restored.¹²⁸ For example, in Tennessee, if Jane is eligible to have her right to vote restored, she can use a form to restore her right to vote.¹²⁹ She can also file an affirmative petition in state court if she wants all of her citizenship rights restored.¹³⁰ Depending on the date and type of her felony conviction, she may not be eligible to restore her right to vote at all or she may not have lost her right to vote.¹³¹ Legal counsel would help Jane navigate what could be an incredibly complex process to restore her citizenship rights.

Sex Offender Issues

Jane: “Can I ever get off the sex offender registry? I can’t find anywhere to live or work that isn’t restricted. I also miss being able to attend my daughter’s school functions or take her trick-or-treating on Halloween because of the registry.”¹³²

If Jane has a sex-offense conviction on her criminal record, she is likely required to register as a sex offender under state law. The types of convictions that require registration can vary greatly. Convictions of sexual assault, rape, and other serious sex crimes could place Jane on a sex offender registry but so could convictions

117 See [ABBY SHAFROTH ET AL., NATIONAL CONSUMER LAW CENTER, CONFRONTING CRIMINAL JUSTICE DEBT, A GUIDE FOR LITIGATION](#) 70–86 (Sept. 2016).

118 *Id.* at 86–102.

119 See [Jean Chung, Sentencing Project, Felony Disenfranchisement: A Primer](#) 1 (Jan. 2017) (Maine and Vermont do not have felony disenfranchisement restrictions). Some states may disenfranchise a person for a misdemeanor crime (see, e.g., *Snyder v. King*, 958 N.E.2d 764 (Ind. 2011) (state constitution that disenfranchises person convicted of “infamous crime” includes misdemeanor convictions); but see *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 851 (Iowa 2014) (only felonies can trigger disenfranchisement)). For a historical overview of felony disenfranchisement laws, see [PIPPA HOLLOWAY, LIVING IN INFAMY: FELON DISFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP](#) (2014).

120 Christopher Uggen et al., [Sentencing Project, 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016](#), at 3, 15 (2016).

121 *Id.* at 3.

122 See [Ann Cammett, Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt](#), 117 PENN STATE LAW REVIEW 349, 371–72 (2012) (civil collateral consequences that may arise from criminal convictions).

123 See, e.g., *United States v. Cassidy*, 899 F.2d 543, 550 (6th Cir. 1990) (citizenship rights include right to vote, run for and hold public office, and sit on jury).

124 For a state-by-state review of civil rights loss and restoration laws, see [Margaret Love, Collateral Consequences Resource Center, 50-State Comparison: Loss and Restoration of Civil Rights and Firearms Privileges](#) (May 2017).

125 See *id.*

126 See [IDAHO CODE § 18-310\(2\)](#) (2016); [NEB. REV. STAT. § 29-112](#) (2017); [N.C. GEN. STAT. § 13-1](#); [OHIO REV. CODE § 2961.01\(A\)](#) (2017).

127 See [American Civil Liberties Union et al., Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States](#) 6 (Sept. 2013) (complexity of Florida’s restoration laws and lack of success in challenging certain felony disenfranchisement laws).

128 See [American Civil Liberties Union, Breaking Barriers to the Ballot Box: Felon Enfranchisement Toolkit](#) 11 [2008].

129 See [Tennessee Secretary of State, If I Have a Felony Conviction, Can I Vote?](#) (n.d.).

130 See TENN. CODE ANN. §§ 40-29-101–40-29-201.

131 *Id.* § 40-29-105.

132 See [Mike Harris, Sex Offender Sues Ventura School District](#), VENTURA COUNTY STAR (March 7, 2017); [Arielle Pardes, Are Sex Offenders Unfairly Persecuted on Halloween?](#), VICE (Oct. 30, 2014).

for urinating in a public place or having sex in a public place, depending on the state.¹³³

The Sex Offender Registration and Notification Act is the federal law that sets minimum national standards for state sex offender registration and notification laws.¹³⁴ All 50 states have some form of sex offender registration and public notification laws, and each state's requirements are distinct.¹³⁵ These laws trace back to state legislatures' knee-jerk reaction to several high-profile child victimization cases in the 1980s and 1990s.¹³⁶ While the legislatures' goal in enacting these laws was to protect children and enhance public safety, the legislatures enacted these laws without empirical scrutiny as to their effectiveness or potential unintended consequences.¹³⁷ These laws have grown more extensive over the years to include frequent reporting requirements, community notification requirements, residency and employment restrictions, geography restrictions, and statutory bars to employment, public assistance, and housing.¹³⁸ Registrant statutes can also result in satellite-based

monitoring, being forced to carry a special identification card, and having to pay a registration fee.¹³⁹ Furthermore, in many states, failing to meet the registration requirements, regardless of intent, can be a new felony offense, jeopardizing chances of ever being removed from the registry.¹⁴⁰

Depending on the jurisdiction and offense, some individuals on sex-offender registries may be eligible for removal.¹⁴¹ Given the severe restrictions Jane might face if she is on a registry, a reentry advocate could help her overcome a significant barrier to reentry by helping her remove her name from the registry if she is eligible. Whether compiling rehabilitation evidence, presenting mitigation evidence to explain registration violations, or interpreting vague or ambiguous legal standards required for removal, a reentry advocate can offer life-changing assistance in these types of cases.

Health and Benefits

Jane: "I was in jail for six months and now Social Security says I owe them money. They are taking \$73.50 out of my check each month. Why did this happen, and can you help me get my full check each month?"

Social Security Benefits and Health

Care. Jane's prior incarceration could have affected social security benefits to which she is entitled. The rules apply slightly differently depending on whether Jane is receiving Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI). SSI payments are suspended when a person has been incarcerated for a full

calendar month; eligibility is terminated after 12 consecutive months of incarceration.¹⁴² SSDI payments are suspended when a person has been convicted of a criminal offense and incarcerated for more than 30 continuous days; unlike SSI, eligibility for SSDI is not affected by incarceration.¹⁴³ Whether or not she receives SSI or SSDI or both, Jane must inform the Social Security Administration that she has been incarcerated.¹⁴⁴ If she does not timely report her incarceration and the agency continues to pay her benefits while she is incarcerated, she will be charged an overpayment in the full amount of the SSI or SSDI she received. To recoup these payments, the agency will automatically reduce her payments upon release until the overpayment has been satisfied.

Social security benefits can be affected by open bench warrants on criminal charges or probation or parole violations. The Social Security Administration considers as ineligible for benefits people who are "fleeing felons," violating a condition of their parole, or violating a condition of

133 See [Erin Fuchs, 7 Surprising Things That Could Make You a Sex Offender](#), BUSINESS INSIDER, (Oct. 9, 2013); [Erik Ortiz, Florida Couple in "Sex on the Beach" Case Found Guilty. Must Register as Sex Offenders](#), NBC NEWS (May 5, 2015).

134 42 U.S.C. §§ 16901, 16902, 16911–16929 (2017); Office of Justice Programs, [The National Guidelines for Sex Offender Registration and Notification](#) 3 (n.d.).

135 See U.S. Department of Justice, [National Sex Offender Search](#) (n.d.); *id.*, [Sex Offender Registration and Notification in the United States: Current Case Law and Issues](#) (Dec. 2015).

136 See [Wayne A. Logan, Megan's Laws as a Case Study in Political Stasis](#), 61 SYRACUSE LAW REVIEW 371, 372–82 (2011) (origins of state sex offender registry and notification laws).

137 See *id.*; see also [Amanda Y. Agan, Sex Offender Registries, Fear Without Function?](#), 54 JOURNAL OF LAW AND ECONOMICS 207 (2011) (various data sets debunk premise that sex offender registries are effective tools for increasing public safety).

138 See [Mary Helen McNeal & Patricia Warth, Barred Forever: Seniors, Housing, and Sex Offense Registration](#), 22 KANSAS JOURNAL OF LAW AND PUBLIC POLICY 317, 321–29 (2013); see also [Matt Mellema et al., Sex Offender Laws Have Gone Too Far: Our Draconian Policies About Sex Offenses Reflect Our Ignorance of Them](#), SLATE (Aug. 11, 2014).

139 [Wayne A. Logan, Database Infamia: Exit from the Sex Offender Registries](#), 2015 WISCONSIN LAW REVIEW 219, 222 (2015).

140 See, e.g., MISS. CODE ANN. § 45-33-33 (2017).

141 See generally Logan, *supra* note 139.

142 42 U.S.C. § 1382(e)(1)(A); 20 C.F.R. §§ 416.1325, 416.1335 (2017). See [Social Security Administration, Program Operations Manual System \(POMS\), Suspension and Reestablishing Eligibility](#) (SI 02301.205) (June 30, 2015) (SSI reinstatement procedures); *id.*, [Title XVI Prisoner Provision](#) (GN 02607.050) (Sept. 4, 2014) (SSI inmate ineligibility provision).

143 42 U.S.C. § 402(x); 20 C.F.R. § 404.468. See [Social Security Administration, Program Operations Manual System \(POMS\), Retirement, Survivors, and Disability Insurance \(Title II\) Reinstatement Policies for Prisoners](#) (GN 02607.840) (Sept. 19, 2014) (SSDI reinstatement procedures); *id.*, [Title II Prisoner Suspension Provisions](#) (GN 02607.160) (Nov. 16, 2016) (SSDI inmate ineligibility provision). While 20 C.F.R. § 404.468 states that Social Security Disability Insurance benefits cannot be paid to a person incarcerated for a felony conviction, it has not yet been amended to reflect 42 U.S.C. § 402(x), which states that benefits cannot be paid to a person incarcerated for any criminal conviction and sentenced to a period of confinement. The Social Security Administration POMS Prisoner Suspension Provisions do reflect the change.

144 See, e.g., 20 C.F.R. § 416.708 (SSI reporting regulations).

their probation.¹⁴⁵ While the agency once held that the mere existence of a felony, probation, or parole violation warrant was evidence of a person being a fleeing felon or a parole or probation violator, federal litigation has narrowed that interpretation. Only felony warrants specifically issued for flight will suspend benefits.¹⁴⁶ Moreover, the agency cannot suspend or deny SSI or SSDI benefits on the basis solely of an outstanding warrant for a probation or parole violation; the agency must have additional proof of a violation.¹⁴⁷

Jane's health care coverage through Medicare or Medicaid may be affected by her prior incarceration.¹⁴⁸ Medicare generally does not pay for health care while a person is incarcerated because the correctional facility is required to provide and pay for medical care for any person in its custody.¹⁴⁹ For most people, Medicare Part A eligibility continues during incarceration.¹⁵⁰ Medicare Part B eligibility also continues if the incarcerated person

145 [42 U.S.C. §§ 402\(x\)\(1\)\(A\)\(iv\), 1382\(e\)\(4\)\(A\)](#). A "fleeing felon" is defined in both statutes as someone who is "fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the person flees, for a crime, or an attempt to commit a crime, which is a felony under the laws of the place from which the person flees, or, in jurisdictions that do not define crimes as felonies, is punishable by death or imprisonment for a term exceeding 1 year regardless of the actual sentence imposed"

146 See [Stipulation of Settlement, *Martinez v. Astrue*](#), No. 08-CV-4735 (N.D. Cal. Aug. 11, 2009) (Social Security Administration agrees that "fleeing felon" provision applies only to felony warrants specifically issued for flight). See also [Social Security Administration, Program Operations Manual System \(POMS\), *Martinez Court Case Settlement Overview*](#) (GN 02613.860) (Oct. 6, 2016).

147 See [Clark v. Astrue](#), 274 F.R.D. 462 (S.D.N.Y. 2011) (*Clark IV*); [Clark v. Astrue](#), 602 F.3d 140 (2d Cir. 2010) (*Clark III*); [Social Security Administration, Program Operations Manual System \(POMS\), *Clark Court Order: Overview*](#) (GN 02615.100) (Oct. 6, 2016).

148 See generally [Jennie Sutcliffe et al., *Unlocking the Affordable Care Act's Potential for Justice-Involved Individuals*](#), CLEARINGHOUSE (Sept. 2016).

149 See [42 C.F.R. §§ 411.4, 411.6, 411.8](#) (2017); [Estelle v. Gamble](#), 429 U.S. 97 (1976) (constitutional right to government-subsidized health care).

150 See [42 C.F.R. § 411.4](#).

SSI payments are suspended when a person has been incarcerated for a full calendar month; eligibility is terminated after 12 consecutive months of incarceration.

continues to pay her Part B premium.¹⁵¹ However, because many people rely on their SSDI payment to pay the Part B premium and SSDI is suspended after 30 days of incarceration, keeping Medicare Part B without an SSDI payment can be difficult for incarcerated persons.¹⁵² If Jane were on Medicare and did not pay her Medicare Part B premium during incarceration after her SSDI payments were suspended, her eligibility would terminate; she would need to reapply after her release during the next open enrollment period to obtain coverage.

Medicaid likewise does not generally pay for health care while someone is incarcerated.¹⁵³ If Jane were on Medicaid, the effect of incarceration on her enrollment would

incarceration, she will need to reapply after her release from incarceration.

A reentry advocate can assist Jane in a number of ways. If Jane has been released from incarceration and the Social Security Administration suspended her SSI benefits due to the length of her incarceration, an advocate must direct her to contact the Social Security Administration immediately to reinstate her benefits. Unless she informs the agency that she is no longer incarcerated, the agency would not be aware that she is eligible to receive benefits again and would automatically terminate her benefits after 12 consecutive months. Moreover, if Jane did not report her incarceration and is responsible for an SSI or SSDI overpay-

People who have open warrants on criminal charges or probation or parole violations are ineligible for SNAP or TANF.

depend on state law.¹⁵⁴ As of 2016, the District of Columbia and 16 states suspend Medicaid coverage, 15 states suspend it for a specific period of time, and 19 states terminate coverage.¹⁵⁵ If Jane is in a state that terminates enrollment as a result of

ment, a reentry advocate could help her apply for an overpayment waiver or ask the agency to withhold less each month.¹⁵⁶

If Jane's SSI or SSDI benefits are suspended because she is considered a fleeing felon or has violated a term of her probation or parole, a reentry advocate should refer her to a public defender or criminal attorney to assist in resolving the criminal violations. In the meantime, a reentry advocate can help Jane draft a protest-of-suspension letter and argue that her

151 2017 MEDICARE HANDBOOK 26 (Judith A. Stein & Alfred J. Chipilin Jr. eds., 2017).

152 *Id.*

153 See [42 U.S.C. § 1396d\(a\)\(29\)\(A\)](#); [42 C.F.R. §§ 435.1009, 435.1010](#).

154 See generally [Council of State Governments Justice Center, *Medicaid and Financing Health Care for Individuals Involved with the Criminal Justice System*](#) (Dec. 2013).

155 [Elizabeth Hagan, *Families USA, Medicaid Suspension Policies for Incarcerated People: 50-State Map*](#) (July 2016).

156 See [42 U.S.C. §§ 404\(a\); 1383\(b\)](#); [20 C.F.R. §§ 404.501-545, 416.501-590](#).

benefits should not have been suspended for a variety of reasons including “good cause.”¹⁵⁷ A reentry advocate could help determine Jane’s current health care coverage status and offer information about how her incarceration affected her health care and what health care options she now has.

Jane: “I spent six months in prison for a misdemeanor marijuana offense. I also have an open warrant in another state. Am I eligible for food stamps or welfare?”

Temporary Assistance for Needy Families and the Supplemental Nutrition Assistance Program. If Jane has a felony drug conviction on her criminal background, she will never be able to receive Supplemental Nutrition Assistance Program (SNAP) benefits (i.e., food stamps) and Temporary Assistance for Needy Families (TANF) assistance (commonly known as welfare) unless she lives in a state that opted out of this federal ban.¹⁵⁸ As of 2016, in regard to the drug-felony SNAP prohibition, 18 states have completely abandoned it, 26 states have partly eased the restrictions, and 6 states continue to enforce the ban fully.¹⁵⁹ With respect to the drug-felony TANF ban, 23 states maintain a partial ban, and 13 states enforce a full ban.¹⁶⁰ As in the social security rules pertaining to open bench warrants, people who have open warrants on criminal charges or probation or parole violations are ineligible for SNAP or TANF.¹⁶¹

While Jane does not have many civil legal remedies concerning her eligibility for SNAP or TANF, an advocate can help by educating

her about what public benefits she might qualify for and referring her to a public defender or criminal defense attorney to help resolve her outstanding criminal cases.

As civil legal aid lawyers, we know firsthand that fairness and equality should never be taken for granted. Behind every “Jane” is a person who does not deserve to have society strip her dignity and humanity away. Whether she has committed a crime of poverty, passion, or premeditated malice, we must do our part to dismantle perceptions—even our own—of who Jane is today based on a record of her past. Through expunction of a conviction or challenging a denial of admission into housing, each of us has a role to play in empowering those whom society marginalizes, discriminates against, and overlooks. Through this work, we can create a just and merciful society.

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157 [42 U.S.C. §§ 402\(x\)\(1\)\(B\)\(iii\); 1382\(e\)\(4\)\(C\)](#).

158 See [21 U.S.C. § 862a](#) (2015).

159 [Eli Hagar, Marshall Project, Six States Where Felons Can't Get Food Stamps](#) (Feb. 4, 2016) (citing Pew Charitable Trusts and Legal Action Center).

160 *Id.*

161 [7 U.S.C. § 2015\(k\)](#) (2015); [42 U.S.C. § 608\(a\)\(9\)](#).