

2015

## Remarks on Collateral Consequences of Mass Incarceration

William C. Hubbard

*Nelson Mullins Riley & Scarborough*

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/clp>



Part of the [Criminal Law Commons](#), and the [Law Enforcement and Corrections Commons](#)

---

### Recommended Citation

Hubbard, William C. (2015) "Remarks on Collateral Consequences of Mass Incarceration," *Criminal Law Practitioner*. Vol. 2 : Iss. 2 , Article 3.

Available at: <https://digitalcommons.wcl.american.edu/clp/vol2/iss2/3>

This Article is brought to you for free and open access by Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Criminal Law Practitioner by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact [kclay@wcl.american.edu](mailto:kclay@wcl.american.edu).

## REMARKS ON COLLATERAL CONSEQUENCES OF MASS INCARCERATION

by ABA President William Hubbard

According to the Sentencing Project, there are approximately seven million Americans under some form of correctional control, including more than 2.2 million incarcerated in federal or state prisons and local jails.<sup>1</sup> One in every 108 Americans is behind bars—the highest proportion in the world.<sup>2</sup> This disproportionately affects communities of color, which represent more than 60% of the incarcerated population.<sup>3</sup> The ballooning incarceration rate in this country is without question a serious problem that has vexed judicial scholars and policymakers alike. The high rate of incarceration burdens American taxpayers, who must shoulder the more than \$80 billion spent annually on federal, state, and local corrections programs.<sup>4</sup> And it burdens

the American family, with more than half of adult inmates being parents of minor children.<sup>5</sup>

What happens, in practice, to the more than 600,000<sup>6</sup> Americans who are released from federal and state prisons each year? Having even a minor criminal record can trigger a quagmire of lifelong barriers to reentry for ex-offenders in all areas of life, including access to housing, employment, public assistance, education, and the ballot box, among other things.<sup>7</sup> Some restrictions on ex-offenders serve meaningful public safety goals, but many do not increase public safety in any appreciable way. This has caught the attention of both the American Bar Association and the current Administration.

In 2013, the Justice Department launched the Attorney General's Smart on Crime Initiative, which included as part of its goals an effort "[t]o bolster prevention and reentry efforts to deter crime and reduce recidivism."<sup>8</sup> The DOJ supported<sup>9</sup> the ABA's efforts to create an online catalog—the National Inventory of the Collateral Consequences of

1 *Report of The Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System* at 1, The Sentencing Project (Aug. 2013), [http://sentencingproject.org/doc/publications/rd\\_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf](http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf).

2 Lauren E. Glaze & Erinn J. Herberman, *Correctional Populations in the United States, 2012* at 3, U.S. Dep't of Justice Bureau of Justice Statistics (Dec. 2013), <http://www.bjs.gov/content/pub/pdf/cpus12.pdf>. [No citation for the second point of sentence, comparing global citation.]

3 *Facts About Prisons and People in Prison*, The Sentencing Project (Jan. 2014), [http://sentencingproject.org/doc/publications/inc\\_Facts%20About%20Prisons.pdf](http://sentencingproject.org/doc/publications/inc_Facts%20About%20Prisons.pdf).

4 Rebecca Vallas & Sharon Dietrich, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records* at 2, Ctr. for Am. Progress (Dec. 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf> [hereinafter *One Strike and You're Out*].

5 *Id.* at 6.

6 *Id.* at 7.

7 See generally Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. Rev. L. & Soc. Change Rev. L. & Soc. Change 585 (2006) [hereinafter Pinard & Thompson, *Offender Reentry*].

8 *Smart on Crime: Reforming the Criminal Justice System for the 21st Century* at 1, U.S. Dep't of Justice, U.S. Dep't of Justice (Aug. 2013), <http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf>.

9 *Id.* at 5.



Conviction—of over 45,000 federal and state statutes and regulations that impose collateral consequences on persons convicted of crimes.<sup>10</sup> The searchable database categorizes collateral-consequence laws by jurisdiction, the area of life affected, the type of offense, and whether the law applies automatically or at the discretion of a government agent.<sup>11</sup> This should serve to expose and render searchable the complex web of federal, state, and local laws that impose collateral consequences on ex-offenders. But there is more work to be done, as recent and unfortunate social and economic data from the Center for American Progress suggest.

Consider barriers to employment: 87% of employers conduct background checks, and recent surveys indicate that most employers are unwilling to hire applicants who have served time in prison.<sup>12</sup>

Many states per se bar ex-offenders from public employment.<sup>13</sup> No wonder, then, that approximately 60% of formerly incarcerated individuals remain unemployed one year after their release.<sup>14</sup> We want released inmates to earn sufficient income to support themselves and to assist their families. If they do not get work, their likelihood of recidivism increases.

For those who do find work, the resultant pay cuts are staggering: formerly incarcerated men take home 40% less pay annually, resulting in an average earnings loss of nearly \$179,000 by age 48.<sup>15</sup> The nation as a whole suffers from this unfortunate reality. In 2008, the Center for Economic Policy

Research estimated that the loss in GDP due to employment barriers for people with criminal records was as much as \$65 billion annually<sup>16</sup>—higher than the GDPs of more than half the world's nations<sup>17</sup>—and employers are losing qualified and motivated workers as a result of the stigma associated with prior incarceration.

What about housing? For many ex-offenders, collateral-consequence laws put public housing out of reach. 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.<sup>18</sup> Entire households may be evicted based on the arrest or pending criminal charge of one household member.<sup>19</sup> 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.<sup>20</sup> Private housing is not easy to come by either. Most landlords use background and credit checks to screen out prospective tenants with criminal records.<sup>21</sup> It is no wonder, then, that nearly one-third of individuals released from incarceration expect to go to homeless shelters,<sup>22</sup> which are more often than not unsafe.<sup>23</sup> Obviously, lack of stable housing undoubtedly contributes to increased recidivism. So what about public assistance—can ex-offenders struggling to find jobs after their release from incarceration rely on this important safety net? Not always. In a majority of states, persons with felony drug convictions face a lifetime ban on receiving

10 *National Inventory of the Collateral Consequences of Conviction*, Am. Bar Ass'n, <http://www.abacollateralconsequences.org/> (last visited Mar. 26, 2015).

11 *See id.* The various functions of the national database can be manipulated by visiting the website, selecting a jurisdiction, and filtering the results using the drop-down menus provided.

12 Vallas & Dietrich, *One Strike and You're Out*, *supra* note 4, at 9.

13 *See* Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-convicts*, 38 U.S.F. L. Rev. 193, 196 (2004).

14 *One Strike and You're Out*, *supra* note 4, at 10.

15 *Id.*

16 *Id.*

17 *See Gross domestic product 2013*, World Dev. Indicators Database, World Bank (Dec. 16, 2014), <http://databank.worldbank.org/data/download/GDP.pdf>.

18 *One Strike and You're Out*, *supra* note 4, at 16.

19 *Id.*

20 Pinard & Thompson, *Offender Reentry*, *supra* note 7, at 595.

21 *One Strike and You're Out*, *supra* note 4, at 19.

22 *Id.* at 16.

23 *See, e.g.,* Winnie Hu, *Review of New York Shelter System Finds Hundreds of Violations*, N.Y. Times, Mar. 12, 2015, <http://www.nytimes.com/2015/03/13/nyregion/new-york-homeless-shelter-system-violations-report.html>.



public assistance.<sup>24</sup> In 2013, approximately 180,000 women were subject to the ban on such assistance in the twelve states with the most punitive policies.<sup>25</sup> A recent study of persons recently released from incarceration in Texas, California, and Connecticut likened their level of food insecurity to that in developing countries.<sup>26</sup> 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.<sup>27</sup>

Mass incarceration also reduces access to education. Roughly 40% of inmates lack a high school diploma or GED, and many are illiterate.<sup>28</sup> Low education and literacy levels decrease ex-offenders' ability to compete in an increasingly competitive job market. For those ex-offenders fortunate enough to seek higher education, the barriers do not end. Former offenders may be ineligible for governmental assistance.<sup>29</sup>

GED programs may not be available, and even when they are available, some released inmates cannot benefit from these programs without first receiving remedial education that is not provided to them. This lack of access to education has an untold effect on the vicious cycle of poverty perpetuated by mass incarceration. A recent study estimates that "our nation's poverty rate would have dropped by twenty percent between 1980 and 2004 if not for mass incarceration and the subsequent criminal records" that plague ex-offenders long after they have satisfied "their debt to society."<sup>30</sup>

Perhaps the greatest, most public barrier to reentry is the inability for ex-offenders to change any of these collateral consequences in the electoral process. An estimated 5.85 million Americans in forty-eight states cannot vote because of laws that prohibit

convicted felons from voting.<sup>31</sup> One in every thirteen African Americans is disenfranchised under these laws.<sup>32</sup> This troubling fact arguably has altered the outcomes of many elections in this country.<sup>33</sup> Therefore, "[t]he loss of voting power has ramifications not only for the individual ex-offender, but also for the communities to which ex-offenders return, (which will then include growing numbers of residents without a recognized political voice,") and the nation at large.<sup>34</sup>

These disturbing statistics and facts are just some of the many quantifiable social and economic impacts of mass incarceration and its collateral consequences. Recent efforts to expose and ameliorate these problems are an admirable first step. But as these figures clearly illustrate, there is more work to be done.

24 *One Strike and You're Out*, *supra* note 4, at 22.

25 *Id.* at 23.

26 *Id.*

27 *Id.*

28 *Id.* at 26.

29 *One Strike and You're Out*, *supra* note 4, at 27.

30 *Id.* at 1.

31 *Felony Disenfranchisement: A Primer* at 1, The Sentencing Project (updated Apr. 2014), [http://www.sentencingproject.org/doc/publications/fd\\_Felony%20Disenfranchisement%20Primer.pdf](http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf).

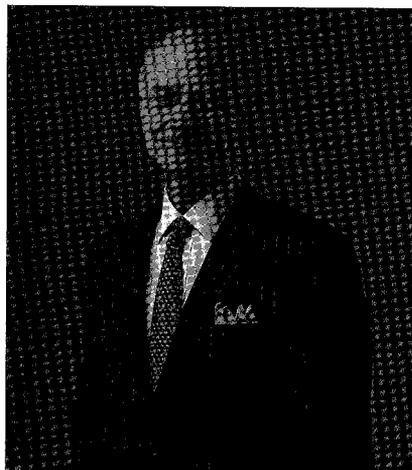
32 *Id.* at 2.

33 Pinard & Thompson, *Offender Reentry*, *supra* note 7, at 598.

34 *See id.* at 599.



## About the AUTHOR



**William C. Hubbard**, a partner with the Columbia, S.C., office of Nelson Mullins Riley & Scarborough, is president of the American Bar Association.

Hubbard established the ABA Commission on the Future of Legal Services, which will make recommendations on how technology and innovation can help expand the availability of affordable legal services to the poor and middle class. He is also emphasizing the ABA's advocacy on criminal justice and sentencing reform, strengthening the association's legal efforts on behalf of domestic violence victims, and leading the ABA's commemoration of the 800th anniversary of Magna Carta in June 2015.

Hubbard has held a variety of leadership positions within the ABA. He served two years as chair of the ABA House of Delegates (2008-10) and is a past president of the American Bar Foundation and the American Bar Endowment. He also served on the ABA Board of Governors, the ABA Standing Committee on the Federal Judiciary, and the ABA Young Lawyers Division as its chair. He is a member of the council of the American Law Institute, and is a Fellow of the American College of Trial Lawyers.

Hubbard is chair of the board of directors of the World Justice Project, a multinational, multidisciplinary initiative to strengthen the rule of law worldwide. He is a permanent member of the U.S. Fourth Circuit Judicial Conference. In addition to South Carolina, he is also admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the Fourth Circuit, the U.S. Court of Appeals for the Federal Circuit, the U.S. District Court for the District of South Carolina, and the U.S. District Court for the District of Columbia. Hubbard also has served on the board of trustees of the University of South Carolina since 1986, including as chairman of the board from 1996 to 2000.

Hubbard practices business litigation related to breach of contract, business torts, breach of fiduciary duty claims, unfair trade practices, energy and utilities disputes, and class actions.

In 2002, Hubbard received the Order of the Palmetto, the highest civilian award given by the governor of South Carolina. He has been honored several times by his alma mater, receiving the University of South Carolina's Distinguished Alumni Award (2009), the University of South Carolina School of Law Compleat Lawyer Platinum Award (2010), and the University's highest recognition, the Honorary Doctor of Laws (2010). Hubbard received the American Inns of Court Professionalism Award for the Fourth Circuit in 2007. He is listed in *The Best Lawyers in America*.

Before joining Nelson Mullins Riley & Scarborough, Hubbard served as a law clerk for Judge Robert F. Chapman of the U.S. District Court for the District of South Carolina. He graduated from the University of South Carolina in 1974 with a bachelor's degree in history. He received his J.D. degree from the University of South Carolina School of Law in 1977.



COLLATERAL CONSEQUENCES HAVE GROWN  
EXPLOSIVELY AS A PART OF THE RELATED  
"WAR ON DRUGS" AND "TOUGH ON CRIME"  
MOVEMENTS.