

**Comments of The Bronx Defenders and Reentry Net  
National Conference of Commissioners on Uniform State Laws  
Uniform Collateral Sanctions and Disqualifications Act  
November 3, 2005**

Members of the Uniform Collateral Sanctions and Disqualifications Act Drafting Committee:

My name is McGregor Smyth, and I am the Project Director of the Civil Action Project and Reentry Net at The Bronx Defenders. I offer these comments along with Kate Rubin, Coordinator for the Reentry Net project. Thank you for the opportunity to share our thoughts on the collateral sanctions and hidden punishments of the criminal justice system.

The Bronx Defenders offers integrated holistic services to indigent criminal defendants and their families, including criminal defense, civil legal services, social services and treatment, investigation, and youth programs. A national leader in the “community defender” initiative, The Bronx Defenders recognizes that most clients cycle through the criminal justice system as a result of deep and interrelated social problems that existing social services have failed to address. The Civil Action Project of The Bronx Defenders strives to meet the comprehensive needs of a critically underserved population – persons with criminal records and their families. The project provides comprehensive legal services to our clients and their families by fully integrating civil representation with our criminal defense practice. Its goal is to use supportive interventions to address the structural issues that trap low-income clients in recurring encounters with the criminal justice system.

Reentry Net,<sup>1</sup> a project of the Bronx Defenders and Pro Bono Net, is an online training and support center for individuals and organizations in that advocate for people who have criminal records, those reentering the community after their incarceration, and their families. Reentry Net connects, trains, and supports organizations and advocates working with this community. The goal is to link all groups providing services from arrest through release, promoting continuity of care and increasing capacity through collaboration and access to resources. Among other things, Reentry Net is a free clearinghouse of materials for criminal defense, legal services, social services, courts, policymakers, probation, and parole on the consequences of criminal proceedings.

We are enthusiastic about the work of your Drafting Committee on the Uniform Collateral Sanctions and Disqualifications Act (UCSDA), and offer the following comments based on our experience working with thousands of clients and hundreds of organizations that make up the reentry community. Underpinning our comments and recommendations is our definition of “reentry” as a process that begins at arrest and continues through community reintegration. This shift in the paradigm of reentry and collateral consequences highlights the

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<sup>1</sup> Visit Reentry Net/NY at [www.reentry.net/ny](http://www.reentry.net/ny).

substantial role that criminal defense attorneys can play in the process and expands the focus beyond convictions.

## **RECOMMENDATIONS**

The Drafting Committee recognizes that if formerly incarcerated people cannot find work, shelter, or help, they are much more likely to be caught in a recurring cycle of crime. This cycle of crime is perpetuated in significant part by the collateral damage inflicted by the criminal justice system. Complications such as a loss of benefits, a job, or a home often serve as the catalyst for entry into the criminal justice system, along with deeper problems such as homelessness, addiction, unemployment, or mental illness.<sup>2</sup> The ensuing arrest, criminal charge, or conviction can result in significant legal and practical disabilities that only exacerbate the social problems that often contribute to criminal behavior.<sup>3</sup>

At every stage of the criminal justice system, from arrest to reintegration into the community, indigent defendants suffer significant and disproportionate non-criminal consequences resulting from the criminal charges.<sup>4</sup> These “invisible punishments” are severe and often unforeseen. Simply being accused of a crime frequently causes the loss of a hard-earned job for a person who has striven to establish self-sufficiency. Convictions can lead to immediate eviction, termination of employment, loss of benefits, or deportation.

The November 2005 draft of the UCSDA is an impressive array of provisions that would benefit many of our clients. We believe, however, that there are a number of areas that warrant further development.

### ***OVERALL RECOMMENDATIONS***

In general, we would urge the Drafting Committee to consider four important features of any legislation in this area.<sup>5</sup> First, legislation should require data collection and reporting requirements. We really have very little empirical information on the incidence of these sanctions, such as how many employment licenses are denied because of a criminal record, or even how many public housing applications are denied. Second, bills must have strong enforcement provisions - both administrative remedies and enforcement and private rights of action. Third, proposals should use guided discretion, or have lists of factors to guide decisionmaking.<sup>6</sup> Fourth, legislation should have financial incentives such as bonding, tax

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<sup>2</sup> See, e.g., McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, 37 CLEARINGHOUSE REV. (J. POVERTY L. & POL'Y), May-June 2003, at 56, available at <http://www.nlada.org/DMS/Documents/1058455948.26/Bridging%20the%20Gap.pdf>.

<sup>3</sup> *Id.* at 57. Our office hopes that a broader recognition that these disabilities are not only draconian and disproportionate, but also actually foster recidivism rather than acting as disincentives to crime, will lead to a large-scale reassessment and repeal of these sanctions.

<sup>4</sup> See generally McGregor Smyth, *The Bronx Defenders, The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records* (4<sup>th</sup> ed. Aug. 2005) (discussing the hidden consequences of a criminal proceeding in New York), available at <http://www.reentry.net/ny>.

<sup>5</sup> Adapted from comments by Kirsten Levingston of the Brennan Center.

<sup>6</sup> The UCSDA artfully uses this technique.

incentives, or bonuses built into the funding regime to encourage desired behaviors by decisionmakers.

#### **A. Use Statutory Language that Reduces Collateral Damage and Promotes Reintegration.**

Statutory language frames issues of public policy and establishes legal definitions. Model codes, in particular, have the power to change the way that lawmakers and policymakers approach significant problems. Given the Drafting Committee’s recognition of the gravity of the consequences resulting from criminal justice involvement, we urge the Committee to make an explicit decision to use language that itself reduces the stigma of this involvement and promotes more effective reentry.

Model language should avoid the use of such labels as “offender,” “ex-offender,” or “felon” in favor of more neutral descriptors as “person with a criminal record” or “person with a felony conviction.” This language is more precise and better corresponds to the statutes and policies that impose sanctions based on one’s criminal record. Such specificity also helps to clarify the different points in the criminal process where a sanction is imposed. Continuing to use these pejorative labels is as counterproductive, in its own way, as the legal barriers themselves. To promote and plan for the reintegration of formerly incarcerated persons into society, a model statute must discuss them as real people, with family and community ties, not merely as “ex-offenders.”

#### **B. Expand the Scope of the Act Beyond Convictions to Cover Arrests.**

The discussion of collateral sanctions must address all of the legal barriers and invisible punishments faced by people with even the most minor criminal histories, including those who were arrested but not convicted. The Drafting Committee has already recognized that hidden sanctions are not limited to felony convictions. Indeed, felony convictions are a substantial minority of cases. In 2002 in New York State, for example, more than two-thirds of adult arrests were for misdemeanors, while only 9% were for violent felonies.<sup>7</sup>

In fact, individuals who have been through proceedings for misdemeanors and even non-criminal violations are disproportionately burdened by the unforeseen consequences of these proceedings, especially given the very minor nature of their charges. For example:

- A plea to disorderly conduct, defined by New York law as a non-criminal offense, makes a person presumptively ineligible for New York City public housing for two years.<sup>8</sup>

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<sup>7</sup> New York State Division of Criminal Justice Services, *Criminal Justice Indicators New York State: 1998-2002*, at <http://criminaljustice.state.ny.us/crimnet/ojsa/areastat/areast.htm> (last visited Nov. 4, 2004). Numbers were similar for New York City: almost two-thirds of adult arrests were for misdemeanors and only 11% were for violent felonies. *Id.*

<sup>8</sup> See N.Y. Penal Law § 240.20 (McKinney 2002) (defining disorderly conduct); N.Y. Penal Law § 10.00(6) (McKinney 2004) (defining crime as misdemeanor or felony); N.Y. Crim. Proc. Law § 1.20(39) (McKinney 2003) (defining petty offense as violation); New York City Housing Authority Applications Manual, “Standards for Admission: Conviction Factors and End of Ineligibility Periods—Public Housing Program” Ex. F. The Supreme Court’s decision in *Dep’t of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 136 (2002), permits public housing authorities to evict entire families for criminal activity even if the tenant did not know of, could not foresee, or could

- Two convictions for turnstile jumping can lead to deportation of a lawful permanent resident.<sup>9</sup>
- A conviction for any crime bars a person from being a barber, boxer, or bingo operator.<sup>10</sup>
- Conviction of simple possession of a marijuana cigarette makes a person ineligible for federal student loans for a year.<sup>11</sup>

More important, these hidden punishments are not limited to convictions. The limitation of the UCSDA to convictions significantly reduces its impact and ignores the actual experiences of those suffering under invisible punishments. As Kent Markus notes, the public now has extraordinary access to a range of criminal history data to use in any number of standardless, discretionary decisions regarding employment, housing, licensing, and other sustaining life activities.<sup>12</sup> Because of the dearth of information on how well criminal history information works as a predictor of risk, decisionmakers concerned with liability and the appearance of impropriety tend to implement a zero-tolerance approach.<sup>13</sup> Private employers, landlords, and other decisionmakers are increasingly using any arrest or criminal justice involvement to deny access, regardless of the actual disposition or conviction.<sup>14</sup>

An arrest and criminal charge alone can have a devastating impact. For example, a person charged with a crime must appear regularly in court, and the resulting days of missed work frequently cause the loss of a hard-earned job. Poorer defendants are disproportionately affected by this phenomenon, as they are more likely to have jobs without vacation benefits, flexibility, or labor protections.

In addition, a significant number of jobs require public licensing, and these licenses are frequently suspended at the moment of arrest. New York alone has over 100 licensing regimes for a variety of occupations, from barber and security guard to cosmetologist and nurse. The increased automatic dissemination of arrest data from government agencies to these licensing

not control the behavior of other occupants or guests. As Michael Barbosa notes, exclusion from low-income housing can be the equivalent to a sentence of homelessness. See Michael Barbosa, *Lawyering at the Margins*, 11 AM. U. J. GENDER SOC. POL'Y & L. 135, 139 (2002).

<sup>9</sup> Immigration and Naturalization Act (INA), § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (1997). See also Nina Bernstein, *When a MetroCard Led Far Out of Town*, N.Y. TIMES, Oct. 11, 2004, at B1.

<sup>10</sup> N.Y. Gen. Bus. Law § 441 (McKinney 1996); N.Y. Unconsol. Law ch. 7, § 17(b) (McKinney 2002); N.Y. Exec. Law § 435(2)(c)(1) (McKinney 1996).

<sup>11</sup> N.Y. Penal Law § 221.05 (McKinney 2000); 20 U.S.C. § 1091(r)(1) (2000).

<sup>12</sup> Kent Markus, Legal and Policy Options for Dealing with Discretionary Criminal Background Checks, University of Toledo College of Law Symposium on the Legal Barriers to Reentry in Ohio: The ABA Collateral Sanctions in Theory and Practice (Sept. 24, 2004). Devah Pager studied the consequences of a criminal record for the employment outcomes of African American and white job seekers. Using matched pairs of individuals applying for entry-level jobs, she found that a criminal record presents a major barrier to employment. See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIOLOGY 937 (2003). Moreover, a white person with a criminal record was more likely to get a call-back interview than an African American without one. *Id.* at 958.

<sup>13</sup> See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIOLOGY at 958 (March 2003). See also Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1301-06 (2002).

<sup>14</sup> Eighty percent of large corporations perform background checks on job applicants; 69% of small businesses do. Eight years ago, only 51% of large corporations did. See Susan Llewelyn Leach, *Bosses Peek into Job-Seekers' Pasts*, CHRISTIAN SCI. MONITOR, Oct. 13, 2004, at 15. Landlords increasingly run background checks as well, and criminal convictions appear more frequently on routine credit histories.

regimes is making license suspensions the rule rather than the exception. In practice, this means the permanent loss of a job for many people, regardless of the outcome of the case.<sup>15</sup> Similarly, an arrest often triggers termination proceedings in publicly subsidized or private housing, without regard to the eventual criminal disposition.<sup>16</sup>

To provide some context, in New York State, more than one in three people arrested are never convicted of any crime or offense,<sup>17</sup> but they still suffer drastic consequences from their arrest alone. The UCSDA can protect this large population by expanding its provisions to prohibit or limit decisionmaking based on arrests without convictions.

### **C. Limit Access to and Use of Records of Arrests that Ended in a Favorable Disposition.**

#### Seal Records of Arrests without Convictions.

Similarly, the UCSDA cannot adequately guard against these sanctions without limiting access to certain information about criminal records.<sup>18</sup> Among the most damaging types of records are arrest records where the person charged has received a favorable disposition such as a dismissal or acquittal. This category also includes arrests voided at the police precinct or cases that the District Attorney declined to prosecute. Records are made at each point in the criminal justice process after the moment of arrest, and the vicious combination of the computer age and the explosion of background investigation companies makes these records readily available without strict protections.

In New York, for example, Section 160.50 of the Criminal Procedure Law requires the automatic sealing of all official records and papers of an arrest and prosecution after a favorable disposition. Police, prosecutor, court, and state rap sheet records are all sealed and cannot be shown to any person or agency. A number of safety valve exceptions are built in, including access by law enforcement during a subsequent criminal investigation.

Many states, however, have no such protections. Many do not protect this arrest information and make it publicly available.<sup>19</sup> The same public policy that protects the rights of people with criminal convictions should also protect those subjected to failed prosecutions. As discussed above, the proscriptive provisions of the UCSDA should cover these situations. For this subpopulation, we would also argue that a further protection is warranted. When an arrest

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<sup>15</sup> See McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479 (2005).

<sup>16</sup> See, e.g., 24 C.F.R. § 966.4(l)(5)(iii)(A) (2004) (stating that in conventional public housing, a PHA may terminate assistance “regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction”); 24 C.F.R. § 982.553(c) (2004) (analogous provision for Section 8 voucher).

<sup>17</sup> See DCJS, *supra* note 7. In New York State and New York City, only 62% and 57.4%, respectively, of arrests resulted in convictions.

<sup>18</sup> For an excellent discussion of the need to restrict access to criminal records, including extensive background statistics, see Maurice Ensellem, *Employment Screening for Criminal Records: Attorney General's Recommendations to Congress* (Comments of NELP to the US Attorney General, Aug. 5, 2005), available at [www.nelp.org](http://www.nelp.org).

<sup>19</sup> See Legal Action Center, *Roadblocks to Reentry*, available at [www.lac.org](http://www.lac.org).

and prosecution terminate favorably for the person charged, the UCSDA should affirmatively restore him or her to the legal status enjoyed prior to the arrest. New York, for example, automatically restores the rights of those in this situation, returning them to the legal position that they held before the arrest.<sup>20</sup> Fundamental to restoring this status is preventing the flow of information to parties, such as employers and landlords, who should not be making decisions based on it.

#### Limit the Use of these Sealed Records.

Explicitly limit the use of sealed records. Simple sealing provisions such as NY Crim. Proc. L. § 160.50, while strong and motivated by an impressive public policy, lack teeth. Once a sealed record is obtained, there are no clear limits to its adverse use in imposing sanctions in employment, housing, or other areas. Instead, ensure that sealing statutes include a use restriction. The goal is to prevent the use of sealed records in court proceedings, administrative proceedings, and private decisionmaking (such as private employment and housing). It could be drafted as both an evidentiary rule and a use restriction.

#### Limit Access to and Maintenance of Other Sources of Criminal History Data.

The proliferation of private databases of criminal history data, such as entries on routine credit reports, highlights the need to address the maintenance of these records. Consider adding a Fair Credit Reporting Act provision to provide stronger protections for any background check agency providing reports within the state. The accuracy of these reports is notoriously unreliable and incomplete.<sup>21</sup> Some recommendations include time-limiting the reporting of arrests without convictions (none older than a year); increasing enforcement powers; ensuring that all background check companies are covered by the definition of covered entities; requiring that a copy of the report be given to each subject (to promote corrections of errors); and requiring that a copy of the report be given to each subject for comment before any adverse decision is made.<sup>22</sup> In addition, any agency or corporation covered by the state FCRA should abide by the sealing statutes and delete or remove any records that qualify for sealing.

### ***SPECIFIC RECOMMENDATIONS***

#### **Section 2. Definitions**

We recommend that Section 2 be amended to reflect the comments above about expanding coverage of the Act. In addition, when reviewing the differential protections against collateral sanctions and discretionary disqualifications, the Drafting Committee should be aware that many of the most damaging hidden punishments qualify only as “discretionary

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<sup>20</sup> See NY Crim. Proc. L. § 160.60.

<sup>21</sup> See Maurice Ensellem, *Employment Screening for Criminal Records: Attorney General's Recommendations to Congress* (Comments of NELP to the US Attorney General, Aug. 5, 2005), available at [www.nelp.org](http://www.nelp.org).

<sup>22</sup> See NELP's commentary to the AG for more extensive recommendations.

disqualifications” under the current definition.<sup>23</sup> Most immigration, public housing, and employment decisions are not automatic and require the intervening decision of an independent court, agency, or official. Because these consequences fall outside the strict “collateral sanction” definition, the strongest provisions of the UCSDA do not apply.<sup>24</sup>

### **Section 3. Collection of Collateral Sanctions and Disqualifications.**

This provision is an excellent procedural recommendation, and noteworthy for its inclusion of discretionary disqualifications in its codification requirement. We suggest that the UCSDA expand its protection beyond convictions as described above. We also recommend that the Drafting Committee take another step to fulfilling the public policy of promoting successful reentry by removing all stigmatizing labels such as “offender.” Another possible title for the code, for example, is “Collateral Sanctions Resulting from Criminal Proceedings.” This title would also encompass the consequences flowing from arrests and failed prosecutions. We also note that the Commentary repeatedly uses the term “felon.” In addition to recommending a new term that would reflect rehabilitative goals, we suggest that the Commentary mention the legion of hidden punishments resulting from misdemeanor and minor offenses and even arrest alone.

Another interesting procedural limitation on collateral sanctions, suggested by Alan Rosenthal at the Center for Community Alternatives, is to require the filing of a “reentry impact statement” for any new legislation imposing a collateral penalty. Such a process, taken from lessons in environmental law, would ensure a fuller discussion of penalties before passage.

### **Section 4. Advisement at Guilty Plea.**

The Drafting Committee’s Commentary reflects a sensitivity to the realities of the treadmill of the criminal justice system, including the pressures to plead guilty. We fear, however, that the lack of any enforcement authority for this provision vitiates its power. By omitting any sanction for failure to advise, the UCSDA replicates the most damaging legal fiction underlying the false distinction between “collateral” and “direct” consequences. By carving out a large exception to its most important criminal process mandate, the UCSDA threatens to doom itself to irrelevance.

While we recognize the importance of finality of judgments, there should be some provision for vacating or withdrawing pleas that were not adequately advised, with some proof of prejudice. Otherwise, defense counsel and judges actually have perverse incentives: it’s better to give no advice or notice because there can be no finding of ineffectiveness. For example, under current New York law, vacatur for ineffective assistance can only be granted if there was affirmatively incorrect advice. The Bronx Defenders has been approached by dozens

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<sup>23</sup> See Smyth, *supra* note 15 for a similar critique of the ABA Standards.

<sup>24</sup> Countless practical barriers arise as well, including the tremendous weight of child support arrears accrued while in prison or the adverse effect of a criminal history on a credit report. See, e.g., Ann Cammett, *Making Work Pay: Promoting Employment and Better Child Support Outcomes for Low-Income and Incarcerated Parents* (NJ Inst. For Social Justice February 2005), available at <http://www.njisj.org/reports/makingworkpay.pdf>; Amy E. Hirsch, Sharon M. Dietrich, Rue Landau, Peter D. Schneider, Irv Ackelsberg, Judith Bernstein-Baker, & Joseph Hohenstein, *EVERY DOOR CLOSED: FACTS ABOUT PARENTS WITH CRIMINAL RECORDS* (CLASP and Community Legal Services 2002), available at [http://www.clasp.org/publications/every\\_door\\_closed.pdf](http://www.clasp.org/publications/every_door_closed.pdf).

of non-citizens who unknowingly plead guilty to offenses that would lead to their deportation.<sup>25</sup> Because their defense attorneys simply failed to give any advice on the immigration consequences of the pleas, the clients were not eligible for any relief, even though they would not have plead guilty had they known the immigration consequences. The remedy for non-compliance with proper advisement is therefore of immense practical importance, in contrast to the suggestion of the Commentary.

## **Section 6. Limitation of Collateral Sanctions and Disqualification Related to Employment, Education, and Licensing.**

Section 6 contains many powerful provisions that limit hidden punishments in certain areas. The wholesale conversion of all existing collateral sanctions into discretionary disqualifications, combined with the statutory presumption against the creation of new collateral sanctions, is an elegant solution. The UCSDA, however, severely limits its efficacy by restricting its application to public actions within employment, education, and licensing.

### Time-Limit all Sanctions.

As suggested by Maurice Ensellem at NELP,<sup>26</sup> all collateral sanctions and discretionary disqualifications should be time-limited from the date of the offense or conviction. In addition, lifetime disqualifications should be eliminated.

### Expand Protections to Private Decisionmaking.

In our experience representing thousands of individuals and providing technical assistance to hundreds of advocates, private discrimination against people with criminal records has the most significant and widespread impact. No solution is sufficient unless it addresses this problem. If the policy of the UCSDA is to reduce barriers to reintegration, promote employment and stability, and increase ties to lawful society, then this policy must also cabin the discretion of private actors. This policy, and the standards set forth in Section 6, must be used to define the “rationality” of private decisionmaking in the same way that other anti-discrimination laws have shaped the world around us.

### Expand Protections to Other Areas such as Housing, Voting, and Family Law.

Moreover, other substantive areas beg for the protection of the UCSDA. Housing, in particular, is fundamental to the reentry process in the same way that employment is. As criminal records are widely available over the internet, through cheap background checks, and on credit reports, landlords increasingly use them to discriminate against people who have been

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<sup>25</sup> These individuals had been represented by other defense counsel in their criminal cases. The Bronx Defenders has a full time immigration attorney who specializes in the immigration consequences of criminal proceedings and advises our non-citizen clients and staff attorneys prior to pleas.

<sup>26</sup> Maurice Ensellem, *Employment Screening for Criminal Records: Attorney General's Recommendations to Congress* (Comments of NELP to the US Attorney General, Aug. 5, 2005), available at [www.nelp.org](http://www.nelp.org).

through the criminal justice system. A few days ago, we received a hotline query typical for Reentry Net:

I am writing on behalf of [a community-based organization] in search of information on housing [people with criminal records]. We run a drop-in center for single homeless adults, a significant number of whom [have criminal records]. We are having difficulty providing housing placements for those with criminal records as many private building owners do background checks which make our clients ineligible. I found your information on-line and was wondering if you know of any programs or organizations that we could refer our clients to for this service. Thank you for your assistance.

Other areas besides housing warrant protection as well, including drivers' licenses (critical to employment), family law, child support arrears,<sup>27</sup> voting, and public benefits and subsidies. Specific provisions could include:

- requiring that the state opt out of the drug felony ban on receipt of benefits funded by Temporary Assistance for Needy Families (TANF);<sup>28</sup>
- requiring that the Department of Corrections and the state welfare office facilitate Medicaid and general assistance applications for eligible jail and prison inmates 45 days before release;
- suspending rather than terminating Medicaid for jail and prison inmates (as recommended by the federal government);<sup>29</sup> and
- allowing courts to consider retroactive reduction or annulment of child support arrears for people whose incarceration has made it impossible for them to pay.

#### Add a List of Prohibited Collateral Sanctions.

The ABA Standards provided an excellent list of sanctions that should never be imposed. The Commentary to the UCSDA notes the ABA provision, but provides no explanation for its exclusion. We believe that such a list is critical for a model statute.

#### Add Enforcement Mechanisms.

Despite its strong proscriptive language, the UCSDA is notably devoid of any enforcement mechanisms. New York's long experience with various protections against collateral sanctions has proven the importance of strong enforcement tools – because New York

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<sup>27</sup> For example, states have the authority to suspend child support obligations automatically during terms of incarceration. See Ann Cammett, *Making Work Pay: Promoting Employment and Better Child Support Outcomes for Low-Income and Incarcerated Parents* (NJISJ, Feb. 2005); Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, ABA JUDGES' JOURNAL, Vol. 43, No. 1, at 6 (Winter 2004).

<sup>28</sup> See N.Y. Soc. Serv. L. § 95.

<sup>29</sup> See Letter of Glenn Stanton to State Medicaid Directors (May 25, 2004).

lacks them, the paper protections are largely ignored. A recent study of employment discrimination in New York City proved this point.<sup>30</sup>

We recommend that the Drafting Committee add a set of enforcement provisions, including administrative remedies and enforcement, private rights of action, and attorneys' fees. It may be more helpful to reframe the protections as anti-discrimination laws, using the Model Sentencing and Corrections Act and NY Exec. L. § 296(16) as examples. As a reasonable corollary to the private right of action, a model code should also provide an affirmative defense to employers, landlords, and other decisionmakers who follow the decisionmaking factors set out in Section 6. For example, an employer that can prove it complied with that process would have a defense against a negligent hiring lawsuit.

### **Add Section Requiring Consideration of Collateral Sanctions and Discretionary Disqualifications at Sentencing.**

The UCSDA should add a provision requiring the sentencing court to take into account all applicable collateral sanctions and discretionary disqualifications in making a sentencing determination. The ABA Standards recommend a similar approach. Such a consideration is fundamental to an expanded conception of truth in sentencing and to determining the true equities of a sentence.

### ***STRUCTURAL IMPROVEMENTS IN SERVICES***

Structural reform in the service sector may be beyond the scope of the Drafting Committee's mandate. We believe, however, that any discussion of hidden sanctions should also reference the disjunction between the draconian consequences of criminal proceedings and the incredible dearth of services available to mitigate them. In the face of dire need for effective services for the hundreds of thousands of people involved with the criminal justice system, there is an enormous gap in comprehensive programs. This gap primarily manifests itself in three ways:

1. Many clients simply cannot obtain necessary services, particularly legal services, to cope with hidden civil consequences.<sup>31</sup>

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<sup>30</sup> See Devah Pager & Bruce Western, *Barriers to Employment facing Young Black and White Men with Criminal Records* (Draft, 2005).

<sup>31</sup> A recent study by the Legal Services Corporation found that, each year, four out of five low-income Americans needing legal help are unable to obtain it, leaving at least 16 million legal problems unaddressed. See "Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans" (LSC, Sept. 2005), available at <http://www.lsc.gov/press/releases/101705pr.htm>. While there is one attorney per 525 people in the general population, there is only one legal aid attorney for every 6,861 low-income people. Another study found that no more than 14% of the legal needs of New York's poor were being met. See Evan A. Davis, Otto L. Walter Lecture at New York Law School, *A Lawyer Has an Obligation: Pro Bono and the Legal Profession* (Apr. 10, 2001), available at [http://www.abcnny.org/currentarticle/otto\\_walter\\_lecture.html](http://www.abcnny.org/currentarticle/otto_walter_lecture.html). In New York, one of the largest legal services providers is forced to turn away at least six eligible clients for every client that it can help. See Michael Barbosa, *Lawyering at the Margins*, 11 AM. U. J. GENDER SOC. POL'Y & L. 135, 137 (2003).

2. The existing services are fragmented and marked by a lack of coordination and communication.<sup>32</sup>
3. When clients are able to access services, the providers are often uninformed about the wide-ranging consequences of criminal proceedings, particularly those outside the provider's narrow practice areas.<sup>33</sup>

In the current system, structural barriers make it nearly impossible for people to get the services that they need to return successfully from prison or jail and reestablish themselves in a supportive community. The effects of involvement with the criminal justice system require the participation of social service agencies, civil legal aid lawyers, and criminal defense attorneys.

Existing reference resources and practice materials are simply difficult to find and access. The delivery system is fragmented and under-resourced. Advocates too often must work hard at locating resources through word-of-mouth, informal networks, or scattered trainings. In many cases, they do not find the existing resources. Many organizations have developed helpful materials that exist only in print form, and few advocates outside of that office or service area know about them. Those resources that are accessible through the internet are disorganized and scattered across dozens of websites. Meanwhile, no existing structure facilitates communication and collaboration across professional sectors or areas of expertise.<sup>34</sup>

How does this play out for individual clients? A person charged with endangering the welfare of a child could easily have a criminal defense attorney handling his criminal case, a family court lawyer handling a related civil action on abuse, neglect, or termination of parental rights, a civil legal services attorney handling his eviction case, and a social services agency providing treatment services.

Another example: a person reentering the community after incarceration could have housing and family law needs that a civil legal services attorney should address, but also extensive treatment needs – such as substance abuse or family counseling – that social services providers should meet.

The breadth of hidden consequences demonstrates that individuals leaving jail and prison need coordinated advocacy, not segregated services. Conventional divisions of labor continually fail to address this need. An effective response to these problems must cut across sectors and must be holistic.

Though the real solutions to these problems will only come with extensive systemic change – alleviating the true repeat offenders of poverty and racism in our communities – specific improvements in service delivery to the reentry community would reduce recidivism and

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<sup>32</sup> McGregor Smyth, *The Bronx Defenders, Reentry.net: Report on the Planning Process 9-10* (Apr. 2004) (on file with author).

<sup>33</sup> *See id.*; Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 254 (2002).

<sup>34</sup> Reentry Net/NY, which launched on November 3, is an attempt to solve these problems. It will strengthen and expand capacity in the field with an online library of hundreds of resources selected by experts, directories of service providers, the latest news and events, and online communications tools.

government spending on incarceration, and fundamentally improve outcomes for everyone involved.

## **Breaking the Cycle**

Coordinated or integrated services from the time of arrest can target hidden consequences to resolve clients' problems in a comprehensive manner. The Bronx Defenders' experience, for example, has shown the following:

- Comprehensive services can help stabilize a family during the crisis of a criminal case and address many of the underlying social problems (such as addiction and homelessness) that contribute to the cycle of poverty and crime.
- By mitigating the collateral damage of criminal proceedings (such as eviction or loss of a job), comprehensive services can address the root problems that lead to crime and help clients reenter society as productive citizens.
- Integrated, coordinated services are also crucial for formerly incarcerated people. Legal assistance for issues ranging from employment and housing to immigration and procuring ID, social services to address the range of problems encountered during the reintegration process, and ongoing access to quality criminal defense have proven effective in stopping the cycle of recidivism.

## **Create and Consolidate Funding Streams**

As illustrated above, our formerly incarcerated clients specifically suffer from both an overall lack of services, and from the lack of communication and coordination among services they do access. To begin to address the problems faced by the reentry community and improve overall outcomes for individuals, new funding must address these problems directly. Specifically, we recommend:

- *More flexible funding to better address the needs of diverse constituencies:* Funding sources should overcome rather than reinforce strict divisions of labor and expertise that currently fragment service delivery. Funding streams should be flexible enough to support a wide range of education and skill development: defense attorneys educating themselves about the hidden civil legal consequences of criminal proceedings; social service organizations accessing training and materials on overcoming legal barriers their clients face; and civil legal services attorneys gaining exposure to these hidden sanctions and moving beyond specialized practice areas.
- *Support existing experience:* Public defenders, civil legal services attorneys, social services providers, researchers and community organizations are already educating themselves about the broad range of reentry issues, including collateral sanctions. Individual advocates and organizations are developing systems that facilitate communication, implementing innovative strategies for overcoming barriers to reintegration, and sharing best practices with each other. The best use of new funding

would be to support existing work, much of which has been done so far with little or no funding to support it.

- *Fund public defenders to mitigate invisible punishments from the moment of arrest and arraignment:* Meeting individuals as their lives and communities are in crisis, public defenders have a unique opportunity for early intervention. Proper civil advocacy around these issues can result in the reinstatement of benefits or employment, the prevention of an eviction, or the advice that a client choose not to take a plea that will lead to excessive civil disabilities down the road. These interventions can also effectively eliminate the legal difficulties that catalyzed the initial arrest, or that could send a person back into the system after release.
- *Fund comprehensive discharge planning* for people before they leave prison or jail, and ensure that all released inmates have proper state identification

On behalf of the Bronx Defenders and Reentry Net, we thank you again for your leadership on this important issue, and urge you to contact us if we can offer any further information or materials on the topics we have addressed in these comments. Our contact information is as follows:

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