



## **Briefing Paper: Legal Barriers to Prisoner Reentry in New Jersey**

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One of the guiding principles adopted by the New Jersey Reentry Roundtable is that a reentry strategy for New Jersey should “seek to eliminate the structural and legal barriers to reintegration that are unnecessary to reserve public safety.” As we move forward towards this goal, it is critical that we understand the specific barriers facing individuals leaving the custody of the criminal justice system. The purpose of this briefing paper is to begin that analysis by providing an overview of the legal and regulatory framework in New Jersey that impacts, in particular, the community context into which prisoners return. This includes what are often referred to as “collateral consequences” of convictions (or “collateral sanctions”), such as the debarment from receiving public assistance for felony drug convictions, as well as laws which otherwise affect opportunities for former prisoners, such as the laws on record expungement and pre-employment inquiries into arrest and conviction records. The major focus of this paper is on barriers to employment, but we have included summaries as well on public assistance, education, housing, parental rights, and voting, all of which will impact the likelihood of successful reentry. In addition, we highlight some of the options to change or ameliorate the negative reentry impact of these legal barriers in New Jersey, and point out as well some of the existing laws which are actually beneficial to reentry.<sup>1</sup>

### **I. Employment**

Finding and keeping a job is one of the most important challenges facing individuals leaving incarceration or detention. Employment provides necessary financial support for individuals and their

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<sup>1</sup> A number of recent publications provide in depth discussion and a more national or general perspective on these issues: *see, e.g.*, AMY HIRSCH ET AL., EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS (2002), and INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind, eds., 2002); JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (2003). In addition, the Legal Action Center is publishing a fifty-state survey of employment barriers affecting individuals with criminal records.

In addition, the Criminal Justice Section of the American Bar Association has recently proposed new model standards on collateral consequences and disqualifications affecting those with criminal records. The standards are designed to limit sanctions to those specifically warranted by the conduct underlying the offense; to prohibit those that infringe on fundamental rights or frustrate chances of successful reentry, without justification, provide for ready availability of information about the sanctions applicable to certain offenses and ensure that defendants are fully informed and judges include them in determining sentences; and provide a mechanism for obtaining relief from those sanctions. PROPOSED ABA CRIMINAL JUSTICE STANDARDS ON COLLATERAL SANCTIONS AND DISQUALIFICATION OF CONVICTED PERSONS, Standard 19-1.2 [hereinafter “ABA STANDARDS”]

families and is usually required as condition of parole. Research confirms the common sense notion that legitimate employment reduces recidivism. Research is also beginning to document and explain, however, the severe disadvantages individuals with criminal records face in the labor market and the impact this disadvantage has both on individual employment rates and earning potential as well as on broader areas of concern, such as national unemployment rates, community economic stability and racial inequality.

The legal and regulatory environment is one of the factors that can help or hinder the employment prospects for those with criminal records, and therefore merits evaluation by the NJRR. The major components of that environment in New Jersey are laid out below.<sup>2</sup>

*A. Jobs with statutory restrictions arising from criminal convictions*

Individuals are statutorily barred from all public employment or office holding in New Jersey upon conviction of an offense involving dishonesty or crime of the 3<sup>rd</sup> degree or above.<sup>3</sup> In addition, there are about 22 categories of jobs for which certain criminal convictions serve as an absolute bar, most under state law, some under federal law. With a couple of exceptions, these are lifetime prohibitions. The convictions from which the statutory bars arise are specified in some cases, but are in many cases grouped under the broad heading of “crimes of moral turpitude.”<sup>4</sup> The job categories include: aircraft/airport employees; paid public school employees, school bus drivers and school crossing guards; bank employees; bartenders and waiters in establishments where liquor is served; housing authority and municipal police and parking enforcement officers; New Jersey Turnpike Authority employees; liquor retail, wholesale, manufacturing or distributing employees; paid firefighters; child care center employees; community residences for individuals with developmental disabilities.

A greater number of jobs require disclosure of criminal convictions (and mandatory background checks on the part of employers), although many also require employers to consider proof of rehabilitation. While these laws do not explicitly provide for absolute bars for those with criminal convictions, they may function as such: it is unlikely that individuals seeking these jobs will know that they can present evidence of rehabilitation and employers may also interpret the requirement of a mandatory background check as a prohibition against those with criminal records. The types of jobs covered by these laws include: alcohol and drug counselors; casino employees; residential child care staff, children’s group home staff, domestic violence shelter staff; homemaker and home health aides; New Jersey Highway Authority; housing authority employees; nursing home staff; nurse’s aides and personal care assistants; insurance adjusters; social workers; real estate sales personnel and appraisers; solid and hazardous waste disposal personnel; state correctional facility employees; staff of facilities for the mentally ill.

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<sup>2</sup> Useful in preparing this summary was an article prepared by Legal Services of New Jersey, which is currently being updated. See, Judy Capik, *A Criminal Record: A Major Barrier to Getting a Job*, LSNJ REPORT (Legal Services of New Jersey) April 2000.

<sup>3</sup> N.J.S.A. § 2C:51-2. See also, N.J.S.A. § 13:1C-16, which applies specifically to administrators and supervisors of departments of conservation, parks and reservations. The list doesn’t include disqualification from federal employment for five years if you’ve been convicted of advocating overthrow or destruction of the government.

<sup>4</sup> Unfortunately, there is no statutory definition of “crimes of moral turpitude,” and New Jersey courts interpreting the phrase have included a range of different kinds of crimes. They have also indicated that what constitutes a crime of moral turpitude for purposes of disqualification will vary depending on the occupation. Generally, the term encompasses crimes of fraud and dishonesty – such as tax evasion, larceny, concealing stolen property, wire fraud, intentionally passing a bad check – but has also been found to include conspiracy to distribute narcotics, repeated indecent exposure, prostitution and other sexual offenses.

### Some options to consider:

- Eliminate specific occupational bars where unnecessary to advance public safety or security. The Criminal Justice Section of the American Bar Association (ABA), for example, has recommended that no collateral sanction, including occupational disqualifications, be imposed on persons convicted of certain offenses unless “the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstance in which imposing the sanction would not be justified.”<sup>5</sup> While it is not advisable to have someone who was recently convicted of child sexual abuse working in day care center, it seems less reasonable to prohibit a trained home healthcare worker with a 15 year old conviction for drug possession from working in her field.
- Allow occupational bars to expire or become discretionary. A number of the bars listed above already include time limits, an approach which, while not assisting those just released from incarceration, has thus already been recognized by the New Jersey legislature as a reasonable way to address public safety concerns while reasonably assuming that individuals can and should be allowed to rehabilitate themselves and live productive lives. The ABA has recommended, for example that the legislature authorize a court, administrative body or both to enter an order “waiving, modifying or granting timely and effective relief from any collateral sanction.”<sup>6</sup>
- Provide for certificates of rehabilitation. Certificates of rehabilitation provide another approach to diminishing the counterproductive impact of occupational bars on rehabilitation. A certificate of rehabilitation is simply that: an official document that recognizes that an individual has been rehabilitated, with the effect of restoring certain rights and lifting bars on certain jobs, licenses, and benefits. Arizona, California, Nevada and New York all provide for some kind of certification of rehabilitation. New Jersey already has some precedent for this. Under the Rehabilitation of Convicted Offenders Act (see below), a convicted offender who presents to a licensing authority a certificate from the parole board or the chief probation officer of a U.S. District Court or county supervising him or her that he or she “has achieved a degree of rehabilitation indicating that his engaging in the proposed employment would not be incompatible with the welfare of society” cannot be disqualified or discriminated against by a licensing authority.<sup>7</sup> This provision could be extended and more generally applied.

### *B. Occupational Licensing*

New Jersey’s general licensing statute provides that any state licensing board may refuse to admit a person to an examination or may refuse to issue or may suspend or revoke a certificate, registration or license upon proof that an individual has been convicted of or engaged in acts constituting a crime of moral turpitude, or relating adversely to the regulated activity.<sup>8</sup> More than fifty professions in New Jersey are subject to state licensing requirements and thus this statute. **However**, the state also has passed the Rehabilitated Convicted Offender’s Act (RCOA), which was adopted to override the general licensing

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<sup>5</sup> ABA STANDARDS, *supra* note 1, Standard 19-2.2. As described in note 1, the Criminal Justice Section has also recommended, among other things, codification of all collateral sanctions and notification regarding applicable sanctions before guilty pleas, and consideration of such sanctions, and notice to the defendant, at the time of sentencing.

<sup>6</sup> ABA STANDARDS 19-2.5.

<sup>7</sup> N.J.S.A. § 2A:168A-3.

<sup>8</sup> N.J.S.A. § 45:1-21(f).

bar.<sup>9</sup> It provides that any licensing authority cannot discriminate or disqualify an applicant on the basis of a conviction of a crime or disorderly person offense, except in the case of public employees convicted of offenses touching on their public offices or crimes relating adversely to the occupation for which the license is sought. The law also doesn't apply to the Alcohol and Beverage Commission, and doesn't apply to law enforcement agencies.

Basically, the RCOA supercedes any statutes that allow license denials for crimes of moral turpitude. It doesn't apply in the cases listed above where the statute requires disqualification from certain jobs based on convictions of moral turpitude. If a licensing authority seeks to disqualify an individual based on conviction for a crime relating adversely to the occupation, trade, vocation, profession or business for which the license is sought, it must explain in writing how a list of factors relate to the license or business sought. These factors include: nature and seriousness of the crime, circumstances under which it was committed, date of the crime, age of the person at the time, whether the crime was an isolated or repeated incident, social conditions that may have contributed, and any evidence of rehabilitation. The statute further provides that certain evidence of rehabilitation, if presented, should preclude a licensing authority from disqualifying an individual, including as described above, a certificate of rehabilitation from parole or probation.<sup>10</sup>

A note on business licensing: in addition to the statutes described above addressing occupational licensing, a number of statutes regarding the licensing of businesses require applicants to provide criminal background information on themselves, officers and their employees. Within the limits of RCOA, licensing agencies for these businesses will consider the criminal records of applicants, officers of an applicant corporation and employees in deciding whether to grant a license: auto body repair; gas stations with inspection licenses; diesel emission inspection stations; towing and highway services providing parkway services; legalized games of chance; community residences for individuals with developmental disabilities (certain convictions an absolute bar); child care centers (certain convictions an absolute bar).<sup>11</sup>

#### **Some options to consider:**

- The RCOA provides an existing statutory hook, and a framework that incorporates public safety concerns as well as rehabilitation goals, that could be expanded with reference to other collateral sanctions, and also potentially, for further detailing and expanding (see above) the reach of a “certificate of rehabilitation.” It is worth having greater knowledge about how it functions currently.
- Clarify the reach of the RCOA and other occupational bars by codifying a discrete definition of “crimes of moral turpitude.”

#### *C. Drivers' Licenses*

In a suburban state like New Jersey, having a valid driver's license can be critical to obtaining and keeping a job. Many of the employment sectors providing good opportunities for entry-level

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<sup>9</sup> N.J.S.A. § 2A:168A. The bill was originally passed in 1968, and amended in 1974, based on recommendations of the President's Commission on Law Enforcement and the Administration of Justice, and then Governor Cahill's Commission on Vocational Education in Correctional Institutions. See *Matter of C.Schmidt & Sons, Inc.*, 386 A.2d 1321 (A.D. 1978).

<sup>10</sup> N.J.S.A. § 2A:168A-3.

<sup>11</sup> See N.J.A.C. § 13:21-21.5; N.J.A.C. § 13:20-44.5; N.J.A.C. § 13:20-47.5; N.J.A.C. § 19:8-2.12; N.J.A.C. § 13:3-3.9; N.J.A.C. § 10:44A-2.4; N.J.S.A. § 30:5B-1 through -25.3.

positions either require a license or are inaccessible to public transportation.<sup>12</sup> Driver's license suspension, therefore, can be a major barrier to employment, and the laws and regulations affecting suspension will greatly impact the ability of returning prisoners to work. While there are almost 400 ways to lose a license in New Jersey, certain types of suspension are most common, and are most likely to carry implications for reentry success. In practice, the majority of suspensions in New Jersey are not imposed for dangerous driving or actions posing a threat to public safety; in fact, a recent study by the New Jersey Institute for Social Justice found that over half of all suspensions were imposed for financial reasons, failure to pay certain kinds of fines and fees. These include failure to pay insurance surcharges,<sup>13</sup> failure to pay parking tickets,<sup>14</sup> failure to pay child support,<sup>15</sup> and failure to pay any fines imposed by a municipal or superior court (including everything from moving violations to the Drug Enforcement and Demand Reduction fines imposed with drug convictions).<sup>16</sup> Individuals looking for work can find themselves in a "catch-22" situation, unable to work without a license, unable to get the license back without a paying job.

Among the common non-financial suspensions that will particularly affect released prisoners are those imposed upon conviction of any kind of drug related charge; New Jersey law provides for suspensions for 6 to 24 months for these charges.<sup>17</sup> This 1992 law was passed pursuant to the Federal Highway Apportionment Act; failure to enact such provisions would have resulted in New Jersey's loss of some federal highway funding.<sup>18</sup> In addition, individuals can be suspended for failure to appear in municipal court – very common – and for driving while suspended, as well as for any motor vehicle and traffic violations.

#### **Some options to consider:**

The Institute's report, "Roadblock on the Way to Work: Driver's License Suspension in New Jersey", makes a number of suggestions for increasing the fairness of New Jersey's current use of suspension as a sanction and reducing the work disincentives. In addition to eliminating suspensions for non-driving related reasons, these include:

- Provide for conditional or job-related licenses. At least half the states, including New York and Connecticut, have instituted some form of limited driver's license for those under suspension, permitting them to drive for work, job training or education, or health reasons while paying off outstanding fees. Certain drivers, such as those suspended for reasons related to dangerous driving, are ineligible for some period of time under most of these statutes.
- Modify the Comprehensive Drug Reform Act: The driver's license suspension provisions of the CDRA can be made less counterproductive without running afoul of the Federal Highway Apportionment Act. First, the FHAA only requires a minimum 6 month suspension; New Jersey's law provides for a suspension of 6 to 24 months, depending on the offense, which could be reduced. Furthermore, the FHAA requires state law to suspend the licenses of drug law violators except in "circumstances warranting an exception." New Jersey's law could give

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<sup>12</sup> For a detailed discussion of driver's license suspension and employment, see KEN ZIMMERMAN & NANCY FISHMAN, NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE, ROADBLOCK ON THE WAY TO WORK (2001).

<sup>13</sup> N.J.S.A. § 29A-35(b)(2).

<sup>14</sup> N.J.S.A. § 39:4-139.1 *et seq.*

<sup>15</sup> N.J.S.A. § 2A:17-56.43.

<sup>16</sup> *See, e.g.,* N.J.S.A. § 39:4-203.2; N.J.S.A. § 2C:46-2.

<sup>17</sup> N.J.S.A. § 35-16.

<sup>18</sup> 23 U.S.C. § 159.

sentencing judges greater authority to modify suspension orders to permit licensure to facilitate rehabilitation or address severe financial hardship.

- Reform the insurance surcharge system. Insurance surcharges – substantial fines charged by the state for certain violations, on top of other statutory penalties, originally to fund insurance policies for high-risk drivers – are the largest cause of suspensions in New Jersey, with stringent payment requirements, and very high rates of default. As the result of the Governor’s Fix DMV Commission, a task force to study the socio-economic impact of license suspension, with particular regard to the insurance surcharge system is being convened to make recommendations.

#### *D. Protections against employment discrimination*

In jobs that are not covered by the laws described above, New Jersey employers are, for the most part, free to hire or not hire those with criminal records as they see fit. Since the majority of jobs are not affected by those statutes, this is generally the situation that most released prisoners face. New Jersey’s Law Against Discrimination does not include any protections against discrimination based on arrest or conviction. A number of other states do include such protections as part of anti-discrimination law, providing that the fact of a conviction or arrest cannot be the sole basis of hiring decisions.<sup>19</sup> Federal law, while not explicitly protecting individuals from employment discrimination based on arrests or criminal convictions, offers some protection based on the fact that African-Americans and Hispanics are disproportionately represented among those with arrest and conviction records. The Equal Employment Opportunity Commission has taken the position that employers who, by policy or practice, exclude individuals from employment on the basis of criminal record are in violation of Title VII of the Civil Rights Act of 1964, because of the disparate impact on disadvantaged minorities, unless they can show a business necessity for this policy.<sup>20</sup> Discrimination claims under Title VII based on criminal records are considered difficult to prove have been brought infrequently; for the average job seeker and employer, federal anti-discrimination law does not have much effect in this area at present.<sup>21</sup>

Employers in New Jersey also have broad access to information about criminal histories if they do choose to include this in their job screening process. New Jersey places no restrictions on employers’ ability to inquire of job seekers about records of convictions and records of arrests, including arrests that did not lead to conviction, regardless of how far in the past they may be.<sup>22</sup> Inquiries about arrests not leading to conviction, which attest to actions taken by the police and not necessarily any wrong doing by the job applicant, can thus, with particular unfairness, limit future employment. Although New Jersey, unlike some states, does not make criminal records available over the internet, state regulations specifically permit individuals and nongovernment entities to obtain all criminal history information from state repositories if they are seeking to “directly engage the services of the subject of the record, for purposes of determining the subject’s qualifications for employment, volunteer work or other

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<sup>19</sup> For example, see statutes in New York (N.Y. Executive Law § 296) and Connecticut (Conn. Gen. Stat. § 46a-80).

<sup>20</sup> See EEOC, *Policy Guidance on Consideration of Arrest Records in Employment Under Title VII of the Civil Rights Act of 1964, as Amended*, II EEOC Compliance Manual § 604, N: 6005 (Sept. 7, 1990). For a good discussion of the EEOC policy statements, see HIRCSH ET AL., *supra* note 1, at 20-21; *see also*, U.S. DEPT. OF LABOR, FROM HARD TIME TO FULL TIME 13-14 (2001). The three factors considered relevant to the “business necessity” justification are: the nature of the gravity of the offense; the time passed since the conviction and/or completion of the sentence; and the nature of the job sought. If it is an arrest under consideration rather than a conviction, an additional factor to be considered is the likelihood that the individual engaged in the conduct for which he or she was arrested.

<sup>21</sup> A challenge to an employer policy or practice of excluding former prisoners because of its disparate racial impact is in theory possible under N.J. state law, but there is no precedent establishing this.

<sup>22</sup> Fourteen states restrict use of arrest records not leading to conviction for employment decision purposes.

performance of services.”<sup>23</sup> Employers using the information obtained to disqualify someone from a job must provide that person with notice and an opportunity to confirm or deny the accuracy of the information, and must provide a reasonable period of time to correct or complete the record prior to a final determination concerning the job.<sup>24</sup> These records are not supposed to include arrests or convictions that have been expunged or, in the case of juvenile matters, sealed.

Employers using private background check companies or credit reporting services – now fairly common and inexpensive<sup>25</sup> – are under no such restrictions as to use, appropriate notice, or opportunities to correct or explain.<sup>26</sup> Given that the information located by these services is not always accurate, such unrestricted use can lead to further difficulties for an individual with a criminal record trying to reestablish himself or herself in the legal labor market.

### **Some options to consider:**

- Extend protections of Law Against Discrimination to cover discrimination by private employers solely on the basis of arrest or conviction record. Other state statutes provide some models. For example, New York employers of more than 10 employees cannot bar individuals based upon criminal conviction unless there are job-related reasons to do so or the applicant poses direct threat to public safety or property. They must consider evidence of rehabilitation, and the applicant is entitled to a written statement of the reasons for the denial.<sup>27</sup> This kind of provision balances valid public safety concerns with the goal of not unreasonably blocking opportunities for successful reentry. To the extent that the Law Against Discrimination does protect against discrimination, based upon the disparate impact on racial and ethnic minorities, the Division of Civil Rights should update its policy statements (and practices) to reflect this.
- Limit reach of pre-employment inquiries. Other states have, for example, limited employers’ right to inquire about arrest records or limited the age of convictions about which employers can inquire.

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<sup>23</sup> N.J.A.C. § 14-59-1.2(a)(2).

<sup>24</sup> N.J.A.C. § 14-59-1.6. The regulation further affirms that an individual is presumed innocent of any pending charges or arrests for which there are no final dispositions indicated. Requesters must sign certifications that they will comply with these provisions.

<sup>25</sup> Two studies by Harry Holzer, Steven Raphael and Michael Stoll looking at employers’ attitudes to hiring ex-offenders signal an increase in the use of background checks since the 1990s. Henry Holzer et al., *Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and their Determinants*, Program on Housing and Urban Policy Working Paper No. W01-005, October 2001; Henry Holzer et al., *Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles*, March 2003 (unpublished paper, on file with the authors). The earlier study, using data from 1992 and 1994, found that 32 percent of employers in their four city study always performed criminal background checks on potential employees and 17 percent sometimes checked. In the follow up study conducted in Los Angeles in 2001, 44 percent of employer respondents always checked and 18 did so some of the time.

<sup>26</sup> Prior to 1998, the Fair Credit Reporting Act used to prohibit the reporting of convictions more than seven years old, but amendments in that year eliminated that protection. HIRCSH ET AL., *supra* note 1, at, at 19. See 15 U.S.C. § 1681c(a)(5)(repealed) and Consumer Reporting Employment Clarification Act of 1998, P.L. 105-347, § 5(2). According to the National H.I.R.E. Network, the FCRA does, however, provide some protections to individuals with regard to the accuracy of information reported by credit reporting agencies; for example, an employer using information from a credit reporting agency to deny someone employment must inform the job applicant and provide the name, address and phone number of the agency providing the report, and the agency must provide the information contained in that report free to applicant, with some restrictions. State law also provides some individual protections against consumer reporting agencies, but not against employers who use them.

<sup>27</sup> N.Y. CORRECT. LAW §§ 750-54.

- Extend the protections provided to job applicants when public criminal history records are used (notice and an opportunity to respond and/or correct) to employer's use of private consumer reporting agencies.

### *E. Expungement*

Expungement statutes allow individuals to clear older convictions and arrests from their criminal history records, making it possible for them to “clean the slate” as they live lives free from criminal behavior. Under New Jersey law the expungement of an arrest or conviction means that all noticed officers, departments and agencies must reply, with respect to the arrest or conviction or related proceedings, that there is no record information.<sup>28</sup> Expunged events are deemed not to have occurred, and the individual can answer any inquiries about them accordingly, with some exceptions.<sup>29</sup> The primary focus of expungement law in New Jersey is to provide relief to one-time offenders who have since “led a life of rectitude,” but not to assist those who periodically or habitually violate the law.<sup>30</sup> It can thus support rehabilitation and help those with criminal records seeking to move beyond their past behavior, but will not provide immediate assistance to those just being released as they look for work.

Expungement under current law in New Jersey is, however, fairly limited in scope. Convictions for indictable offenses (and all related proceedings) can be expunged after 10 years from the date of conviction, payment of fine, satisfactory completion of probation and parole, or release from incarceration, whichever is later.<sup>31</sup> However, most serious indictable offenses – e.g., murder, kidnapping, aggravated sexual assault, robbery, arson, perjury, false swearing, distribution, sale or possession of controlled dangerous substances with the intent to distribute (except for small amounts of marijuana and hashish), etc. – cannot be expunged, regardless of how much time has passed.<sup>32</sup> Disorderly persons offenses and petty disorderly persons offenses can be expunged after 5 years,<sup>33</sup> and municipal ordinance violations, with some restrictions, after 2 years.<sup>34</sup> Arrests not leading to conviction can be expunged any time after disposition, and job applicants can answer questions about them accordingly.<sup>35</sup> Motor vehicle offenses cannot be expunged. While guidelines for petitioning and granting expungement exist, the courts ultimately consider the award of expungement discretionary.

Expungement is a broader remedy for juvenile adjudications, and can include the entire juvenile record if after 5 years if there were no subsequent convictions, none of the adjudications were for non-expungeable crimes, and no adult convictions were ever expunged or dismissed after completion of supervision or diversion.<sup>36</sup> One time drug possession and use adjudications can be expunged after one year, if certain conditions are met.<sup>37</sup> Juvenile records can also be sealed, either by the court or the person

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<sup>28</sup> N.J.S.A. § 52-15.

<sup>29</sup> The existence of a previously expunged arrest or conviction must be revealed on the application for expungement. N.J.S.A. § 2C:52-8. A person must disclose an expunged record if he or she is seeking employment within the judicial branch or with a law enforcement or corrections agency; those expunged records will continue to bar that person from employment, where applicable. N.J.S.A. § 2C:52-27(c). Expunged records will also be opened and considered by the courts where there is a subsequent conviction and the court are considering supervisory treatment or diversion, N.J.S.A. § 2C:52-20, or for purposes of setting bail or for a presentencing report. N.J.S.A. § 2C:52-21.

<sup>30</sup> N.J.S.A. § 2C:52-1.

<sup>31</sup> N.J.S.A. § 2C:52-2.

<sup>32</sup> N.J.S.A. § 2C:52-2(b). Crimes committed by individuals holding public office that touch on that office cannot be expunged.

<sup>33</sup> N.J.S.A. § 2C:52-3.

<sup>34</sup> N.J.S.A. § 2C:52-4.

<sup>35</sup> N.J.S.A. § 2C:52-6. There can be no expungement, however, if the dismissal was on grounds of insanity.

<sup>36</sup> N.J.S.A. § 2C:52-4.1.

<sup>37</sup> N.J.S.A. § 2C:52-4.1.

who is the subject of the records, if two years have passed and there have been no subsequent convictions.<sup>38</sup>

### **Some options to consider:**

- As currently structured, New Jersey expungement law does not provide much relief for the majority of individuals leaving incarceration, who have been convicted for indictable offenses, and an ever-increasing number for drug-related offenses. The NJRR could consider recommending that expungement law be expanded, for example, to provide some relief for those convicted of drug offenses, or some drug offenses.

### *F. Negligent Hiring*

One of the reasons employers under no legal obligation to perform background checks or bar those with criminal records will do so anyway is fear of liability should an employee commit an act of violence or otherwise harm someone while on the job. New Jersey recognizes the doctrine of “negligent hiring,” meaning that “an employer who negligently hires or retains in his employ an individual who is incompetent or unfit for the job ‘may be liable to a third party whose injury was proximately caused by the employer’s failure to exercise due care.’”<sup>39</sup> That is, if an employer knew or had reason to know of the unfitness or dangerous attributes of an employee, could have reasonably foreseen that these characteristics created a risk of harm to others, and these characteristics were the proximate cause of that harm, the employer can be liable. Employers are under an obligation to exercise reasonable care in selecting competent employees and to refrain from hiring unfit employees.<sup>40</sup> While there is not extensive precedent in this area in New Jersey, the courts have ruled that liability cannot be predicated solely upon failure of the employer to investigate an employee’s criminal record, but will be decided based on a review of the totality of the circumstances.<sup>41</sup>

## **II. Public Assistance**

Public benefits providing cash assistance and food stamps can be critical to help individuals leaving prison and jail get on their feet and pay for basic necessities while looking for work, completing substance abuse treatment, reuniting with their families and otherwise reintegrating with their communities. In addition, eligibility for public assistance means not only cash benefits but also payment for job training, childcare, transportation, and certain kinds of medical assistance (including help to defray the cost of drug treatment).

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), the federal welfare reform law, imposed a lifetime ban on receipt of cash assistance and food stamps for individuals convicted of state or federal felony offenses involving use or sale of drugs.<sup>42</sup> States have the option of either opting out or modifying the ban. Eight states, including New York and Connecticut, and the District of Columbia have opted out of the ban entirely. Twenty states, including New Jersey, have chosen to modify the ban in some way, and the remaining twenty-two states have adopted it in its entirety. It is notable that aside from welfare fraud (see below), drug felonies are the only crimes that result in

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<sup>38</sup> N.J.S.A. § 2A:62.

<sup>39</sup> *Lingar v. Live-In Companions, Inc.*, 300 N.J. Super. 22, 29 692 A.2d 61, 65 (1997)(citing *Di Cosala v. Kay*, 91 N.J. 159, 170, 450 A.2d 508 (1982)).

<sup>40</sup> *DiCosala*, 91 N.J. at 172.

<sup>41</sup> *Lingar*, 300 N.J. Super. at 32.

<sup>42</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193; 42 U.S.C. 862(a).

disqualification. Someone who has been sentenced for murder or kidnapping or embezzlement will be eligible for benefits, while someone convicted of minor drug possession will not. With more people in prison for drug offenses than ever before, particularly in women's prisons, this exclusion, which was included in the law with almost no discussion or debate, has a significant impact and can be counterproductive to rehabilitation.

Work First New Jersey applies the modified ban both to the WFNJ-TANF population (families with children) and to the state-funded general assistance program for single adults (WFNJ-GA). For these programs, individuals convicted after August 22, 1996 of a felony or crime that includes as an element of the crime in the relevant jurisdiction "the distribution of a controlled substance" under the federal "Controlled Substances Act"<sup>43</sup> will, as a general rule, be prohibited from receiving all WFNJ benefits and food stamps.<sup>44</sup> Individuals convicted of "possession and use" felony drug offenses, however, can receive both WFNJ benefits and food stamps if they are enrolled in or have completed a licensed residential treatment program.<sup>45</sup> Eligibility for benefits under this exception starts as soon as an individual is enrolled in the program and continues as long as they stay enrolled or complete the program. During the program, though, and in the 60 days after completion, recipients can be tested for drug use, and if they test positive, they lose eligibility.<sup>46</sup> Also, while in the program, the cash benefits, except for a personal needs allowance, are issued directly to the licensed drug treatment program to offset the cost of treatment.

Individuals on WFNJ-TANF and WFNJ-GA who are convicted of offenses involving "distribution of a controlled substance" can be eligible for food stamps if they enroll in or have completed a licensed residential treatment program, as described above. They cannot get any cash benefits, although those who are GA eligible can qualify for whatever limited medical assistance benefits they would have been able to receive as GA recipients but only while receiving treatment in a licensed residential drug treatment program (with no provision to fund any nonresidential drug treatment).<sup>47</sup> Those on TANF (and single individuals who are elderly or disabled) will still be eligible for Medicaid benefits regardless of any felony drug convictions.

In addition to those with drug felony convictions, federal and state law also forbid assistance to those fleeing to avoid prosecution, custody or confinement after a conviction for a felony or high misdemeanor, or those violating a condition of parole under federal or state law.<sup>48</sup> Individuals applying for benefits who have recently been released from prison and are on either parole or probation will have to show that they are in compliance. If a condition of compliance is payment of fines or court costs, they may not be able to do so, and may then have trouble getting the benefits that will help pay.<sup>49</sup> Those misrepresenting information or committing fraud on their applications will also face limited exclusion from all benefit receipt.<sup>50</sup>

Beyond these statutory restrictions, experts in this area have noted that additional barriers to receiving or continuing to receive benefits arise from the often conflicting requirements of criminal justice supervision and welfare reform work requirements.<sup>51</sup> Those who are not restricted from receiving

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<sup>43</sup> 21 U.S.C. §.802 (6)

<sup>44</sup> N.J.S.A. § 44:10-48(b)(7).

<sup>45</sup> *Id.* By statute, there is no requirement that the individual actually be determined to need residential drug treatment, although there is reportedly more flexibility with this requirement as it is implemented.

<sup>46</sup> This does not include methadone, if they are participating in a methadone program.

<sup>47</sup> N.J.S.A. § 44:10-48.1.

<sup>48</sup> N.J.S.A. § 44:10-48(b)(8).

<sup>49</sup> *See*, HIRSCH ET AL., *supra* note 1, at 32. *See also*, LEGAL ACTION CENTER, GETTING TO WORK: HOW TANF CAN SUPPORT EX-OFFENDER PARENTS IN TRANSITION TO SELF-SUFFICIENCY (April 2001).

<sup>50</sup> N.J.S.A. § 44:10-48(b)(9).

<sup>51</sup> *See* HIRSCH ET AL., *supra* note 1, at 32-35.

TANF benefits, for example, must comply with the work requirements of these programs to avoid getting sanctioned. While most parole plans require work as well, they may also require reporting to a parole officer during work hours, which can lead both to sanctions and to job loss. A parole plan may also require participation in on-going drug treatment, which can also conflict with welfare work requirements. While the goals and requirements of supervision and public assistance programs overlap considerably, they are not coordinated for those falling under both jurisdictions, and neither set of gatekeepers (parole officers, benefits case workers) know much about the other. In addition, individuals leaving prison are often without the documentation they need to apply for benefits as well as documentation to indicate the nature and date of their conviction, whether they are in compliance with parole or probation, etc. There is, finally, no provision to enable eligible individuals to apply prior to release so that benefits can be activated swiftly once they are out, providing much needed basic financial stability.

### **Some options to consider:**

- New Jersey can opt out of the felony drug ban. As mentioned above, a number of states have done this, making it possible for them to use TANF money creatively with the reentry population to assist in reintegration and reduce recidivism.<sup>52</sup> While the deterrent impact of New Jersey's current approach is unclear, it is obvious that this policy excludes individuals who may most be in need of temporary cash assistance as they try to get and stay clean, a goal we would hope to encourage. Moreover, not all individuals convicted of drug-related crimes need residential drug treatment, and resources for such treatment are scarce and waiting lists long. Opting out of the ban (or at least modifying it further) can further provide opportunities to increase the coordination and information sharing between criminal justice supervision and benefit case managers.
- Create administrative pathways to permit applications for public benefits prior to release. The first days and months immediately following release can be incredibly stressful for former prisoners, and when the risk for recidivism is greatest. Allowing individuals to arrange for basic financial support as part of their discharge planning prior to release could significantly ease the transition back into the community.
- Ensure that the requirements of parole and probation (including drug treatment) can be considered pre-employment activities for Work First purposes, and that other aspects of compliance with parole and probation requirements will not be construed as actions that can lead to Work First sanctions.

### **III. Education**

One way for individuals with criminal records to move beyond this background and create better lives for themselves and their families is through education, particularly higher education.<sup>53</sup> Access to education for those with criminal records has become increasingly difficult. Private and public colleges and universities have wide discretion to admit or deny admission to applicants based on criminal convictions.<sup>54</sup> College applications routinely ask about prior convictions. Although New Jersey law does not specifically address this matter (except, as noted above, the failure to include discrimination based on a criminal record on the Law Against Discrimination), federal cases in this area suggest that the standard

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<sup>52</sup> See GETTING TO WORK, *supra* note 49.

<sup>53</sup> Evaluations of prison education programs, within the limits of methodology, have consistently shown an inverse relationship between level of education and recidivism. Gerald G. Gaes, Timothy J. Flanagan et al., *Adult Correctional Treatment* in PRISONS 361 (Michael Tonry and Joan Petersilia, eds., 1999).

<sup>54</sup> See Derek Langhauser, *Use of Criminal Convictions in College Admissions*, 154 ED.LAW REP. 733, 736 (2001).

for an institution's decision to deny or revoke admission is "reasonableness; whether the college's decision is not arbitrary, unreasonable or capricious; and whether it is consistent with standards of professional judgment."<sup>55</sup> The college may establish reasonableness by merely showing a connection between the "nature, severity, or recency of the crime" and the college's interests.<sup>56</sup>

Even if a person with a criminal record is admitted to a school, however, her criminal record may nevertheless prevent her from gaining an education because of federal limits on financial assistance to ex-offenders. The 1992 reauthorization of Title IV of the Higher Education Act of 1965 eliminated prisoners' eligibility for Pell Grants, which largely supported post-secondary education within correctional facilities.<sup>57</sup> The 1998 reauthorization<sup>58</sup> went a step further and included a provision (the "Souder Amendment") that prohibited giving federal financial aid to persons convicted of any drug offense under state or federal law, with various time limits in relation to the recurrence of the offense. For possession offenses, a first offense leads to one year of ineligibility, a second offense, two years. A third offense leads to "indefinite" ineligibility. For sales offenses, a first offense leads to two years of ineligibility, and a second offense leads to "indefinite" ineligibility. "Indefinitely" has been interpreted by the Department of Education regulations to mean "permanently."<sup>59</sup> The periods of ineligibility begin from the date of conviction and only apply to convictions that are on the student's record, thereby excluding expunged and sealed juvenile records.<sup>60</sup> Loans and grant programs affected by the restriction include: Perkins Loans, Federal Direct Loans, Federal Family Education Loans, Federal Pell Grants, Federal Early Outreach and Student Services programs, Federal Supplemental Educational Opportunity grants, Leveraging Education Assistance Partnership program, and others.

As with the federal public assistance benefits described above, these restrictions apply only to those convicted of drug offenses, so individuals convicted of all other kinds offenses are eligible for all of these loans.

#### **IV. Housing**

Finding affordable housing in New Jersey is difficult for all low-income residents; the National Low Income Housing Coalition's 2002 Out of Reach study notes that New Jersey's "housing wage" for a one bedroom apartment, the amount of money a person would need to earn per hour of a 40 hour work week in order to afford an apartment at the average fair market rent, is \$15.58, more than three times the minimum wage.<sup>61</sup> Those returning from prison face additional difficulties, the result not only of the barriers to employment and benefits described above but also of a number of relatively recent state and federal laws limiting access to private and public housing for those with criminal convictions, particularly for drug-related offenses.

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<sup>55</sup> *Id.* (citing Regents of University of Michigan v. Ewing, 474 U.S. 214, 225 (1985)).

<sup>56</sup> *Id.*

<sup>57</sup> 20 U.S.C. § 1091(b)(5).

<sup>58</sup> 20 U.S.C. §§ 1001, 1002. Prior to the 1998 amendment, the Higher Education Act only prohibited loans to students incarcerated during the time they were seeking the loan, as noted above. The law provides that "no incarcerated student is eligible to receive a loan" under work study (part C of subchapter I of chapter 34 of Title 42) or a loan or grant under Title 20, Subchapter IV, Part C.

<sup>59</sup> 64 Fed. Reg. 57,356 (Oct. 22, 1999) (interpreting 34 C.F.R. Part 668).

<sup>60</sup> 34 C.F.R. § 668.40.

<sup>61</sup> National Low Income Housing Coalition, Out of Reach 2002, <<http://www.nlihc.org/>> (accessed April 2, 2003).

### *A. Private Housing*

As noted above, New Jersey's anti-discrimination law, which includes protections against discrimination in housing, does not protect against discrimination on the basis of criminal convictions. Landlords are not restricted from asking potential tenants questions related to their records, or from using information about arrests or convictions gleaned from credit reports.

The New Jersey Anti-Eviction Act, which protects tenants from being removed by landlords without good cause, includes in its enumeration of the exclusive grounds constituting good cause two provisions that can impact individuals with criminal records. First, a tenant can be evicted for good cause if he or she has been convicted or adjudicated delinquent for or pled guilty to an offense under the "Comprehensive Drug Act of 1987" committed within or upon the leased premises and has not successfully completed or been admitted to a drug rehabilitation program.<sup>62</sup> Given the shortage of drug treatment resources in New Jersey, this requirement may be unduly burdensome and, in certain circumstances, unreasonable, as not everyone convicted of a drug crime needs drug treatment. In addition, a tenant can be evicted for knowingly allowing someone else who has been convicted or plead guilty to a drug offense to occupy the premises continuously or intermittently (this does not apply to juveniles).<sup>63</sup> Landlords cannot bring eviction actions, however, more than two years after the date of an adjudication or conviction, or release from prison, whichever is later. This durational limitation is helpful in the long term, but can pose a significant problem for the initial transition from incarceration: a person who has just been released from prison or jail for a drug conviction, who is most likely to need the help of others to find shelter, will put a friend or relative who offers them shelter at risk for eviction.

#### **Some options to consider:**

- Create protections against blanket discrimination in housing on the basis of an arrest or conviction record. While landlords validly want to protect themselves, their properties and other tenants from criminal activity, a prospective tenant with a criminal record should be able to receive some notice of the grounds for refusal, contest the accuracy of a record, and provide evidence of rehabilitation. As noted above, to the extent that New Jersey's Law Against Discrimination protects against housing and public accommodation practices which have a disparate impact on racial minorities, the Division of Civil Rights should make clear the extent to which a policy or practice of excluding anyone with a criminal record may raise a claim.
- Provide protection for tenants against unreasonable evictions relating to criminal convictions. Eviction can be a just and important remedial action when a tenant is conducting illegal activity in a rented property. It is less appropriate, or just, to allow for the eviction of, for example, a relative or friend who helps out a person just out of prison by providing a room or couch to sleep on while he gets on his feet.

### *B. Public Housing*

The Anti-Drug Abuse Act of 1988,<sup>64</sup> followed by the Housing Opportunity Program Extension Act of 1996<sup>65</sup> and the Quality Housing and Work Responsibility Act of 1998,<sup>66</sup> amended the U.S. Housing Act to provide housing authorities (PHAs) with greater power and responsibilities to deny

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<sup>62</sup> N.J.S.A. § 2A:18-61.1(q).

<sup>63</sup> N.J.S.A. § 2A:18-61.1(n).

<sup>64</sup> 102 Stat. 418(d)(1)(6).1 (Nov. 18, 1988), codified at 42 U.S.C. § 1437(d)(1)(5).

<sup>65</sup> P.L. No. 104-120 (March 28, 1996).

<sup>66</sup> P.L. No. 105-276 (October 21, 1998).

housing to applicants, to terminate their Section 8 assistance, and to evict residents if the tenant or any member of the household<sup>67</sup> engages in drug-related or certain other criminal activity,<sup>68</sup> creating the so-called “one strike and you’re out” policy. Conviction of a crime is not necessary for these provisions to apply: the PHA must only prove the activity took place based upon a “preponderance of the evidence” standard.<sup>69</sup> PHAs and owners of buildings accepting Section 8 vouchers may, but do not have to, deny a tenant admission or terminate a tenancy if the tenant is fleeing to avoid prosecution, or custody or commitment, or is in violation a condition of parole under federal or state law.<sup>70</sup> Federal regulations also require PHAs to establish standards prohibiting admission to housing or federally-assisted housing for any household member the agency determines is currently using an illegal controlled substance or has reasonable cause to believe is using or has had a pattern of illegal use of a controlled substance or alcohol that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.<sup>71</sup>

Under the law, PHA’s are permitted to perform criminal background checks<sup>72</sup> and can deny admission to adult applicants with histories of crimes of violence or other criminal acts that could adversely affect other residents.<sup>73</sup> The PHA can ban a person for a reasonable period of time and can require the applicant, as a condition of admission to a housing program or to federally assisted housing, to submit evidence sufficient to ensure that whoever in the household engaged in previous criminal activity has not engaged in any further criminal activity during that subsequent period of time.<sup>74</sup> The PHA can further require an applicant to exclude a household member in order to be admitted to housing unit or to continue to reside there.<sup>75</sup>

With regard to evictions, PHAs must include a lease provision dictating that families will be evicted if a tenant, any member of the household, or their guests engage in criminal behavior on or off the leased premises. Since revision of HUD regulations in 2000, PHAs are no longer required to consider any mitigating circumstances, such as the seriousness of the activity or the effect on household members who were not involved, in deciding whether or not to evict on these grounds.<sup>76</sup> Innocent tenants are essentially held strictly liable for their household members’ and guests’ conduct: PHAs can evict a tenant regardless of whether he or she knew about the criminal activity, or could have foreseen or controlled it.<sup>77</sup> Last year,

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<sup>67</sup> See 24 C.F.R. § 982.310(c).

<sup>68</sup> The implementing HUD regulations note the other types of criminal activity that may warrant conviction, including those that pose a threat to other residents, to “the health, safety, or right to peaceful enjoyment of the premises” by the other residents, or others in the immediate vicinity of the premises, any violent criminal activity on or near the premises by a tenant, household member or guest, fugitive felon or parole violator. 24 C.F.R. § 982.310(2).

<sup>69</sup> 24 C.F.R. § 982.533(c) (2001).

<sup>70</sup> 42 U.S.C.A. § 1437(d); 24 C.F.R. § 982.310(c)(ii)(A).

<sup>71</sup> 42 U.S.C. § 13661(b)(1)(1998). The federal regulations provide some guidance on how to establish these standards. See 24 C.F.R. § 5.852.

<sup>72</sup> “The National Crime Information Center, police departments, and other law enforcement agencies shall, upon request, provide information to public housing agencies regarding the criminal conviction records of adult applicants for, or tenants of, covered housing assistance for purposes of applicant screening, lease enforcement, and eviction.” 42 U.S.C. § 1437d(q)1(A).

<sup>73</sup> 42 USC § 13661(c).

<sup>74</sup> 42 USC § 13661(c)(2). PHAs are required to set up a system of criminal records management such that criminal records are maintained confidentially, not misused, and the records are destroyed once used for the purpose obtained. 42 U.S.C. § 1437d(q)(4). There is a private right of action for tenants whose confidential criminal records have been unlawfully disclosed. 42 U.S.C. § 1437d(q)(7).

<sup>75</sup> 24 C.F.R. § 5.852(b).

<sup>76</sup> 24 C.F.R. 966.4(l)(5) (2000).

<sup>77</sup> 24 CFR § 982.310

the United States Supreme Court in *Housing and Urban Development v. Rucker*<sup>78</sup> upheld the general validity of these regulations (although there is still a lack of clarity about breadth of the decision's applicability). Once evicted, tenants are barred from receiving any kind of federal housing assistance for three years.<sup>79</sup> Notably, legal services organizations that receive funding from the Legal Services Corporation are prohibited from representing individuals being evicted from public housing due to criminal activity.

Most housing authorities have adopted the strict "one strike" policies: a HUD survey conducted shortly thereafter found that 75% of the 1,818 housing authorities responding indicated that they had done so.<sup>80</sup> Implementation across New Jersey depends on the PHA involved. In Newark, for example, the Newark Housing Authority completes a criminal background check on all adult applicants for public housing<sup>81</sup> and requires applicants to demonstrate their ability "not to engage in criminal activity that threatens the health, safety, or right to peaceful enjoyment of other residents or staff; and not to engage in drug-related activity."<sup>82</sup> Individuals can be terminated for criminal activity and drug-related activity on or near the premises, and are not allowed any grievance procedure if termination arises from these grounds.<sup>83</sup> The NHA's policies with regard to Section 8 indicate that the agency will deny assistance to applicants who have a history of criminal activity by any household member involving crimes of violence, drug-related activity, or any other criminal activity that would adversely affect health and safety or cause damage to the property.<sup>84</sup> The agency will further deny assistance to an applicant with a family member who has been evicted from assisted housing with five years because of drug-related criminal activity, or who is illegally using a controlled substance or abusing alcohol in way that will interfere with health and safety and peaceful enjoyment.<sup>85</sup> NHA can waive this objection if the person in question can show that he or she is no longer using drugs or alcohol, has successfully completed or is participating treatment, or is otherwise rehabilitated.<sup>86</sup> Apartment owners can be discontinued from the program if they refuse to evict families for drug-related or violent criminal activity.<sup>87</sup> The statewide Section 8 program operated by the Department of Community Affairs appears to utilize similar rules.<sup>88</sup>

## **V. Parental Rights**

A 2000 report by the Bureau of Justice Statistics estimated that, nationwide, state and federal prisons held 721,500 parents of about 1.5 million minor children.<sup>89</sup> Almost half of these parents reported living with their children prior to admission; the report estimated that 336,300 U.S. households with minor children were directly affected by the imprisonment of a resident parent.<sup>90</sup> While New Jersey does not regularly collect comparable data on its prison and jail population, this pattern of parental

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<sup>78</sup> 122 S.Ct. 1230 (2002).

<sup>79</sup> 42 U.S.C. § 13661(a), 24 C.F.R. § 960.204(a) (public housing provision); 24 C.F.R. § 982.553(a)(1)(2001) (section 8 provision).

<sup>80</sup> Gwen Rubenstein and Debbie Mukamal, *Welfare and Housing – Denial of Benefits to Drug Offenders* in *INVISIBLE PUNISHMENT* 37, 47 (Marc Mauer and Meda Chesney-Lind, eds., 2002).

<sup>81</sup> Newark Housing Authority Admissions and Continued Occupancy Policy (January 2000) § II(F)(2)(f).

<sup>82</sup> *Id.* § II(F)(1)(f) and see, also § II(F)(2)(i).

<sup>83</sup> *Id.* § VIII(B).

<sup>84</sup> Administrative Plan for the Section 8 Certificate and Voucher Programs (April 2002), § III(E)(C).

<sup>85</sup> *Id.* § III(G) and (H).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* § V(B)(2)(A).

<sup>88</sup> DEPT. OF COMMUNITY AFFAIRS, *GUIDE TO THE SECTION 8 PROGRAM* (January 1999).

<sup>89</sup> CHRISTOPHER MUMOLA, BUREAU OF JUSTICE STATISTICS, *INCARCERATED PARENTS AND THEIR CHILDREN* (August 2000).

<sup>90</sup> *Id.*

incarceration exists in the state as well, and issues of family preservation and reunification will play role in the reentry process.

Recent changes in federal law, and New Jersey's implementation of the federal mandates, have altered the likelihood that parents separated from their children because of imprisonment will be able to be reunified. New Jersey law has long provided that the Division of Youth and Family Services is obligated to initiate proceedings to terminate parental rights when certain grounds exist: a conviction for abuse; abandonment or neglect; the dictates of the "best interests of the child;" when a child is in foster care and a parent has failed for one year to fix the problems that led to the removal, although physically and financially able to do so and despite the agency's diligent efforts to assist; the parent has abandoned the child; or the parent has been convicted for serious crimes against the health and safety of the child.<sup>91</sup> The New Jersey Supreme Court has held that the incarceration of a parent is a relevant factor in determining whether the parent-child relationship should be terminated on the basis of either abandonment or unfitness.<sup>92</sup>

In 1997, Congress passed the Adoption and Safe Families Act, which shifted the emphasis of federal policy away from family preservation, towards safety and permanency, pushing states to move much more rapidly to terminate parental rights.<sup>93</sup> Federal funding to states for foster care and adoption assistance and child protective services was made contingent on state adoption of implementing legislation, which New Jersey has done. Under the AFSA amendments, DYFS must make reasonable efforts, no longer "diligent efforts," to prevent placement or reunify families<sup>94</sup> prior to petitioning to terminate parental rights, and will not be required to make such reasonable efforts if the parent has subjected the child to aggravated circumstances of abuse, neglect or abandonment, has committed enumerated violent crimes against a child, or has had another child permanently removed.<sup>95</sup> Most significantly, mirroring the provisions of the ASFA, New Jersey law now requires DYFS to seek termination as soon as any of the grounds for termination are established but no later than when a child has been in placement for 15 out of the most recent 22 months.<sup>96</sup> It is this short time line that poses the greatest risk for an incarcerated parent, and makes it difficult for a single parent serving a fairly short sentence to avoid losing his or her children prior to release.

At present, there is no requirement that DYFS assist parents and children to maintain a bond during a period of incarceration. With most correctional facilities inaccessible to public transportation, and the exceptionally high cost of phone calls from prison (a cost borne by those outside of the prison), it is extremely difficult for parents to maintain relationships with their children, not to mention contest termination of their parental rights.

New Jersey law also requires mandatory criminal background checks for prospective foster and adoptive parents, and individuals will be permanently disqualified from being either if they or anyone in their household has been convicted of a range of violent crimes. They will also be disqualified for five years (from conviction or last date of incarceration, probation or parole, whichever is later) if they or any household member was convicted of certain lesser felonies and any violation of the Comprehensive Drug Reform Act.

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<sup>91</sup> N.J.S.A. § 30:4C-15.

<sup>92</sup> Matter of the Adoption of Children by L.A.S., 134 N.J. 127 (1993).

<sup>93</sup> P.L. 105-89, 111 Stat. 2115 (Nov. 19, 1997).

<sup>94</sup> N.J.S.A. § 30:4C-15.1(c)

<sup>95</sup> N.J.S.A. § 30:4C-11.3. The statute provides that "When determining whether reasonable efforts are required to reunify the child with the parent, the health and safety of the child and the child's need for permanency shall be of paramount concern to the court."

<sup>96</sup> N.J.S.A. § 30:4C-15.

### **Some options to consider:**

- Where children have been placed in foster care or kinship foster care due to a parent's incarceration, DYFS should assist parents to maintain bonds with their children, where appropriate, from prison. Parents who cooperate, and who do not face very long sentences, should not be the subject of termination proceedings.
- Eliminate the excessive surcharge on prison phone calls. These charges are imposed on the recipients of collect phone calls from those in state correctional facilities, generating money for the private contractor and the state at the expense not of the prisoner but of the family members of the prisoner. The high cost of communication, combined with the difficulty of visitation, makes continued contact with an outside support system and between incarcerated parents and their children less likely. Attenuating these contacts can make reintegration into the family and community that much more difficult.

## **VI. Voting and Jury Service**

Voting and jury service are both responsibilities and privileges of citizenship, and both are curtailed as the result of criminal convictions in New Jersey. Individuals lose the right to vote while serving a sentence or on parole or probation for an indictable offense.<sup>97</sup> Once convicted of an indictable offense, in New Jersey or in any other state or federal court, they are also permanently disqualified from serving on jury.<sup>98</sup>

### **Some options to consider:**

- Restore the right to vote for released felons. As noted above, voting is a responsibility of citizenship, and, from a reentry perspective, should be promoted as one part of the restitution that individuals convicted of crimes owe to their community. Perversely, disenfranchisement serves to further marginalize those who we, in other ways, expect to act like full members of society. We also know disenfranchisement – which has an ignominious history<sup>99</sup> – translates the racial imbalance in our criminal justice system into unequal distribution of one of democratic government's most fundamental rights.
- Restore the right to serve on a jury for released felons. Public policy reasons for this ban are slim compared to the significance of the responsibility of jury service to full community membership and participation.

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<sup>97</sup> N.J.S.A. § 19:4-1.

<sup>98</sup> N.J.S.A. § 2B:20-1. New Jersey has flip-flopped in recent years on this issue. A law passed in 1995 reversed the historical permanent exclusion for convicted felons, barring them from jury service only while serving a sentence or on parole or probation. In 1997, this was reversed and the permanent exclusion reinstated.

<sup>99</sup> See, e.g., March Mauer, *Mass Imprisonment and the Disappearing Voters* in *INVISIBLE PUNISHMENT* 37, 47 (Marc Mauer and Meda Chesney-Lind, eds., 2002).