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ARTICLE

RETURNING CITIZENS: HOW SHIFTING LAW AND POLICY IN MARYLAND WILL HELP CITIZENS WHO RETURN FROM INCARCERATION

By: **Khyla D. Craine, Esq. and Glenn E. Martin¹**

I. INTRODUCTION

“While I have the utmost faith in – and dedication to – American’s legal system, we must face the reality that, as it stands, our system is in too many respects broken. The course we are on is far from sustainable. And it is our time – and our duty – to identify those areas we can improve in order to better advance the cause of justice for all Americans.”

--Former Attorney General Eric H. Holder, Jr.²

In America, the concept of “time served” is a misnomer, as the shackles of a lifetime of collateral consequences make a criminal record a scathing obstacle for over 100 million Americans.³ Each year, more than 650,000 people are expected to reintegrate into our communities, often with substance abuse and mental health issues, minimal education, no job to sustain a life, and no stable home awaiting them.⁴

While these numbers are staggering on their own, they do not reflect the even larger number of people who cycle through the court system and jails. For example, some take pleas for a lesser charge in order to expedite their

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² Eric H. Holder, Jr., Former Attorney General, Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013) [*hereinafter* Holder Remarks to ABA], available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.

³ *Poverty and Opportunity Profile: Americans with Criminal Records*, THE SENTENCING PROJECT, (Sept. 15, 2015) http://www.sentencingproject.org/doc/publications/cc_HiT_CriminalRecords_profile_1.pdf.

⁴ *Prisoners and Prisoner Re-entry*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/archive/fbci/progmenu_reentry.html (last visited Oct. 2, 2015).

case and return to society only to face a myriad of statutory and practical criminal record barriers without support or resources.⁵ This ultimately impacts every layer of society – communities, schools, the labor force, law enforcement – and often puts Americans at risk or in harm’s way.

Congress, state and local legislatures, and many administrative agencies have promulgated an array of counterproductive laws, regulations, and policies that make it more difficult for formerly incarcerated people and those with criminal records to successfully re-enter society. As a result, these men and women find themselves struggling to reintegrate, even after they have completed their sentences, demonstrated that they are not a threat to public safety, and expressed their commitment to becoming productive tax-paying citizens. In part, due to these crippling policies, almost 70% of persons released from prison in 2005 were re-arrested within three years, and almost 80% within five years.⁶ Thus, for many upon re-entry into society, the vicious cycle of struggle and instability begin.

In recent years, elected officials on both the State and Federal level have been increasingly engaged in lowering the prison population across the country.⁷ In his 2013 address to the American Bar Association’s House of Delegates, former Attorney General Eric Holder, Jr. referenced the aforementioned recidivism statistics and the overall need to reform the criminal justice system on both the federal and local levels.⁸ However, the reform process will not be complete without changes to the policies that affect areas such as housing, employment, child custody and support, and education. This article will review the changes to Maryland’s criminal laws over the past decade concerning those formerly incarcerated and evaluate the progress needed to push the state and the rest of the country toward ensuring a more just return for our fellow citizens entangled in the criminal justice system.

II. THE ROAD TRAVELED

⁵ Peter Wagner & Leah Sakala, *Mass Incarceration: The Whole Pie*, PRISON POLICY INITIATIVE (Mar. 12, 2014), <http://www.prisonpolicy.org/reports/pie.html>.

⁶ MATTHEW R. DUROSE, ALEXA D. COOPER, & HOWARD N. SYNDER, U.S. DEP’T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010*, available at <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

⁷ See Cory Booker, *Our Criminal-Legal System: Justice Doesn’t Have to be Missing from Equation*, HUFFINGTON POST (Apr. 15, 2015), available at http://www.huffingtonpost.com/cory-booker/our-criminal-legal-system_b_7071792.html (discussing the need for reform of the criminal-justice system); Igor Bobic, *Rand Paul Pushes for Criminal Justice Reform at Historically Black College*, HUFFINGTON POST (Mar. 13, 2015), available at http://www.huffingtonpost.com/2015/03/13/rand-paul-criminal-justice-reform_n_6866702.html.

⁸ Holder Remarks to ABA, *supra* note 2.

In 2003, Chief Justice Robert M. Bell of the Court of Appeals of Maryland commissioned the University of Maryland Francis King Carey School of Law to review the collateral consequences levied upon returning citizens as they leave the state's penal system.⁹ This report was in response to the American Bar Association's initiative to create a centralized depository for all collateral consequences on the federal and state level.¹⁰ The comprehensive report outlined both federal and Maryland statutory and administrative procedures that kept citizens from fully returning to their communities. Between familial, housing, employment and educational restrictions upon people who were formally incarcerated, Maryland's criminal justice system and its federal counterpart continued to punish people well after their sentences and probation periods concluded.

A. SUMMARY OF THE DEVASTATING LAWS

i. Housing

The University of Maryland Report Methodically reviewed the various roadblocks that returning citizens must endure upon release.¹¹ One of the most crucial needs for returning citizens is access to affordable housing. Despite the fact that thousands of persons were estimated to be released from incarceration every day, many of them were precluded from applying for affordable housing. This puts an unbearable pressure on those newly released trying to find a home for their families and sustain a life post incarceration. The University of Maryland Report found five different statutes that covered the rules concerning housing,¹² while Maryland had not codified the rules.¹³ Therefore, one's ability to find housing upon release was conditioned upon the community to which one returned.

⁹ THE RE-ENTRY OF EX-OFFENDERS CLINIC, UNIV. OF MD. SCH. OF LAW, *a report on the collateral consequences of criminal convictions in Maryland*, (2007), 3 [hereinafter University of Maryland Report], available at

http://www.sentencingproject.org/doc/publications/cc_report2007.pdf.

¹⁰ AMERICAN BAR ASS'N, ABA STANDARDS ON COLLATERAL SANCTIONS (THIRD EDITION): COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (2004), [hereinafter ABA STANDARDS ON COLLATERAL SANCTIONS], available at

http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standard_s/Treatment_of_Prisoners.authcheckdam.pdf.

¹¹ Please note this was the law as of 2007. We will later address the changes, if any, to these laws.

¹² See University of Maryland Report, *supra* note 9, at 17.

¹³ See also 42 U.S.C. §§ 13661-13663 (2000); 42 U.S.C. § 1437(d)(1)(B)(iii)(2000).

For example, until 2003, Baltimore City permanently barred anyone with a criminal conviction from receiving housing benefits.¹⁴ Though the City's revision in June of that year removed the permanent bar, the new policy still prevented returning citizens from receiving public housing between eighteen months and three years after release.¹⁵ Prince George's County's policies were similarly devastating to returning citizens. The county barred an applicant for seven years if the applicant was convicted of a crime regardless of the category. Even more egregious is an applicant can be rejected for disclosing criminal charges for which he was never convicted.¹⁶ Many of the counties within the state have adopted these laws, which ultimately affect all 4,900 persons who were incarcerated in 2005 for drug related offenses.¹⁷

ii. Employment Impediments

Although affordable housing is a major concern for returning citizens, equally devastating is the lack of opportunity for employment. Maryland has prevented many returning citizens from applying for licenses or working for the state government based upon their criminal history.¹⁸ In a wide array of industries, including healthcare, education, or drivers for hire, having a criminal background can prevent a returning citizen from obtaining employment, even if the citizen has the necessary educational requirements.¹⁹ The leeway permitted for employers to bar individuals with conviction records, as described in the Equal Employment Opportunity Commission's Enforcement Guidance, is vast and troublesome.²⁰ Title VII concerns are implicated for a large amount of people of color with criminal histories who have been excluded from employment in this manner.²¹ In 2007, Maryland was one of thirty-eight states to use criminal backgrounds – even arrest records that did not result in convictions – to determine eligibility for

¹⁴ University of Maryland Report, *supra* note 9, at 18.

¹⁵ *Id.*

¹⁶ See University of Maryland Report, *supra* note 9, at 20.

¹⁷ *Id.* at 17-21 (referencing policies in Cecil County, St. Mary's County, and Wicomico County).

¹⁸ *Id.* at 22. See also Md. Code Ann., Bus. Occ. & Prof. §§ 5-314(a)(1)(vii)(1)–(2) (Supp. 2006).

¹⁹ See University of Maryland Report, *supra* note 9, at 23.

²⁰ EEOC ENFORCEMENT GUIDANCE NO: N-915: POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (1987), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

²¹ *Id.*

licensure and employment with public and private sector employers.²² For example, the Maryland Code of Regulations completely bars persons from serving as a personal care aide, respite worker, or an assisted living aide if they have a criminal history that may indicate harmful behavior to other.²³ The discretion in the regulations prevents individuals convicted of virtually any crime from holding a job within the healthcare aide industry.²⁴

iii. Voting

As President Lyndon B. Johnson once stated, “A man without a vote is a man without protection.”²⁵ Yet, in 2007, over five million Americans had temporarily or permanently lost the right to vote due to a felony conviction.²⁶ This number would equate to one-third of all African Americans that would be “without protection” due to their history.²⁷ Persons –incarcerated or not – are represented by men and women on all levels of the government, via the democratically elected process. However, the ability to vote was stripped from persons who were convicted of felonies – the vast majority of which were wholly unrelated to election laws, fraud, or other crimes that may disrupt the franchise. Not only was the right stripped, but until 2007, Maryland was one of the many states at the time that permanently barred certain persons convicted of felonies from voting, even after completing their sentences, probation or any other restitution ordered by the court.²⁸

III. A CHANGE IN WASHINGTON AND ANNAPOLIS

In the years since the University of Maryland Report, leaders in Maryland and Washington have begun the work to change the collateral consequences for returning citizens. Even as Maryland Law students were writing their

²² *Id.* See also MD. ANN CODE, State Gov’t, § 10-1405 (2014) (describing the factors to determine whether an individual’s application for an employment-based license and/or license renewal will be granted or denied).

²³ See MD. CODE REGS. § 10.09.20.05(F)(2); MD. CODE REGS. § 10.09.54.10-1(A); and MD. CODE REGS. § 10.07.14.17(B)(4) (2007).

²⁴ *Id.*

²⁵ Brooklyn Dames, *Remembering Lyndon B. Johnson Amidst Today’s GOP*, BORDERLESS NEWS AND VIEWS (Aug. 27, 2012), available at <http://borderlessnewsandviews.com/2012/08/remembering-lyndon-b-johnson-amidst-todays-gop/>.

²⁶ FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, THE SENTENCING PROJECT, 1 (2007), available at http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf.

²⁷ *Id.*

²⁸ *Id.*

first edition in 2003, states across the country were relaxing the problematic felony disenfranchisement laws that blocked millions from the voter rolls.²⁹

Until 2013, Virginia held fast as one of three states in the country that permanently barred citizens with a felony conviction from voting in their state.³⁰ Though former Virginia Governors Mark Warner and Tim Kaine initiated and implemented rules that simplified the process of receiving a gubernatorial approval to restore voting rights, individuals still had to seek permission to vote in the Commonwealth upon release.³¹ In a move that was heralded by the broad civil rights community, former Governor Robert McDonnell signed an executive order that automatically restored the vote for persons convicted of non-violent felonies in May of 2013.³²

In Maryland, this restoration of the vote came in 2007 under Governor Martin O'Malley, when the state legislature passed a bill automatically restoring rights upon completion of one's sentence and probation. This action restored the rights to over 50,000 Marylanders. Overall, the actions taken by state legislatures and by governors through 2010 have restored the right to vote for almost 800,000 citizens.³³

However, even as the rules were relaxed, people of color were still overwhelmingly affected by the unnecessary and excessive punishment. A joint report by several civil rights groups to the United Nations Human Rights Commission reported that the disenfranchisement rate for African Americans was four times that of their white counterparts.³⁴ As the NAACP described in its 2012 report "*Silenced: Citizens Without a Vote*," across the

²⁹ NICOLE D. PARKER EXPANDING THE VOTE STATE FELONY DISENFRANCHISEMENT REFORM, 1997-2010, THE SENTENCING PROJECT REPORT, 1 (2010), [*hereinafter* 2010 Sentencing Project Report], available at http://www.sentencingproject.org/doc/publications/publications/vr_expandingthevotefinaladdendum.pdf.

³⁰ *Id.* at 28.

³¹ See EXPANDING THE VOTE STATE FELONY DISENFRANCHISEMENT REFORM *supra* note 25 at 28, for an in depth discussion of Virginia's felony disenfranchisement reformation.

³² *Id.* See also Josh Israel, *Virginia Governor Automatically Restores Voting Rights to Nonviolent felons*, THINK PROGRESS (May 29, 2013, 12:00PM), available at <http://thinkprogress.org/justice/2013/05/29/2071211/mcdonnell-felon-voting-restoration/> (Specifically, the executive order removed the application process for individuals who have completed their sentences on a nonviolent felony and also eliminated the two-year waiting period for such voting rights restoration).

³³ JEAN CHUNG, FELONY DISENFRANCHISEMENT: A PRIMER, THE SENTENCING PROJECT, 4 (2013), available at http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf.

³⁴ *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the U. S.*, THE SENTENCING PROJECT, 2 (2013), available at http://sentencingproject.org/doc/publications/fd_ICCPR%20Felony%20Disenfranchisement%20Shadow%20Report.pdf.

country, more than one million persons had completed the terms of their sentence but still could not vote.³⁵

A. RECENT CHANGES IN MARYLAND LAWS

The restoration of the right to vote is important. But, if employers and governments are still able to discriminate against returning citizens' efforts to gain housing, employment, or government benefits, their ability to reintegrate into society will remain an uphill battle. For instance, Baltimore City reaffirmed their commitment to review and deny citizens public housing based upon their criminal histories.³⁶ A glimmer of optimism comes in the form a group of new laws going into effect in October 2015.

i. Maryland Second Chance Act

In April 2015, Governor Larry Hogan signed three pieces of legislation aimed at helping the shielding or the expungement of court and police records.³⁷ The Maryland Second Chance Act of 2015 permits persons to petition the court to hide from view of the public certain criminal histories, including drug related crimes.³⁸ This will have an enormous effect upon returning citizens who are seeking employment or looking to further their education.

Upon enactment, this law bars most employers from asking about information regarding criminal history, so long as those charges are shieldable pursuant to the Act. Employers cannot compel an individual to disclose their criminal history on either the application process or in an interview. Additionally, it prevents employers from refusing to hire or

³⁵ *Silenced: Citizens Without A Vote*, NAACP, 2 (2012) (emphasis added), available at http://naacp.3cdn.net/10d16ab1c3d4b10b11_x7m6bzkgj.pdf.

³⁶ *The FY 2016 Public Housing Admissions & Continued Occupancy Policies*, HOUSING AUTH. BALT, CITY, 10 (2015), available at http://static.baltimorehousing.org/pdf/fy2016_occupancy.pdf.

³⁷ Maryland Second Chance Act of 2015, 2015 Md. Laws ch.313 (to be codified at MD. CODE ANN., CRIM. PROC. § 10-301 et. seq.) (effective Oct. 1, 2015) (“authorizing a person to petition the court to shield certain court records and police records relating to certain convictions at a certain time.”).

³⁸ See *Id.* at §10-301(f)(1)-(12), for a list of ‘shieldable convictions,’ including but not limited to the following: Disorderly Conduct; Disturbing the Peace; Malicious destruction of Property, Possession or administering both controlled and non-controlled substances, use or possess with the intent to use drug paraphernalia, driving without a license, driving while your license is suspended, canceled, refused, or revoked; driving without insurance.

discharging persons who did not disclose information about shielded charges.³⁹ This includes government employers.⁴⁰

A potential drawback to the Maryland Second Chance Act is the failure to revise the laws around employment-based licenses and permits. The Act specifically carves out the exception for employers and government licensing agencies that are statutorily mandated to conduct background checks.⁴¹ Ultimately, returning citizens are still prevented from working in the vast majority of health-related fields or becoming taxicab drivers.⁴² Nonetheless, it is certainly a step in the right direction to eliminate the discretionary checks which government entities developed overtime.

ii. Expungement

The Maryland Legislature also passed a measure reforming the rules around the expungement of crimes.⁴³ In Maryland, expungement is a completely different process than the mere shielding of criminal histories.⁴⁴ With this new law, the field is expanded to permit persons to petition for expungement if they had an entry of *nolle prosequi*, indefinite postponement (STET), a finding of not criminally responsible, a gubernatorial pardon, or an entry of probation before judgment for a crime that is no longer a crime in the State, such as possession of 10 grams or less of Marijuana.⁴⁵

As with the new shielding law, there are exceptions to this new expungement rule. A number of Marylanders will be aided by these new laws, more specifically, a disproportionate number of people of color. The doors of opportunity will be opened and access to jobs, education, and even

³⁹ Maryland Second Chance Act of 2015, 2015 Md. Laws Ch.313 (to be codified as MD. CODE ANN., CRIM. PROC. §10-306(B)(2)(i)-(ii)).

⁴⁰ *Id.* (to be codified as MD. CODE ANN., CRIM. PROC. §10-306(B)(3)).

⁴¹ *Id.* (to be codified at MD. CODE ANN., CRIM. PROC. §10-302(B)(2)).

⁴² *Id.*

⁴³ Act of Oct. 1, 2015, Ch. 314, 2015 Md. Laws 304 (codified as amended at MD. CODE ANN., CRIM. PROC. §10-105(e)(4)).

⁴⁴ MD. CODE ANN., CRIM. PROC. §10-105 (West 2013) (outlining the petition process to have one's record expunged); *see also* §10-101(e) (Expungement in the state of Maryland means "to remove information from public inspection. . . with respect to a court record or police record . . . by obliteration," or "removal to a separate secure area . . . which is limited to persons with "legitimate reasons for access."); *see also* §10-108(b)-(c) (outlining when expunged records can be opened, reviewed or disclosed).

⁴⁵ *See* MD. CODE ANN., CRIM. PROC. §10-105(e)(4)(i).

housing will be available for them. The consistent concern is the time factor in being eligible to take advantage of these new laws. As stated above, citizen reintegration into their communities within the first few years upon release is essential.

A U.S. Government report indicates that if a returning citizen is not re-arrested in their first year, the likelihood of recidivism precipitously declines over the next several years.⁴⁶ In fact, from year one to year two, the likelihood drops by fifteen percent.⁴⁷ Thus, the need to create policies and work with returning citizens and their families in order to promote and encourage successful re-entry into their communities is clear. Additionally, there is a need to have returning citizens involved in crafting the policies that affect the formerly incarcerated. For example, organizations like JustLeadershipUSA work with returning citizens to empower them to engage with lawmakers and influential policy advocates in order to reform the system.⁴⁸

CONCLUSION

Maryland's recent changes are a small step in the right to direction to permit returning citizens the opportunity to fully reintegrate and thrive within their communities. The current system results in eager, yet ill-equipped individuals failing to reintegrate, leading many to reoffend, and ultimately resulting in re-incarceration.⁴⁹ Today, one in three black men will be in prison or jail at some point in their lives, leaving many families without fathers, income providers, and role models.⁵⁰

The increased financial strain on those families leads to a myriad of collateral consequences, such as missed opportunities to continue education, poor health and nutrition, and more issues that impact both the families' self-perception and reinforce the American stereotypes that misinform public policies. Children who grow up in these environments often feel pressure to

⁴⁶ NATHAN JAMES, OFFENDER REENTRY: CORRECTIONAL STATISTICS RE-INTEGRATION INTO THE COMMUNITY, AND RECIDIVISM, CONG. RESEARCH SERV. (2015), available at <https://fas.org/sgp/crs/misc/RL34287.pdf>.

⁴⁷ *Id.* at 7.

⁴⁸ *About us*, JUSTLEADERSHIPUSA, <http://www.justleadershipusa.org> (last visited Sept. 28, 2015).

⁴⁹ *Reentry Trends in the U. S.*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/content/reentry/recidivism.cfm> (last visited Sept. 23, 2015).

⁵⁰ *Report of the Sentencing Project to the United Nations Human Rights Committee: Regarding Racial Disparities in the U. S. Criminal Justice System*, THE SENTENCING PROJECT 1 (Aug. 2013), http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf.

commit crimes – both from inside and outside of their communities – and in the form of negative and systematized expectations. Even those who do not wish to follow that path often lack the resources or support to follow another, leading them to contribute to the aforementioned statistic. This is part of the vicious cycle that destroys families and entire communities. Without a major shift in strategy, America will continue to contribute to valuable lives wasted, erosion in public safety, and diminished justice.