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# **COLLATERAL CONSEQUENCES OF ARRESTS AND CONVICTIONS: POLICY AND LAW IN GEORGIA**

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H. Lane Dennard, Jr.  
Patrick C. DiCarlo

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CHAPTER CONTRIBUTORS:

Jennifer D. Fease  
Latif Oduola-Owoo  
Herman J. Hoying

September 2008

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ADDITIONAL CONTRIBUTORS:

The Georgia Justice Project,  
Executive Director Douglas Ammar, Atlanta, Georgia

Students participating in directed research at  
Emory University School of Law, Fall Semester, 2006  
(work coordinated by Professor Charles A. Shanor)

Students participating in Class at Mercer University  
School of Law, Spring Semester, 2008.

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ASSISTANCE WITH PUBLICATION:

Mercer University School of Law, Law & Public  
Service Program (directed by Professor Timothy Floyd)  
under a grant from the Georgia Bar Foundation

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## FOREWORD

After retirement from the active practice of law in 2003, I volunteered at the Georgia Justice Project (GJP) and was involved with the representation of a group of clients who faced eviction from public housing because of their criminal records. After a collaborative effort of volunteer lawyers and staff from King & Spalding and GJP, with the support of the Casey Foundation, most of the lease terminations were suspended, preventing these individuals from becoming homeless. This work sparked an interest in the collateral consequences of arrests and convictions that has continued through the completion of this Study. This interest expanded into an awareness that civil barriers to reentry exist, not only for housing, but also in the areas of employment, state and federal benefits and even the right to vote.

This Study fully recognizes that some collateral consequences exist for the protection of the public from individuals who have engaged in criminal conduct. There should also be, however, some balance in the application of these consequences, giving due consideration to the rights of ex-offenders to reenter society and society's interest in facilitating the transition to productive citizenship. There are two main objectives for this Study: (1) to provide the legal background and authorities for representation of clients by volunteer lawyers and non-profit agencies, and (2) the development of strategies for legislative and administrative change in Georgia. In addition to the humanitarian and social interests, at some point this becomes an economic interest for Georgia taxpayers. The Georgia Department of Corrections has estimated that reducing the recidivism rate in Georgia by 1% would save Georgia taxpayers seven million dollars each year.

This Study is a work of volunteer lawyers, law staff and law students. During Fall Semester, 2006, six law students at Emory University School of Law conducted research and submitted papers on the legal obstacles for ex-offenders that exist in Georgia and comparative information on other states. In 2007, volunteer lawyers at King & Spalding and Alston & Bird continued work on this Study. A class on the subject matter of the Study was taught at Mercer University School of Law during Spring Semester, 2008. This course

was taught as a survey of the civil and legal circumstances in Georgia that create these barriers to reentry, and assignments were designed to advance the preparation of this Study. Both the class at Mercer and related representation of clients by the Georgia Justice Project were supported by grants from the Georgia Bar Foundation.

The authors thank the following persons for their work on this Study: students participating in Directed Research at Emory University School of Law, Fall Semester, 2006; students participating in the class at Mercer University School of Law, Spring Semester, 2008; Neil Edwards and Arthur York, Mercer law students who were involved in research and editing of the Study; Rhea Rajkumar, a paralegal at King & Spalding; and Charlotte Oberto, a legal secretary at King & Spalding, for her patience and hard work in the word processing of the manuscript.

The authors hope that the Study will improve the plight of indigent Georgians faced with the collateral consequences of arrests and convictions.

*H. Lane Dennard*

## **DEDICATION**

This Study is dedicated to Griffin B. Bell, who passed away shortly before its publication. Judge Bell, former Justice on the Fifth Circuit Court of Appeals, Attorney General of the United States, and partner at King & Spalding law firm, was very supportive during the early work on the Study. One of his comments about the Study was that it should serve as a model for other states. Judge Bell was a lifetime Trustee of Mercer University and a strong supporter of the Georgia Justice Project.



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**COLLATERAL CONSEQUENCES  
OF ARRESTS AND CONVICTIONS:  
POLICY AND LAW IN GEORGIA**

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# I. INTRODUCTION

## A. Overview and Identification of Need

In his 2004 State of the Union address, President George W. Bush reported:

This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit crime and return to prison. . . . America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.<sup>1</sup>

But the actions of state and federal governmental agencies have not matched this rhetoric. As explained below, this is especially the case in Georgia.

Both in Georgia and in the nation, an increasing percentage of our population has been incarcerated. According to a recent report, between 2000 and 2004, the rate of admissions to prison in Georgia increased 15.9% with 17,373 prisoners admitted in 2002, and 20,140 prisoners admitted in 2004.<sup>2</sup> Georgia's release patterns reflect the admission trends: during this same timeframe, the release rate grew from 14,797 prisoners released in 2000, to 18,211 released in 2004 — a 23.1% increase.<sup>3</sup> As of June 30, 2005, Georgia ranked second in the country behind only Louisiana in terms of inmates per 100,000 residents.<sup>4</sup>

When these individuals leave jail or prison, they face an array of civil problems, many of which are not intended by the justice system in our country. Problems triggered by their criminal record create barriers to

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<sup>1</sup>George W. Bush, President of the United States of America, Address Before a Joint Session of the Congress on the State of the Union (Jan. 20, 2004) (transcript available at [http://www.c-span.org/executive/transcript.asp?cat=current\\_event&code=bush\\_admin&year=2004](http://www.c-span.org/executive/transcript.asp?cat=current_event&code=bush_admin&year=2004)).

<sup>2</sup>PAIGE M. HARRISON & ALLEN J. BECK, PRISON AND JAIL INMATES AT MIDYEAR 2005, U.S. DEP'T OF JUST. BUREAU OF JUST. STATS. BULLETIN 1 at 10 (May 2006), available at <http://www.ojp.gov/bjs/pub/pdf/pjim05.pdf> (last visited August 15, 2008).

<sup>3</sup>Id. at 6, Table 7.

<sup>4</sup>Id. The top five states were Louisiana at 1,138, Georgia at 1,021, Texas at 976, Mississippi at 955 and Oklahoma at 919. Id. at 1.

employment, housing, public assistance, and even the right to vote. These often harsh consequences stand as substantial impediments to people who want to return to lives as contributing members of society. In fact, these barriers may be so substantial that they are counter-productive, causing some of those released to return to criminal activity in order to support themselves. The overall impact of these roadblocks for ex-offenders constitutes a social and economic drain on our state. The Legal Action Center in Washington recently published a study of the legal barriers facing people with criminal records and ranked the states according to the number of “roadblocks” that were in place. Roadblocks were defined as “unfair and counterproductive barriers to the reentry into society of people with criminal records.” Georgia was ranked as the third worst state in the country.<sup>5</sup> These problems are compounded for our state’s poor citizens who have no money for legal representation.

Clearly, some collateral consequences exist for the protection of the public from individuals who have engaged in criminal conduct.<sup>6</sup> There should also be, however, some balance in the application of these consequences, giving due consideration to the rights of ex-offenders to reenter society.

This is a Study on the Collateral Consequences of Arrests and Convictions: Policy and Law in Georgia. There are two major objectives for this Study: (1) to provide the legal background and authorities for representation of clients by the Georgia Justice Project<sup>7</sup> and other agencies, and (2) to develop strategies for legislative and administrative change in Georgia. The mission for this Study is to improve the plight of indigent Georgians faced with the collateral consequences of arrests and convictions.

During Fall semester, 2006, six law students at Emory University School of Law conducted research and submitted papers on the legal obstacles for ex-offenders that exist in Georgia as well as comparative information

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<sup>5</sup>LEGAL ACTION CENTER (LAC), GEORGIA REPORT CARD, AFTER PRISON: ROADBLOCKS TO REENTRY, <http://lac.org/roadblocks-to-reentry/index.php>; follow “Report Card” hyperlink, then “State Report Cards” (hereafter “LAC Report”).

<sup>6</sup>For example, predatory sex offenders should not be permitted to work in schools, and employers and housing authorities may have justification to consider convictions for violent crimes and the sale of drugs.

<sup>7</sup>The Georgia Justice Project (GJP) is a non-profit group of lawyers, social workers and job staff located in Atlanta that represents indigent clients who have been accused of a crime.



on other states.<sup>8</sup> During 2007, volunteer lawyers at King & Spalding and Alston & Bird continued work on this Study. A class on the subject matter of the Study was taught at Mercer University School of Law during Spring semester, 2008. This course was taught as a survey of the civil and legal circumstances in Georgia that create these barriers to reentry, and assignments were designed to advance the preparation of this Study, which is summarized below. Both the class at Mercer and the publication of this Study have been supported by a grant from the Georgia Bar Foundation.

## **B. Identification of Issues for Study**

### ***1. The Availability of Arrest and Conviction Records and its Impact***

Sections II and III of this Study cover the availability of arrest and conviction records in Georgia and its impact on state citizens. The Georgia Crime Information Center (GCIC), operated by the Georgia Bureau of Investigation, is a state agency that impacts all civil barriers considered in this Study. When an individual is arrested and fingerprinted in Georgia, a record of that arrest is sent to the GCIC with subsequent dispositions sent by various courts and agencies. These “criminal histories” are made available to public and private entities based on so-called “Purpose Codes.” For example, one level of information may be sent to criminal justice agencies and probate courts. Another level of information may be sent with consent to the ex-offender’s prospective employer and/or public housing authorities.<sup>9</sup> Several serious problems are inherent in the system itself. First, mistakes may be made in the information that is transmitted and retained. For example, an arrest may be recorded but the disposition in the case not updated (anecdotal evidence indicates that this is frequently the case). Second, the arrest/conviction listed may go back 20 years or more. Finally, the characterization of the arrest and language used on the GCIC report may not realistically reflect the seriousness of the offense.

When decisions made in areas like public housing and employment are based on incorrect and/or incomplete histories, it has a devastating effect

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<sup>8</sup>These Emory students (now graduates) are Elizabeth Gould, Brooke Emery, Gary Feldon, James McDonough, Shawn Sukumar, and Carolyn Placey.

<sup>9</sup>O.C.G.A. § 35-3-35 (GCIC Authority); Ga. Comp. R. & Regs. § 140-1-.01 - .06 (GCIC Regulations).

on the ex-offender. An important part of this Study is the review of GCIC protocols and research of related legal issues. Section III includes a review of the process that is available for “expungement” of these records.<sup>10</sup> This section concludes with an analysis of public policy including administrative and legal issues that can subsequently be presented to Georgia courts, state agencies and the State legislature.

## ***2. Housing***

Section IV of this Study covers the civil consequences of criminal records on housing opportunities for ex-offenders. The difficulties that those with criminal records have in obtaining housing (both private and public) are significant barriers to their successful integration into society. The work by the Georgia Justice Project representing clients faced with eviction from public housing in Atlanta provides a good example. In late 2004, the Annie E. Casey Foundation<sup>11</sup> and GJP entered into an agreement, providing that GJP would provide legal representation for residents of the McDaniel Glenn subsidized housing complex who were at risk of becoming homeless because of the termination of their leases. This particular complex, which was administered by the Atlanta Housing Authority (AHA), had been identified for demolition and reconstruction as a “mixed use” complex under a Hope Six Grant. Most of the residents were given the opportunity to move to other federally-assisted housing, but approximately 45 residents were identified for lease termination based on arrest records that had been retrieved from the GCIC by AHA. After notification of their pending lease terminations, 41 of these individuals chose to be represented by GJP. To represent these clients, a team was organized that included volunteer lawyers from GJP, intern law students from Georgia State University (GSU) and volunteer lawyers and staff from the law firm of King & Spalding in Atlanta. During a timeframe that spanned several months, clients were interviewed, court records were checked and legal research was conducted to prepare for this representation. After the administrative hearings and an appeal, all but

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<sup>10</sup>O.C.G.A. § 35-3-37 (Expungement).

<sup>11</sup>Casey is a large philanthropic foundation started by Jim Casey, the founder of United Parcel Service (“UPS”), that commits substantial resources to inner-city problems, including those associated with the homeless.

six of the evictions were rescinded. Without this representation, this group of individuals would have been at risk to suffer the collateral consequences of homelessness.

Section IV of the Study analyzes the arrest/conviction consequences associated with housing and includes sections on applicable federal statutes, AHA corporate policies, client representation before the housing authority, dispossession warrants and concludes with a public policy discussion, including identification of issues for possible change in Georgia.

### **3. Employment**

In referring to work, Shakespeare said: “You take my life, when you take the means whereby I live.”<sup>12</sup> These words are as true today as they were over 400 years ago. Employment supports both economic and basic psychological needs. It follows that difficulty in finding employment is one of the greatest burdens to the reintegration of ex-offenders into society. There are several areas of Georgia law related to employment that constitute “roadblocks” to reentry. The LAC Report referenced above gave Georgia a score of 10 out of 10 roadblocks to employment, with 10 representing the worst score a state could receive.<sup>13</sup>

Ex-offenders who apply for employment usually face questions about their arrest and conviction record. Further, a private or public employer can, with consent, obtain arrest/conviction records from the GCIC. As referenced above, this report frequently contains information that is incomplete and/or incorrect. In many instances, the employer rejects the applicant based simply on a record of arrest without any consideration of whether the arrest resulted in a conviction. Georgia law does not restrict an employer’s right to consider arrests not leading to conviction, and the state does not have standards prohibiting employment discrimination based on an arrest or conviction record.

Section V covers these civil consequences and includes discussions of employer access to criminal records; restrictions on employment under

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<sup>12</sup>Cited in MARK A. ROTHSTEIN AND LANCE LIEBMAN, *EMPLOYMENT LAW, CASES AND MATERIALS*, at p. 2 (5th ed. 2003, Foundation Press).

<sup>13</sup>LEGAL ACTION CENTER, *AFTER PRISON: ROADBLOCKS TO REENTRY, REPORT CARD, GEORGIA*, available at [http://lac.org/roadblocks-to-reentry/upload/reportcards/12\\_Image\\_Georgia.pdf](http://lac.org/roadblocks-to-reentry/upload/reportcards/12_Image_Georgia.pdf).

both federal and state law; protections available under federal law and the corresponding lack of protection under Georgia law; and concludes with the identification of public policy issues and areas for possible administrative and/or legislative change in Georgia.

#### ***4. Federal and State Programs***

Section VI of the Study covers the impact of arrests and convictions on federal and state benefits and programs. In addition to the challenges faced in employment and housing, ex-offenders may be denied social services (including food stamps), as well as other federal and state monies that would otherwise be available for education (student loans) and other assistance like alcohol and drug treatment. Ex-offenders must petition the state to restore their right to vote, and they may not have the right to adopt or raise foster children. In many situations, these conditions constitute unreasonable roadblocks to basic survival and the return to responsible and participatory citizenship.

This part of the Study includes subsections on federal benefits such as educational assistance, Social Security and Medicare/Medicaid and state programs, including welfare, foster care, drivers' licenses, health care, education and voting. The section concludes with a discussion of public policy issues and the identification of areas for possible administrative and/or legislative change in Georgia.

#### ***5. Conclusion***

Georgia has the second highest incarceration rate in the country, yet lags behind most of the nation in the reintegration of ex-offenders. In the Conclusion to the Study (Section VII), we summarize how the information in the Study can be utilized to improve this situation. This includes a discussion of:

- (a) The representation of clients by volunteer lawyers working with the Georgia Justice Project and other non-profit agencies;
- (b) Transfer of knowledge and experience to other partnering agencies in the state;
- (c) Educational development including teaching a course on the topic at other law schools in Georgia and development of a Continuing Legal Education (CLE) program on this subject matter;

- (d) Publication and distribution of the final Study to partnering agencies and referral sources;
- (e) Participation in educational and training programs presented to referral sources and other agencies; and
- (f) Assistance with the coordination of efforts to develop and implement strategies for administrative and legislative change in Georgia (areas for initial focus are identified).

Given Atlanta's and the state's growing reputation as a progressive business center, the state of Georgia should strive to have social policies that reflect this stature.

## II. THE MAINTENANCE, DISSEMINATION AND CORRECTION OF ARREST AND CONVICTION RECORDS

The state of Georgia maintains a centralized depository for all criminal justice information (*i.e.*, arrest and conviction records) generated by the various state and local law enforcement agencies throughout the state. Although this information is used for a wide array of purposes within the criminal justice arena, such as the identification of criminal patterns and the investigation and prosecution of crimes, its accessibility and use is not limited to those in the criminal justice field.

The information is made available to other government agencies and the general public as a resource for ensuring the public safety. Thus, criminal justice information is made available to prospective employers, landlords and public service agencies for their use in determining whether a particular applicant's criminal background disqualifies him/her from selection. Although the public's safety obviously is a valid concern and screening based on an individual's criminal record may advance that cause in certain situations, one must also take into account the rights and welfare of the individual whose record is being evaluated.

Upon reentering society following a conviction—or even just an arrest individuals often face societal stigma that can hinder, if not wholly prevent, the individual from successful reentry. The widespread dissemination and use of criminal justice information within the community can work to perpetuate that stigma by preventing the individual from obtaining housing, employment and/or the public services he or she needs to get his or her life back on track. Continuing to punish those reentering society from the criminal justice system not only calls into question principles of fundamental fairness, but it also can compromise public safety and contribute to a cycle of crime as those denied opportunity often resort to—or return to—criminal activity.

Thus, it is essential that a community strike a balance between the appropriate use of criminal justice information to protect the public safety of the community and the provision of opportunity to those who are reentering the community from the criminal justice system. Regardless of how much weight one devotes to these competing interests, criminal justice information is only useful to the extent that it is complete and accurate. Decisions based on incomplete or inaccurate criminal justice history both facilitate

injustice and compromise public safety by either providing an opportunity to one who is undeserving or denying an opportunity to one who is deserving.

This section of the Study examines the collection, maintenance and use of criminal justice information in the state of Georgia. In addition to evaluating how Georgia currently seeks to ensure the accuracy and proper use of that information, it also provides recommendations both for advancing the accuracy and completeness of the information and for improving the balance between the use of criminal justice information and the protection of an individual's liberty and opportunity.

### **A. The Georgia Crime Information Center**

The Georgia Crime Information Center ("GCIC") was established in 1973 as a division of the Georgia Bureau of Investigation and charged with responsibility for creating a statewide, central repository for the collection, maintenance and dissemination of criminal history records for all local law enforcement and criminal justice agencies.<sup>1</sup> GCIC is a creation of the Georgia legislature, and thus its organization and operation are governed by state law.<sup>2</sup> Specifically, GCIC is required to obtain and preserve "finger prints, descriptions, photographs and any other pertinent identifying data" for individuals arrested or taken into custody for felonies and certain categories of misdemeanors and violations of ordinances<sup>3</sup> and to "[d]evelop, operate, and maintain an information system which will support the collection, storage, retrieval, and dissemination of all crime and offender data."<sup>4</sup>

GCIC is responsible for the maintenance of criminal justice information collected from more than 600 state and local law enforcement agencies.<sup>5</sup> The criminal history record information maintained by GCIC includes:

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<sup>1</sup>See GEORGIA CRIME INFORMATION CENTER, available at <http://www.ganet.org/gbi/gcic.html>.

<sup>2</sup>See O.C.G.A. § 35-3-30, *et seq.*; Ga. Comp. R. & Regs. § 140-1-.01, *et seq.*

<sup>3</sup>O.C.G.A. § 35-3-33(a)(1)(A).

<sup>4</sup>O.C.G.A. § 35-3-33(a)(5).

<sup>5</sup>GBI CRIME STATISTICS DATABASE, at [http://gbi.georgia.gov/00/channel\\_modifielddate/0,2096,67862954\\_87981396,00.html](http://gbi.georgia.gov/00/channel_modifielddate/0,2096,67862954_87981396,00.html).

“the subject’s identification data (name, date of birth, social security number, sex, race, height, weight, etc.), arrest data (including arresting agency, date of arrest and charges), final judicial disposition data submitted by a court, prosecutor or other criminal justice agency and custodial information if the offender was incarcerated in a Georgia correctional facility.”<sup>6</sup>

GCIC’s computerized criminal history database contains fingerprint and criminal history information for more than 2,800,000 persons.<sup>7</sup> In 2006 alone, GCIC added more than 100,000 new individuals to the system and updated an additional one million records.<sup>8</sup>

GCIC thus is tasked with collecting and maintaining vast amounts of data affecting literally millions of people. The importance of this monumental task is especially great in Georgia where a recent study found that an estimated 10.2% of Georgians would spend time in a Georgia state prison during their lifetime, whereas, on average, only 6.6% of persons nationwide are estimated to spend time in a state or federal prison during their lifetime.<sup>9</sup> Given the amount of data, the number of outlets from which it is received and the importance of the data, it is essential that GCIC maintain structured and centralized processes for the collection and maintenance of the data to ensure its comprehensiveness and accuracy.

## **B. Data Collection**

GCIC relies on over 600 local and state law enforcement and criminal justice agencies for the collection of criminal justice information.<sup>10</sup> Although

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<sup>6</sup>GEORGIA CRIME INFORMATION CENTER, OBTAINING CRIMINAL HISTORY RECORD INFORMATION, FREQUENTLY ASKED QUESTIONS, at <http://ganet.org/gbi/crimhist.html>.

<sup>7</sup>GCIC ANNUAL REPORT FOR 2006, available at [http://gbi.georgia.gov/vgn/images/portal/cit\\_1210/24/46/95809832GCIC2006.pdf](http://gbi.georgia.gov/vgn/images/portal/cit_1210/24/46/95809832GCIC2006.pdf).

<sup>8</sup>*Id.*

<sup>9</sup>Compare GA. STATE BD. OF PARDONS & PAROLES, OFFICE OF CRIMINAL JUSTICE RESEARCH, LIFETIME LIKELIHOOD OF GOING TO A GEORGIA STATE PRISON (Feb. 1999) with U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDER STATISTICS, at <http://www.ojp.usdoj.gov/bjs/crimoff.htm#prevalence>.

<sup>10</sup>GBI CRIME STATISTICS DATABASE, at [http://gbi.georgia.gov/00/channel\\_modifielddate/0,2096,67862954\\_87981396,00.html](http://gbi.georgia.gov/00/channel_modifielddate/0,2096,67862954_87981396,00.html).



GCIC has adopted rules governing the collection of this data, as described below, the process remains largely decentralized and unautomated. As such, there are many places for the system to break down and/or room for information to fall between the cracks, thereby jeopardizing the accuracy and completeness of the data received, maintained and disseminated by GCIC.

### **1. Arrest Records**

State and local law enforcement agencies are required to provide GCIC with fingerprints and identifying information of individuals arrested for a felony or one of the misdemeanor or ordinance violations tracked by GCIC within 24 hours of arrest, though that period “may be extended to cover any intervening holiday or weekend.”<sup>11</sup> The law enforcement agencies are provided the option of submitting the fingerprints and other identifying information electronically using a GCIC certified live scan device or manually (rolled, inked prints) on fingerprint cards.<sup>12</sup> The GCIC does not mandate the use of a standardized fingerprint card and permits the use of any alternative medium or system of submission upon prior GCIC approval.<sup>13</sup>

The submission process for arrest data thus is neither automated nor standardized. Although the majority of arrest records are now processed by GCIC electronically, in 2006, 13 percent of the criminal arrest record submissions were still submitted manually.<sup>14</sup> The lack of automation not only adds another step to the process and thereby increases the opportunity for human error, but it also substantially increases the amount of time it takes

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<sup>11</sup>Ga. Comp. R. & Regs. § 140-2-.03(1). Pursuant to statute, GCIC is required to obtain fingerprints and identifying information for individuals arrested or taken into custody for (1) an offense that is a felony; (2) a misdemeanor or violation of an ordinance “involving burglary tools, commercial gambling, dealing in gambling devices, contributing to the delinquency of a child, dealing in stolen property, dangerous drugs, narcotics, firearms, dangerous weapons, explosives, pandering, prostitution, sex offenses where children are victims, or worthless checks;” or (3) an offense charged as disorderly conduct, but which relates to an act connected with one or more of the offenses under subpart (2) above. O.C.G.A. § 35-3-33.

<sup>12</sup>Ga. Comp. R. & Regs. § 140-2-.03(1).

<sup>13</sup>*Id.*

<sup>14</sup>See GCIC ANNUAL REPORT FOR 2006, available at [http://gbi.georgia.gov/vgn/images/portal/cit\\_1210/24/46/95809832GCIC2006.pdf](http://gbi.georgia.gov/vgn/images/portal/cit_1210/24/46/95809832GCIC2006.pdf).

for the information to enter the system. GCIC is able to process electronic submissions in a matter of minutes,<sup>15</sup> whereas manual submissions require delivery to GCIC followed by manual entry into the GCIC system.

## **2. Disposition Records**

For every arrest record received, GCIC subsequently should receive notification of the disposition of the charge upon a final outcome. Similar to the process by which GCIC receives arrest records, the process in place for obtaining disposition records is neither fully automated nor standardized. Moreover, the process is extremely decentralized, with various players in the criminal justice system bearing responsibility for the submission of the disposition information depending on the type of resolution obtained.

In addition to the submission of arrest records, the arresting law enforcement agency also is responsible for initiating disposition forms for the arrest “[a]t the time and place that fingerprints are obtained.”<sup>16</sup> Although the law enforcement agency is responsible for initiating the disposition form, the agency responsible for submission of the form is determined by the method in which the matter is resolved.<sup>17</sup>

If the arresting law enforcement agency decides to dispose of the arrest without referring the matter to prosecuting officials, it is the duty of the law enforcement agency to complete the disposition forms and forward them to GCIC.<sup>18</sup> Alternatively, if the arresting agency determines that the matter should be referred for prosecution, the law enforcement agency must forward the disposition forms to the prosecuting agency with the arrest warrant, citation or charges.<sup>19</sup> When the prosecuting authority decides to dispose of the matter without referral of the matter to the courts, it is the duty of the prosecuting authority to complete the disposition forms and forward

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<sup>15</sup>Processing includes identification of the fingerprints, transmission of a response to the arresting agency, update and creation of a computerized criminal history record, and transmission to the FBI. GCIC ANNUAL REPORT FOR 2006, available at [http://gbi.georgia.gov/vgn/images/portal/cit\\_1210/24/46/95809832GCIC2006.pdf](http://gbi.georgia.gov/vgn/images/portal/cit_1210/24/46/95809832GCIC2006.pdf).

<sup>16</sup>Ga. Comp. R. & Regs. § 140-2-.03(2).

<sup>17</sup>Ga. Comp. R. & Regs. § 140-2-.03(2)(a)-(f).

<sup>18</sup>Ga. Comp. R. & Regs. § 140-2-.03(2)(a).

<sup>19</sup>Ga. Comp. R. & Regs. § 140-2-.03(2).

them to GCIC; electronic submission is permissible so long as the system used meets GCIC requirements.<sup>20</sup> Where final disposition—or modification of a prior disposition—is determined by a court of competent jurisdiction, it is the duty of the clerk of court to forward disposition reports to GCIC.<sup>21</sup>

When the sentence of a convicted person is modified, a parole is revoked or a parolee is discharged from parolee status by the State Board of Pardons and Parole (the “Board”), the Board is responsible for forwarding disposition reports for the modification to GCIC.<sup>22</sup> When probationary sentences are revoked, terms of probation under the Georgia First Offender Act<sup>23</sup> are completed or revocation hearing dispositions are determined, “it shall be the duty of all persons in charge of probation offices under the direct supervision of the Department of Corrections to forward disposition reports to GCIC.”<sup>24</sup> When the Court of Appeals or the Supreme Court modifies or suspends the disposition of an individual defendant, it is the duty of the clerk of the court rendering decision to forward the report of such modification or suspension to GCIC.<sup>25</sup>

In short, it is the duty of any criminal justice agency or court that makes a final disposition determination or modification to report that action to GCIC. The rules require the responsible agency or court to forward the disposition information to GCIC “within 30 days of final disposition decisions.”<sup>26</sup> The process is extremely decentralized and relies upon the cooperation and administrative competence of each of the various players in the criminal justice system. GCIC has not developed a standardized reporting form for the various agencies to use. Although efforts have been undertaken to automate the disposition reporting system, many of the agencies responsible for submitting information still lack access to the automated system. In

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<sup>20</sup>Ga. Comp. R. & Regs. § 140-2-.03(2)(b).

<sup>21</sup>Ga. Comp. R. & Regs. § 140-2-.03(2)(c). If final disposition is determined by a court for which there is no clerk of court, the duty falls to “any other official required to maintain records of court proceedings and findings.” *Id.*

<sup>22</sup>Ga. Comp. R. & Regs. § 140-2-.03(2)(d).

<sup>23</sup>See Section II(D)(2), *infra*.

<sup>24</sup>Ga. Comp. R. & Regs. § 140-2-.03(2)(e).

<sup>25</sup>Ga. Comp. R. & Regs. § 140-2-.03(2)(f).

<sup>26</sup>Ga. Comp. R. & Regs. § 140-2-.03(4).

2006, only 44 percent of the dispositions obtained by GCIC were received electronically.<sup>27</sup>

The deficiencies in the disposition reporting process manifest themselves in the accuracy and completeness of the criminal justice information maintained by GCIC. GCIC estimates that approximately 70 percent of all arrests dating from the 1970s to present have final dispositions reported.<sup>28</sup> Only 75 percent of all felony arrests reported in the past two to seven years have a final disposition reported.<sup>29</sup> Not accounted for in this data are the untold numbers of modified or revoked dispositions missing from the system. Although GCIC performs an audit function which seeks to complete records for which final disposition information is missing, in 2006, GCIC located final dispositions for less than 4,000 cases of the nearly 24,000 cases researched.<sup>30</sup>

In addition to GCIC's failure to obtain complete and accurate disposition data, the disposition reporting system prescribed by GCIC also results in significant delay both between the time the disposition is rendered and when it is reported to GCIC and between the time the disposition is reported and when it is entered into the criminal justice information database at GCIC. According to a national survey conducted in 2003, it takes an average of 45 days for GCIC to receive final disposition data once the disposition has been made, whereas nationally, the average is less than 22 days.<sup>31</sup> Once the data is received by GCIC, it then takes an average of 152 days before it is entered into the system, compared to a national average of 50.2 days.<sup>32</sup>

The incompleteness of these records can have significant consequences not only for those whose records are incomplete, but also for the public safety of the community. For those who have been cleared of the crime for which they were arrested, the failure of the GCIC to obtain complete and accurate final disposition information will result in individuals, such as po-

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<sup>27</sup>See GCIC ANNUAL REPORT FOR 2006, available at [http://gbi.georgia.gov/vgn/images/portal/cit\\_1210/24/46/95809832GCIC2006.pdf](http://gbi.georgia.gov/vgn/images/portal/cit_1210/24/46/95809832GCIC2006.pdf).

<sup>28</sup>*Id.*

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, at 37(2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sschis03.pdf>.

<sup>32</sup>*Id.*

tential employers and public service agencies, receiving inaccurate criminal record information that may result in the denial of employment, housing or public services. Alternatively, the failure of GCIC to obtain and record disposition information for those who have been convicted of a crime may result in high risk individuals obtaining employment or services to which they are not entitled and thereby jeopardizing community safety.

### **C. Crime Record Dissemination**

The statutes and regulations governing GCIC provide the rules governing the circumstances and conditions under which public and private individuals and agencies may receive criminal justice information. These rules govern dissemination by GCIC as well as other criminal justice agencies and distinguish between the various purposes for which the information is disseminated, including a distinction between criminal justice purposes and non-criminal justice purposes.

#### ***1. Dissemination for Criminal Justice Purposes***

By statute, GCIC is required to provide access to criminal justice information 24 hours a day, seven days a week to “all local and state criminal justice agencies, all federal criminal justice agencies, and criminal justice agencies in other states.”<sup>33</sup> GCIC has a mandate to provide criminal justice information to bona fide criminal justice agencies “to serve the administration of justice and to facilitate criminal justice employment.”<sup>34</sup> The rules require GCIC to enter into service agreements with all bona fide criminal justice agencies for this purpose.<sup>35</sup> In general, the requesting agency is required to provide GCIC with two sets of fingerprints for the individual for whom the criminal history record check is requested,<sup>36</sup> though GCIC is authorized to conduct criminal history record checks for criminal defense purposes on the basis of personal identifiers supplied by authorized requestors.<sup>37</sup>

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<sup>33</sup>O.C.G.A. § 35-3-33(a)(12).

<sup>34</sup>Ga. Comp. R. & Regs. § 140-2-.04(2)(a).

<sup>35</sup>Ga. Comp. R. & Regs. § 140-2-.04(2)(a)(1).

<sup>36</sup>Ga. Comp. R. & Regs. § 140-2-.04(2)(c).

<sup>37</sup>Ga. Comp. R. & Regs. § 140-2-.04(2)(c)(4).

Criminal justice agencies are also permitted to distribute criminal justice information to other bona fide criminal justice agencies “to facilitate the administration of criminal justice and criminal justice employment.”<sup>38</sup> Criminal justice agencies are required to refer requests from counsel for defendants in criminal actions to GCIC, but are permitted to provide counsel in civil cases with criminal justice information for individuals for whom the attorney provides signed consent.<sup>39</sup> Upon written request from the counsel for the defendant, GCIC provides criminal history records of the defendant and witnesses in criminal actions.<sup>40</sup>

## **2. Dissemination for Non-Criminal Justice Purposes**

Separate rules govern the dissemination of criminal justice information for non-criminal justice purposes. In order to obtain criminal justice information from GCIC, non-criminal justice related government agencies and private businesses must obtain a “unique agency number” from GCIC and “sign a Service Agreement.”<sup>41</sup> Upon having such an account, any request for information must be accompanied by two sets of fingerprints and identifying information for the individual whose information is requested, along with payment of a \$15.00 fee.<sup>42</sup> GCIC will provide criminal history record consisting of Georgia arrest, conviction and sentencing information<sup>43</sup> within seven to ten business days for properly submitted requests.<sup>44</sup>

Individuals may obtain a copy of their own criminal history record from GCIC by providing GCIC with a current set of the record subject’s finger-

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<sup>38</sup>Ga. Comp. R. & Regs. § 140-2-.04(1)(a).

<sup>39</sup>Ga. Comp. R. & Regs. § 140-2-.04(1)(a)(1).

<sup>40</sup>O.C.G.A. § 35-3-34; *see also* Ga. Comp. R. & Regs. § 140-2-.04(1)(a)(1).

<sup>41</sup>GEORGIA CRIME INFORMATION CENTER, OBTAINING CRIMINAL HISTORY RECORD INFORMATION, FREQUENTLY ASKED QUESTIONS, *at* <http://ganet.org/gbi/crimhist.html>.

<sup>42</sup>*Id.*

<sup>43</sup>Information for certain types of criminal justice information is protected from disclosure, as discussed in Section D, *infra*.

<sup>44</sup>GEORGIA BUREAU OF INVESTIGATION, GCIC, GUIDELINES FOR REQUESTING CRIMINAL HISTORY REPORTS FOR EMPLOYMENT, LICENSING, ADOPTION OR OTHER PURPOSES (on file with authors).

prints taken by a GCIC employee or a local law enforcement agency.<sup>45</sup> Applications must be accompanied with payment of a \$3.00 fee.<sup>46</sup> Upon written application and payment of the fee, counsel for the record subject may obtain a copy of the record subject's criminal history record.<sup>47</sup>

Private individuals and businesses or agencies without an account with GCIC may obtain State of Georgia and local criminal justice information from local criminal justice agencies.<sup>48</sup> Requestors must provide the criminal justice agency with either the fingerprints or the signed consent of the person whose criminal record is sought.<sup>49</sup> However, neither consent nor the provision of fingerprints are required in order to obtain the record of an individual's in-state felony convictions, pleas and sentences.<sup>50</sup> The amount of the fee required is determined by the individual criminal justice agency.<sup>51</sup>

### **3. Protective Measures**

In addition to providing rules on the circumstances under which individuals and entities may obtain criminal justice information, the statutes and regulations also contain several provisions which seek to ensure the proper usage of criminal justice information. GCIC maintains a record of all requests for the dissemination of criminal justice information.<sup>52</sup> Both GCIC and criminal justice agencies are required to inform all recipients of criminal justice information that the use of such information is limited to the

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<sup>45</sup>Ga. Comp. R. & Regs. § 140-2-.10(1).

<sup>46</sup>Ga. Comp. R. & Regs. § 140-2-.10(1)(b).

<sup>47</sup>Ga. Comp. R. & Regs. § 140-2-.10(2).

<sup>48</sup>Ga. Comp. R. & Regs. § 140-2-.04(1)(b).

<sup>49</sup>Ga. Comp. R. & Regs. § 140-2-.04(1)(b)(1). The signed consent must include the person's full name, address, social security number, race, sex, and date of birth. *Id.* Neither fingerprints nor signed consent are required for a representative of the Board of Voter Registrars or county board of elections to obtain criminal record information for the purpose of verifying voter eligibility. *Id.*

<sup>50</sup>*Id.*; O.C.G.A. § 35-3-34(d.2).

<sup>51</sup>Ga. Comp. R. & Regs. § 140-2-.04(1)(b)(2).

<sup>52</sup>Ga. Comp. R. & Regs. § 140-2-.06.

purpose for which it was intended and may not be further disseminated.<sup>53</sup> In addition, GCIC and criminal justice agencies are required to inform those who obtain criminal record information for non-criminal justice purposes of special rules which govern their use of the information to make decisions with regard to the individuals whose information they have requested. More specifically, GCIC and criminal justice agencies:

“shall advise all requestors that, if an employment, licensing, housing, or other decision adverse to the record subject is made, the individual or agency making the adverse decision must inform the record subject of all information pertinent to that decision. This disclosure must include that a [criminal history] check was made, the specific contents of the record, and the effect the record had upon the decision. Failure to provide such information to the person in question is a misdemeanor under Georgia Law.”<sup>54</sup>

By requiring such notice to the requestors of criminal justice information and providing for criminal liability for failure to inform individuals when an adverse decision is made on the basis of their criminal history, the state seeks both to protect individuals from the improper usage of criminal history information and to alert them when their criminal history is the cause of adverse action so as to allow them to attempt to correct any misinformation in their record. However, the effectiveness of these protections is questionable given the difficulty of—and lack of infrastructure for—enforcement.

As further methods of protection, the regulations provide for periodic audits of public agencies and officials requesting information “to assure their compliance with relevant provisions of Georgia law and these Rules.”<sup>55</sup> GCIC “check[s] a representative sample of non-criminal justice recipients of criminal history record information annually.”<sup>56</sup> The director of GCIC has the authority to invoke disciplinary procedures against agencies that fail to

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<sup>53</sup>Ga. Comp. R. & Regs. § 140-2-.04(1)(f); Ga. Comp. R. & Regs. § 140-2-.04(2)(g)-(h).

<sup>54</sup>Ga. Comp. R. & Regs. § 140-2-.04(1)(b)(3); Ga. Comp. R. & Regs. § 140-2-.04(2)(c)(1).

<sup>55</sup>Ga. Comp. R. & Regs. § 140-2-.04(2)(c)(2).

<sup>56</sup>Ga. Comp. R. & Regs. § 140-2-.07(3).



comply with the rules governing dissemination and use of criminal justice information.<sup>57</sup> The statutes also provide criminal liability for those who obtain or communicate criminal justice information in violation of the laws and rules governing maintenance and dissemination and/or those who seek to disclose the security measures taken to protect the information.<sup>58</sup>

## **D. Special Circumstances**

Under Georgia law, certain types of criminal justice information receive special protection from disclosure by GCIC and local criminal justice agencies. In such situations, the state has recognized that one's criminal record can have significant impacts on an individual's ability to succeed in society and has made the decision that the individual is entitled to relief from those impacts due to circumstances surrounding the criminal conduct.

### **1. Juvenile Offenders**

In general, GCIC and criminal justice agencies are prohibited from disclosing the criminal conduct of juvenile offenders and must maintain such records separately from adult records.<sup>59</sup> However, such protection is not applicable for juvenile misconduct where the matter is transferred for criminal prosecution of the individual as an adult.<sup>60</sup> Moreover, juvenile criminal justice information is permitted to be disclosed to certain groups of individuals for specific purposes.<sup>61</sup>

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<sup>57</sup>Ga. Comp. R. & Regs. § 140-1-.05.

<sup>58</sup>O.C.G.A. § 35-3-38.

<sup>59</sup>O.C.G.A. § 15-11-82.

<sup>60</sup>O.C.G.A. § 15-11-82(b); see O.C.G.A. § 15-11-30.2.

<sup>61</sup>O.C.G.A. § 15-11-82(c) states:

“Inspection of the records and files is permitted by: (1) A juvenile court having the child before it in any proceeding; (2) Counsel for a party to the proceedings, with the consent of the court; (3) The officers of public institutions or agencies to whom the child is committed; (4) Law enforcement officers of this state, the United States, or any other jurisdiction when necessary for the discharge of their official duties; (5) A court in which the child is convicted

## 2. *First Offender Statute*

In cases involving defendants that have no prior felony convictions, judges in Georgia have the discretion to invoke the First Offender Statute.<sup>62</sup> Under the First Offender Statute, following a plea or verdict of guilty or a plea of *nolo contendere* but prior to an adjudication of guilt, the judge, upon the consent of the defendant, defers further proceedings and sentences the defendant either to probation or a term of confinement.<sup>63</sup> Upon successful completion of the terms of that sentence, the defendant shall be discharged without court adjudication of guilt, which “shall completely exonerate the defendant of any criminal purpose and shall not affect any of his civil rights or liberties.”<sup>64</sup> The defendant is thereafter considered to have no criminal conviction, and the clerk of court is required to enter the following notice on all court documents related to the case: “Discharge filed completely exonerates the defendant of any criminal purpose and shall not affect any of his civil rights or liberties; and the defendant shall not be considered to have a criminal conviction. *See* O.C.G.A. 42-8-62.”<sup>65</sup> The statute further provides that a record of the discharge and exoneration be forwarded to GCIC without request of the defendant.<sup>66</sup>

Once the defendant has been exonerated and discharged pursuant to the First Offender Statute, GCIC and criminal justice agencies are generally prohibited from disclosing records of the defendant’s arrest, charge, and

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of a criminal offense, for the purpose of a presentence report or other dispositional proceeding; (6) Officials of penal institutions and other penal facilities to which the child is committed; (7) A parole board in considering the child’s parole or discharge or in exercising supervision over the child; or (8) Any school superintendent, principal, assistant principal, school guidance counselor, school social worker, school psychologist certified under Chapter 2 of Title 20, or school law enforcement officer appointed pursuant to Chapter 2, 3, or 8 of Title 20 when necessary for the discharge of his or her official duties.”

<sup>62</sup>O.C.G.A. § 42-8-60.

<sup>63</sup>*Id.*

<sup>64</sup>O.C.G.A. § 42-8-62.

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

sentence.<sup>67</sup> Disclosure of the arrest and sentence is permissible, however, until the defendant has completed the sentence and officially been exonerated and discharged by the court.

In addition, if the defendant was exonerated and discharged by the court on or after July 1, 2004, GCIC may provide the defendant's record of arrests, charges and sentences, if:

- (a) the request relates to a person who has applied for employment with various types of schools or child care facilities and the person was prosecuted for child molestation, sexual battery, enticing a child for indecent purposes, sexual exploitation of a child, pimping, pandering, or incest;<sup>68</sup>
- (b) the request relates to a person who has applied for employment with various types of entities that provide care to elderly or disabled persons and the person was prosecuted for the offense of sexual battery, incest, pimping, pandering or the abuse, neglect, or exploitation of any disabled adult or elder person;<sup>69</sup> or
- (c) the request relates to a person who has applied for employment with a facility that provides care to persons who are mentally ill or mentally retarded and the person was prosecuted for the offense of sexual battery, incest, pimping, or pandering.<sup>70</sup>

Although each of these exceptions is limited to the context in which the record subject has applied for employment in a specific area of service, it is not clear from that statute and regulations how these exceptions are administered to ensure the narrow application anticipated by the statute.

It is important to note that although the First Offender Statute states that upon exoneration and discharge the offense "shall not affect any of his

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<sup>67</sup>O.C.G.A. § 35-3-34(a)(1)(B); O.C.G.A. § 35-3-35(a)(1)(B); Ga. Comp. R. & Regs. § 140-2-.04(1)(b). *But see* Ga. Comp. R. & Regs. § 140-2-.04(2)(a)(3) (indicating that release of First Offender arrest and sentencing information is appropriate for criminal justice purposes and in certain situations related to substance abuse charges).

<sup>68</sup>O.C.G.A. § 35-3-34.1(a)(1).

<sup>69</sup>O.C.G.A. § 35-3-34.1(a)(2).

<sup>70</sup>O.C.G.A. § 35-3-34.1(a)(3).

civil rights or liberties,” the statute does not prohibit prospective employers, landlords and public service agencies from inquiring about an applicant’s arrest record independent of the information obtained from GCIC or local criminal justice agencies. Thus, there is nothing to prevent them from seeking information about juvenile or First Offender offenses through the application process. The Georgia Court of Appeals has held that the statute creates no civil liability for an employer who bases an adverse decision on an offense for which the employee was discharged under the First Offender Statute.<sup>71</sup>

As a result of these exceptions and caveats to the First Offender Statute, it is important that a defendant be informed of the potential gaps in the protection offered by the First Offender Status prior to accepting a plea agreement involving a sentence pursuant to the First Offender Status. It is especially important that the defendant be informed that information of his or her arrest and sentence will be available to potential employers, landlords and public service agencies during the term of his/her probation under the First Offender Statute. The resulting impairment may impede the defendant’s ability to carry out the terms of his/her probation. Moreover, the defendant should be instructed regarding what information he or she must provide on applications requesting criminal history information upon the exoneration and discharge of his/her offense.

### **3. Sexual Offenders**

Treatment under the First Offender Act is not available for certain sexual offenders. Specifically, the First Offender Act excludes persons who have been found guilty, or entered a plea of guilty or nolo contendere, for (1) a “sexual offense” as defined in O.C.G.A. § 17-10-6.2; (2) sexual exploitation of a minor as defined in O.C.G.A. § 16-12-100; or (3) computer pornography and child exploitation as defined in O.C.G.A. § 16-12-100.1.<sup>72</sup> Further, as discussed above, even when an offender has been discharged without an adjudication of guilt pursuant to the First Offender Act, the GCIC is still

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<sup>71</sup>See *Mattox v. Yellow Freight Systems, Inc.*, 243 Ga. App. 894 (2000) (stating that “[t]he violation of [O.C.G.A. § 42-8-63] does not give rise to a private cause of action because the statute does not specify a civil remedy”).

<sup>72</sup>O.C.G.A. § 42-8-60(d).

authorized to provide the first offender's arrest records in certain circumstances involving applications for employment.<sup>73</sup> First offenders must also comply with the Sex Offender Registry Act until discharged after completion of the sentence, or, of course, after an adjudication of guilt.<sup>74</sup>

#### **4. Pretrial Intervention and Diversion Programs**

The final category is notable not based on the special protection from disclosure received, but rather for the **lack of protection** from disclosure provided. Pursuant to statute, “[t]he prosecuting attorney for state courts, probate courts, magistrate courts, municipal courts, and any other court that hears cases involving a violation of the criminal laws of [Georgia] or ordinance violations shall also be authorized to create and administer a Pretrial Intervention and Diversion Program for offenses within the jurisdiction of such courts.”<sup>75</sup> The purpose of the program is to provide prosecuting attorneys a self-devised alternative to the prosecution of offenders in the traditional criminal justice system.<sup>76</sup> Inclusion in the program is based on prosecutorial discretion within written guidelines established by the prosecuting attorney's office.<sup>77</sup>

Generally, Pretrial Intervention and Diversion Programs are viewed as an opportunity to provide a special avenue of justice for those who have committed an offense uncharacteristically or under mitigating circumstances. Similar to the First Offender Statute, Pretrial Intervention and Diversion Programs often are meant to provide an offender with a fresh start free of the stigma and liabilities attached to criminal convictions. Thus, one might expect similar treatment of criminal history records under the First Offender and Pretrial Intervention and Diversion Program statutes. The latter, however, unlike the First Offender Statute, provides no express authority or permission for the confidential treatment of the arrest and conviction records related thereto. Although prosecuting attorneys are provided some

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<sup>73</sup>O.C.G.A. § 35-3-34.1(a); see discussion in Sec. II(D)(2), *supra*.

<sup>74</sup>O.C.G.A. § 42-1-12.

<sup>75</sup>O.C.G.A. § 15-18-80.

<sup>76</sup>*Id.*

<sup>77</sup>*Id.*

discretion that may allow for the removal of arrest information from an offender's record,<sup>78</sup> there is no express authorization or stated policy preference for such treatment expressed in the statute. In fact, as discussed below, the statute providing for expungement of criminal records specifically states that expungement is not appropriate where an individual has completed a pretrial diversion program, unless the terms of the program "specifically provide for expungement of the arrest record."<sup>79</sup>

## **E. Correcting, Supplementing and Purging Criminal Justice Information Records**

In addition to the procedures followed by GCIC to improve the precision of its records, there are several mechanisms available to individuals to verify and ensure the accuracy and comprehensiveness of their criminal histories. There are also methods by which individuals can seek to have information removed from their criminal records. Given the increasing role played by criminal justice information in society, it is essential that individuals be informed both of how to monitor the accuracy of their criminal history and of their rights with regard to the removal of information from their record.

### **1. Ensuring the Accuracy of Criminal Justice Information**

GCIC has several procedures in place to monitor and improve the accuracy and completeness of its data. The Agency performs biennial audits of criminal justice agencies that operate network terminals at which the criminal justice information maintained by GCIC is accessible.<sup>80</sup> GCIC also endeavors to audit "[a] representative sample of non-terminal agencies . . . based on the availability of auditor resources."<sup>81</sup> GCIC also utilizes special federal funds awarded for criminal history record improvement to conduct audits of criminal justice agencies' reporting of fingerprint and disposition

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<sup>78</sup>See generally Section III(A), *infra* (discussing the role of prosecuting attorneys in the procedure for expungement of criminal records).

<sup>79</sup>O.C.G.A. § 35-3-37(d)(7)(E); see Section III(A), *infra*.

<sup>80</sup>Comp. R. & Regs. § 140-2-.07(1). *But see* GCIC Annual Report for 2006, available at [http://gbi.georgia.gov/vgn/images/portal/cit\\_1210/24/46/95809832GCIC2006.pdf](http://gbi.georgia.gov/vgn/images/portal/cit_1210/24/46/95809832GCIC2006.pdf) (stating that audits are conducted triennially).

<sup>81</sup>*Id.*

data.<sup>82</sup> According to a 2003 study conducted by the U.S. Department of Justice, however, GCIC does not audit the central repository system.<sup>83</sup> In addition to the audit procedures, several provisions governing the Agency provide criminal and/or employment consequences for failure to use appropriate care with regard to the accuracy and security of criminal justice information.<sup>84</sup>

GCIC also provides procedures through which one is able to seek to influence the process GCIC utilizes in the collection, maintenance and dissemination of criminal justice information globally or seek to correct his or her own criminal record information. GCIC provides a procedure by which an entity or individual may seek an administrative declaratory ruling as to the applicability of a rule or policy where their “legal rights are impaired by the application of any statutory provision, or by any GCIC Rule or order.”<sup>85</sup> Individuals or entities seeking global change to GCIC policy also may petition the GCIC Council to adopt a specific rule in conformity with the Georgia Administrative Procedure Act.<sup>86</sup>

Individuals also are provided the right to petition GCIC to correct or update their criminal justice information. To seek correction or update of information, GCIC recommends that the individual obtain verification of the requested change from the appropriate criminal justice agency and petition that agency to provide proper documentation of the change to GCIC.<sup>87</sup>

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<sup>82</sup>GCIC Annual Report for 2006, *available at* [http://gbi.georgia.gov/vgn/images/portal/cit\\_1210/24/46/95809832GCIC2006.pdf](http://gbi.georgia.gov/vgn/images/portal/cit_1210/24/46/95809832GCIC2006.pdf).

<sup>83</sup>U.S. Dep’t of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, at 53(2003), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/sschis03.pdf>.

<sup>84</sup>*See* Comp. R. & Regs. § 140-2-.05 (stating that criminal justice information shall not be altered, etc. for the purpose of obstructing justice or otherwise violating the law); O.C.G.A. § 35-3-38 (criminalizing improper obtainment or communication of criminal history data or security techniques); O.C.G.A. § 35-3-39 (stating that any officer or official reference in the statutes “who shall neglect or refuse to make any report or do any act required by any provision . . . shall be deemed guilty of nonfeasance in office and subject to removal therefrom”).

<sup>85</sup>Comp. R. & Regs. § 140-1-.03.

<sup>86</sup>Comp. R. & Regs. § 140-1-.04.

<sup>87</sup>Georgia Crime Information Center, Obtaining Criminal History Record Information, Frequently Asked Questions, *at* <http://ganet.org/gbi/crimhist.html>.

Specifically, GCIC states that the relevant criminal justice agency must provide it “a written request . . . , on official letterhead, with the following information: full name of subject, date of birth, social security number, race, sex, and date of arrest; or State Identification Number (SID) and date of arrest or Offender Tracking Number (OTN) for that date of arrest; and the requested changes.”<sup>88</sup> Alternatively, if an individual wishes to contest the accuracy of information contained in his/her criminal record, (s)he must submit the following: (1) a signed written request with a brief explanation of the request, including the specific data challenges and a complete return mailing address; (2) two completed fingerprint cards with all of the applicant’s identifying information; and (3) payment of a \$3.00 fee.<sup>89</sup>

According to GCIC rules, “[c]riminal history records determined by GCIC or by other criminal justice agencies to be in error shall be corrected without undue delay.”<sup>90</sup> Where GCIC determines that the information in the criminal history record is accurate as entered, the individual’s recourse is through the court system.<sup>91</sup> Given the significant negative impact faced by individuals with negative criminal history records, it is essential that individuals at risk for inaccurate or incomplete criminal history records (*e.g.*, individuals whose arrests have not been prosecuted or who have received a favorable resolution to their case; individuals discharged pursuant to the First Offender Statute) be advised to obtain copies of their criminal history record to ensure its accuracy and completeness. Such individuals should further be counseled on the methods available for seeking to update or correct their criminal record should an error occur with its processing.

## **2. Expungement**

In addition to the correction of errors and omissions, Georgia law also provides for the expungement of an individual’s criminal history record under certain circumstances. Although, as discussed below, historically the courts have adopted a very narrow view of the expungement statute,

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<sup>88</sup>*Id.*

<sup>89</sup>*Id.*

<sup>90</sup>Comp. R. & Regs. § 140-2-.10(4).

<sup>91</sup>Comp. R. & Regs. § 140-2-.10(5).



the Georgia legislature significantly overhauled the expungement statute in 1997. Although the courts have not yet had occasion to interpret the revised statute, the legislative history and text of the statute make clear that it greatly expands the circumstances under which expungement is available.

Prior to the 1997 amendments, the statute provided that individuals who believed their criminal records to be “inaccurate or incomplete” could request the criminal justice agency with control of the criminal records to “purge, modify, or supplement” them and notify GCIC of such changes.<sup>92</sup> Upon unsatisfactory resolution by the law enforcement agency, the statute provided individuals the opportunity to appeal the decision to the Superior Court within 30 days.<sup>93</sup> If the court found the record to be “inaccurate, incomplete, or misleading,” the court had the authority to order the record “expunged, modified, or supplemented by explanatory notation.”<sup>94</sup>

The courts interpreted this statute to mean that the court’s authority to expunge criminal record information was limited to instances in which the criminal record was “inaccurate, incomplete and misleading,” which in general did not allow for the expungement of criminal arrest data where the arrest was not prosecuted so long as the disposition of the matter was correctly identified in the criminal record.<sup>95</sup> The Georgia Supreme Court held that, under the pre-1997 version of the statute, “expungement should be reserved for exceptional cases.”<sup>96</sup> The court went on to hold that in making the determination, the Superior Court:

... should balance the competing interests involved, namely those of the state in maintaining extensive arrest records to aid in effective law enforcement and those of the individual in being free from the harm that may be caused from the existence of those records. Only

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<sup>92</sup>See Georgia House of Representatives, HB 183—Criminal records; purge if person arrested but not charged, O.C.G.A. 35-3-37(c) available at [http://www.legis.ga.gov/legis/1997\\_98/leg/fulltext/hb183.htm](http://www.legis.ga.gov/legis/1997_98/leg/fulltext/hb183.htm).

<sup>93</sup>*Id.*

<sup>94</sup>*Id.*

<sup>95</sup>See *Drake v. State*, 170 Ga. App. 846, 847 (Ga. App. 1984); *Meinken v. Burgess*, 262 Ga. 863, 864-65 (Ga. 1993).

<sup>96</sup>*Meinken*, 262 Ga. at 865.

where this balancing test weighs in the individual's favor may a court expunge an arrest record.<sup>97</sup>

It was against this backdrop that the Georgia legislature undertook to revise the expungement statute. Initially the matter was raised by Senator Edward Boshears in the 1996 legislative session, in which he introduced a bill (SB 533) that sought to allow an arrest or conviction to be purged if the offense subsequently was not charged, not prosecuted or the individual was cleared through a court proceeding.<sup>98</sup> Although the bill did not pass, it laid the groundwork for a successful house bill (HB 183) introduced the next term that provided for a slightly less expansive expungement. The bill that passed, which represents the current law, left the old language of the expungement statute largely in tact, but added several new sections that broadly expanded the circumstances under which expungement was available.<sup>99</sup>

For the first time, the new law provided individuals with an absolute *right* to have their criminal records expunged in certain circumstances, such as where: (1) the individual was not prosecuted for the offense either because the criminal justice agency released the individual without reference of the offense to the prosecuting attorney or because the prosecuting attorney dismissed the charges without seeking an indictment or filing an accusation; (2) no other criminal charges were pending against the individual at the time; and (3) the individual had not been previously convicted of the same or similar offense within the last five years, excluding any period of incarceration.<sup>100</sup> Although the individual still must petition for expungement, assuming these conditions are met, he or she is entitled to have the arrest expunged, including any fingerprints or photographs of the individual taken in conjunction with the arrest.<sup>101</sup>

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<sup>97</sup>*Id.* at 867.

<sup>98</sup>RAYMOND L. PEELER., LAW ENFORCEMENT AND OTHER AGENCIES, 14 Ga. St. U. L. Rev. 182, 185 (1997).

<sup>99</sup>See Georgia House of Representatives, HB 183—Criminal records; purge if person arrested but not charged, O.C.G.A. 35-3-37(c) available at [http://www.legis.ga.gov/legis/1997\\_98/leg/fulltext/hb183.htm](http://www.legis.ga.gov/legis/1997_98/leg/fulltext/hb183.htm).

<sup>100</sup>O.C.G.A. § 35-3-37(d)(1), (3).

<sup>101</sup>*Id.* “Any material which cannot be physically destroyed or which the prosecuting attorney determined must be preserved under *Brady v. Maryland* shall be restricted by the agency.” O.C.G.A. § 35-3-37(d)(4).

Subject to certain exceptions, the expanded statute also provides a right to expungement of arrests where an indictment or accusation was filed but where the charges were nolle prossed, dead docketed or otherwise dismissed. Specifically, the statute states: “After the filing of an indictment or an accusation, a record shall not be expunged if the prosecuting attorney shows that the charges were nolle prossed, dead docketed, or otherwise dismissed because” (1) the individual entered a plea agreement resulting in a conviction for an offense arising out of the same underlying transaction or occurrence; (2) the government was barred from introducing material evidence against the individual on legal grounds; (3) a material witness refused or was unavailable to testify unless based on his/her statutory right to refuse to do so; (4) the individual was incarcerated on other criminal charges and the decision was based on judicial economy; (5) the individual successfully completed a pretrial diversion program, the terms of which did not specifically provide for expungement of the arrest record; (6) the conduct which resulted in the arrest was part of a pattern of conduct for which the individual was prosecuted in another court; or (7) the individual had diplomatic, consular, or similar immunity or inviolability from arrest or prosecution.<sup>102</sup> Although framed in terms of the circumstances under which an individual’s record may *not* be expunged, the provision clearly denotes that absent these circumstances an individual is entitled to expungement of his/her record where an indictment or accusation was filed but the charges were ultimately dismissed.<sup>103</sup>

Moreover, the statute provides a favorable judicial standard for the appeal of an agency decision denying the expungement of individuals’ criminal history records. Specifically, the statute provides that a decision of the agency shall be upheld “only if it is determined by clear and convincing evidence that the individual did not meet the criteria” for expungement.<sup>104</sup> The burden is thus placed on the agency to show that expungement is not appropriate in a given situation. In sum, following the revision of the

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<sup>102</sup>O.C.G.A. § 35-3-37(d)(7).

<sup>103</sup>This interpretation is further supported by the judicial enforcement provision which provides that the decision of the agency denying expungement shall be upheld “only if it is determined by clear and convincing evidence that the individual did not meet the criteria set forth” in this subsection of the statute. O.C.G.A. § 35-3-37(d)(6).

<sup>104</sup>O.C.G.A. § 35-3-37(d)(6).

expungement statute by the legislature in 1997, absent certain specific circumstances, an individual has a judicially enforceable right to have his/her criminal record expunged for an arrest (1) which did not result in the filing of an indictment or accusation; or (2) for which an accusation or indictment was filed but which was subsequently nolle prossed, dead docketed, or otherwise dismissed.

Although these rights to expungement are clear from the text and legislative history of the 1997 overhaul of the expungement statute, the statute has not yet been interpreted in a reported decision of the Georgia courts. Perhaps as a result of this, law enforcement agencies—the gatekeepers of the process for obtaining expungement—have not yet adopted application forms for expungement that encompass the full scope of the right as defined in the statute.<sup>105</sup> Thus, it is essential that individuals subjected to the criminal justice system be counseled as to the full extent of their expungement rights as part of their representation.

### **3. Pardon or Restoration of Rights**

Georgia law also provides a mechanism by which those individuals who have been convicted of crimes may seek either to have their criminal convictions pardoned or may seek to have rights that were forfeited as a result of a conviction restored. Both of these remedies are available exclusively from the Board of Pardons and Paroles.<sup>106</sup> Unlike some states, Georgia does not provide its governor with the authority to grant pardons.<sup>107</sup>

Although the Board of Pardon and Paroles is provided discretion in making pardon and restoration of rights decisions, state regulations provide that a pardon may be granted where an individual proves his/her innocence after conviction or where five years have expired without any criminal activity since the individual concluded his/her sentence (inclusive of probation and payment of fines).<sup>108</sup> However, for good cause, the Board may lift the five year requirement.<sup>109</sup>

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<sup>105</sup>Each agency has its own forms which can be obtained by contacting the agency.

<sup>106</sup>Ga. CONST. Art. 4, § 2, ¶ II.

<sup>107</sup>O.C.G.A. § 42-9-56.

<sup>108</sup>Ga. Comp. R. & Regs. § 475-3-.10(3).

<sup>109</sup>*Id.*

A pardon may only be granted for an in-state conviction and has the effect of “restor[ing] civil and political rights and all legal disabilities resulting from conviction.”<sup>110</sup> The grant of a restoration of rights may be sought regardless of the jurisdiction in which the individual was convicted. Upon receiving a restoration of rights, the individual has all civil and political liabilities that resulted from conviction restored, including the right to sit on a jury and the right to hold political office. A restoration of rights, unlike a pardon, however, does not remove legal disabilities such as adverse licensing and employment decisions.

An individual must appeal to the Board for either a pardon or a restoration of rights through a standardized application form. The Board is required to review each application individually. In 2005, the Board granted 335 pardons and 232 restorations of rights.<sup>111</sup> It is unclear, however, what impact, if any, the grant of a pardon or restoration of rights has on that individual’s criminal history. GCIC’s regulations regarding the handling of disposition information make no reference to the collection of disposition information relating to pardons and restoration of rights.<sup>112</sup> Nor do the regulations provide whether or not an individual who has obtained a pardon or restoration of rights is entitled to have his criminal record purged.

## **F. Conclusion and Recommendations for Improvement of the Collection, Maintenance and Dissemination of Criminal Justice Information**

Given the serious consequences one’s criminal record can have on his or her opportunities in society, it is essential that the state maintain a system that ensures accurate and comprehensive data that is updated in a timely manner. The improved accuracy of the data not only benefits those whose information is maintained by GCIC, but also benefits public safety. The state should undertake not only to ensure that the process in place for the collection, maintenance and dissemination of criminal justice information is sound, but also should encourage individuals to monitor their criminal

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<sup>110</sup>*Id.*

<sup>111</sup>Ga. Bd. Of Pardons and Paroles, 2005 Annual Report, *available at* <http://pap.state.ga.us/05AnnualReport.PDF>.

<sup>112</sup>*See* Ga. Comp. R. & Regs. § 140-2-.03(2).

record information both for the accuracy of the data contained therein and to take advantage of opportunities to purge criminal history information from their records.

Through policies such as expungement and the First Offender Statute, the state has acknowledged that individuals who have been charged with crimes under certain situations should not be denied opportunities on the basis of those charges. These policies can only be successful to the extent they are exercised. Thus, it is essential that individuals be educated about their rights under these policies and the state encourage the exercise of such rights.

The below recommendations seek to address some of the barriers that currently exist with an eye toward achieving the joint goals of (1) maintaining and disseminating accurate and comprehensive criminal justice information in a timely manner; and (2) ensuring that individuals who have wrongly been accused of a crime and/or those who are committed to succeeding in society in spite of a criminal misstep are provided the opportunity to succeed.

### ***1. The Collection of Criminal Justice Information***

Although GCIC does have guidelines in place governing the collection of arrest and disposition information from the over 600 agencies from which it gathers data, the process is extremely decentralized, and GCIC fails to provide a completely standardized and automated process for the collection. As a result, the accuracy, completeness and timeliness of the data suffers, which can have serious negative results for those whose criminal record information is inaccurate or incomplete. To address this problem, GCIC should undertake to fully automate and standardize the system. In addition, GCIC should attempt to centralize reporting responsibilities in order to decrease the cracks in the system and to provide greater accountability.

### ***2. The Dissemination of Criminal Justice Information***

Under the current system, criminal justice information is available through a variety of state and local criminal justice agencies in addition to GCIC. In spite of this decentralized approach, there is no standardized process of dissemination to ensure that all recipients of information receive warning and apply the statutorily mandated restrictions on the use and further dissemi-

nation of criminal justice information. Similarly, although the regulations require that all recipients of information be informed of their obligations to inform individuals of any adverse decision made based on the criminal record obtained, there is no uniform protocol in place to ensure that all recipients are so informed.

It is recommended that GCIC develop a standardized procedure for the dissemination of criminal justice information, including standardized notification forms to inform recipients of criminal justice information of their obligations (1) to restrict their use of the information to its intended purpose; (2) to refrain from further dissemination of the information; and (3) to inform an individual of any adverse decision made on the basis of the information. Recipients of information should be required to sign such notification forms regardless of the outlet from which the criminal justice information is received. GCIC should also establish mechanisms and procedures to ensure the enforcement of these restrictions on the use of criminal justice information.

The State should also provide additional protection for certain types of criminal record information. The First Offender Statute indicates the State's desire to assist first time offenders by allowing them a means of shielding their record from those outside the system. To better accomplish this, information related to a First Offender eligible offense should be shielded from the public throughout the process, thereby allowing the individual a chance to succeed pending final resolution of the matter without the negative impact of a criminal arrest and sentence (probation or incarceration) record. Similarly, the State should provide for the nondisclosure of criminal history related to an offense for which the accused completes a Pretrial Intervention and Diversion Program.

In all instances where the State provides protection from disclosure of the criminal history information, the State should adopt measures to ensure that the information is not used to form the basis of adverse decisions against the protected individual in spite of the information not being obtainable from GCIC. For example, the State should adopt measures to prohibit employers, landlords and public service providers from seeking and/or basing an adverse decision on criminal history information that has been protected from disclosure by the State, such as juvenile criminal records, First Offender offenses, and expunged criminal justice information. Civil and/or criminal liability should attach for those who violate the provision.

Similarly, the State should adopt laws that expressly allow individuals not to disclose such information on application forms, and the State should devote resources to ensuring that those who have gone through the criminal justice system are informed of their right to non-disclosure.

### **3. The Correction and Expungement of Criminal Justice Information**

Given the public safety implications and the severity of the consequences a negative criminal history record can have on an individual's prospects in society, it is essential that the information maintained be accurate, and the State should be willing to undertake significant efforts and expense to ensure such. One of the best mechanisms of ensuring the accuracy of the data is to provide the individual record holder with an opportunity to review and correct the data. Thus, individuals should be provided a copy of their criminal history information—along with information explaining in detail the steps for challenging its accuracy—each time GCIC adds or edits their criminal record file.

With regard to expungement, criminal justice information which qualifies for expungement as a matter of right under the statute should be expunged without application from the individual. Moreover, the process of expungement should be centralized such that a GCIC department with expungement expertise handles all expungement issues instead of requiring each individual law enforcement agency to handle expungement requests and pass information on to GCIC. At a minimum, GCIC should provide a standardized process for seeking expungement and provide local law enforcement agencies with training that ensures that expungement is available to the full extent permitted by the post-1997 statute.

The next section of this Study (Section III) is a practical guide to the correction of criminal records and expungement under Georgia law. That Section also includes specific recommendations for administrative and legislative change in Georgia. See Section III(C), *supra*.



### III. A PRACTICAL GUIDE TO ALTERING OR AMENDING CRIMINAL RECORDS UNDER GEORGIA LAW

#### Introduction

This Section of the study addresses the practical aspects of representing clients who seek to make changes to their criminal records. As discussed in Section II above, each time a person is arrested in Georgia, the date of the arrest and crimes charged are listed on that person's criminal record. The subsequent dispositions of those charges should also be reflected, but this often does not happen, or the information that is transmitted is untimely or incorrect. In certain circumstances where charges are dropped, or other special circumstances exist, records of arrests should be deleted altogether.

The central repository for criminal history information is the Georgia Crime Information Center (GCIC), which is a division of the Georgia Bureau of Investigation.<sup>1</sup> Law enforcement agencies submit arrest and other information to the GCIC, and prosecutors or courts are responsible for submitting final disposition information. As noted in Section II, this process is neither standardized nor automated. Instead, each jurisdiction has its own method for handling criminal history information, and that information is largely processed manually. The result is frequent errors and even more frequent omissions.

Georgia law does provide a procedure for altering or amending criminal records. The circumstances in which this is possible, however, are somewhat limited and the process is unnecessarily cumbersome. What follows is: (1) a discussion of both the procedural and substantive aspects of representing clients attempting to correct their criminal records; (2) a discussion of criminal record access reform recommendations put forward by the ABA Commission on Effective Criminal Sanctions; and (3) recommendations for reform (through litigation, regulation or legislation) specific to Georgia.

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<sup>1</sup>O.C.G.A. § 35-3-35 (GCIC Authority); Ga. Comp. R. & Regs. § 140-1-.01-.06 (GCIC Regulations).

## **A. Altering or Amending Criminal History Records**

### **1. Obtaining Criminal Records**

The first step in representing a client seeking to alter their criminal record is to obtain an official copy of the client's record. Because updates are often transmitted long after final dispositions, it is best to obtain a new copy at the outset of the representation, even if the client has an older copy. Further, it is important to impress upon clients that they need to keep counsel informed of any information they receive about their criminal record because the GCIC will often send notices only to the record subject, even if represented by counsel.

Individuals may obtain a copy of their own criminal record by providing the GCIC a current set of their fingerprints taken by the GCIC or a local law enforcement agency and paying a \$3.00 fee.<sup>2</sup> Upon written application and payment of the fee, counsel for the record subject may obtain a copy of his or her client's record.<sup>3</sup> GCIC is also authorized to make criminal history records of the defendant or witnesses in a criminal action available to counsel for the defendant upon receipt of a written request from the defendant's counsel.<sup>4</sup>

### **2. The Criminal Records Statute**

The Georgia Code provides procedures for altering information contained on a person's criminal record where: (1) there is a record of arrest for charges that were dismissed at the pre-indictment or pre-accusation stage; (2) there is a record of arrest for charges that were dead-docketed, nolle prossed, or dismissed post-indictment or accusation;<sup>5</sup> and/or (3) the record contains inaccurate, incomplete or misleading information (although, as discussed below, there is some uncertainty as to the meaning of the term "misleading" under the amended statute).

#### **(a) Charges Dropped Pre-Indictment**

If charges are dropped (1) after an arrest but before referral for prosecution, or (2) after referral for prosecution but before the prosecutor has

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<sup>2</sup>Ga. Comp. R. & Regs. § 140-2-.10(1); *see also* O.C.G.A. § 35-3-37(b).

<sup>3</sup>Ga. Comp. R. & Regs. § 140-2-.10(2).

<sup>4</sup>O.C.G.A. § 35-3-34(a)(2).

<sup>5</sup>O.C.G.A. § 35-3-37.

sought an indictment or filed an accusation, the accused may request the original agency to “expunge” (*i.e.*, delete) the record of such arrest.<sup>6</sup>

Upon receipt of such written request, the agency must provide a copy of the request to the proper prosecuting attorney, who must “promptly” review the request to determine if it meets the criteria set forth in O.C.G.A. § 35-3-37(d)(3). An individual has the “right” to have his or her record of an arrest expunged if the prosecuting attorney determines that the following criteria have been satisfied:

- The charge was dismissed pre-indictment;
- No other criminal charges are pending against the individual; and
- The individual has not been previously convicted of the same or similar offense within the last five years, excluding any period of incarceration.<sup>7</sup>

#### **(b) Charges Dropped Post-Indictment**

After indictment or accusation, an arrest record can be expunged if the charges were nolle prossed, dead docketed or otherwise dismissed. However, records of such charges cannot be expunged if the prosecutor shows that the charges were disposed of because:

- Of a plea agreement resulting in a conviction for an offense arising out of the same transaction or occurrence as the dismissed charge;
- The government was barred from introducing material evidence on legal grounds such as the grant of a motion to suppress or motion in limine;
- A material witness refused to testify or was unavailable to testify, unless such witness refused to testify based on his or her statutory right to do so;
- The individual was incarcerated on other criminal charges and the prosecuting attorney elected not to prosecute for reasons of judicial economy;

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<sup>6</sup>O.C.G.A. § 35-3-37(d)(1).

<sup>7</sup>O.C.G.A. § 35-3-37(d)(3).

- The individual successfully completed a pretrial diversion program, the terms of which did not specifically provide for expungement of the arrest record;
- The conduct which resulted in the arrest was part of a pattern of criminal activity which was prosecuted in another court of this state, the United States, another state or foreign nation; or
- The individual had diplomatic, consular, or similar immunity from arrest or prosecution.<sup>8</sup>

### (c) Inaccurate or Incomplete Records

Where records are simply inaccurate or do not include required information (typically the final disposition), Georgia law permits the record subject to petition, and ultimately sue, to have the erroneous records corrected. This is a relatively uncontroversial process; however, as discussed below, the required procedure is unnecessarily cumbersome.

### (d) Exceptional Cases

The Georgia Supreme Court has held that expungement may also be available in “exceptional cases” where the interest of the state in maintaining extensive arrest records is outweighed by the harm caused to the individual by the existence of such records.<sup>9</sup> However, *Meinken* was decided prior to an extensive revision of O.C.G.A. § 35-3-37 in 1997. It is unclear what effect, if any, the 1997 amendments have on the *Meinken* holding.

Prior to the 1997 amendments, the expungement statute generally authorized Superior Courts to order “expungement, modification or supplementation” of criminal records when such records were “inaccurate, incomplete or misleading.”<sup>10</sup> There were no express provisions for expungement of arrest records disposed of prior to conviction.<sup>11</sup>

The Georgia Supreme Court extensively analyzed the pre-1997 version

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<sup>8</sup>O.C.G.A. § 35-3-37(d)(7); a flow chart on expungement is included as Appendix A to this Study.

<sup>9</sup>*Meinken v. Burgess*, 262 Ga. 863, 426 S.E.2d 876 (1993).

<sup>10</sup>See 14 Ga. St. U. L. Rev. 182 (1997).

<sup>11</sup>*Id.*; see also *Meinken*, 262 Ga. at 870 (Mills, J., dissenting).

of the expungement statute in *Meinken v. Burgess*. However, neither the Supreme Court nor the Court of Appeals has addressed the impact of the 1997 changes to the expungement statute. As discussed below, the 1997 changes, although adding additional grounds for expungement, likely did not affect the *Meinken* holding.

(i) The *Meinken* Holding

In *Meinken*, the plaintiff in the expungement suit had been arrested and indicted for allegedly molesting his 3-year-old daughter. The arrest had apparently been based on a police interview of the child, which had been videotaped. The plaintiff had demanded a speedy trial on the criminal charges, and the state was unable to comply because the daughter would not discuss the alleged molestation. The plaintiff was, therefore, acquitted by operation of law. Plaintiff then brought suit to have the record of his arrest expunged under O.C.G.A. § 35-3-37.<sup>12</sup>

The trial court found that plaintiff's arrest record was "inaccurate and misleading in that it does not reflect the disposition" of the case, and also expressed "grave concerns" about the "leading . . . and very suggestive" nature of the videotaped interview with the child that had formed the basis for the arrest.<sup>13</sup>

The Court of Appeals reversed on the grounds that plaintiff's arrest record accurately stated that he had been arrested, but was merely incomplete in that it did not also reflect the acquittal. The Court of Appeals held that the remedy of expungement is only available when an arrest record is inaccurate. The Supreme Court granted certiorari, and framed the issue as whether "a person with an incomplete arrest record can never have his arrest record expunged under O.C.G.A. § 35-3-37(c) but instead can only have his arrest record supplemented."<sup>14</sup>

The Supreme Court concluded that if a criminal record is inaccurate, incomplete or misleading, the superior court has three available remedies: expungement, modification or supplementation. The Court indicated that expungement (based on the pre-1997 law) "should be reserved for exceptional

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<sup>12</sup>*Meinken*, 262 Ga. at 863-64.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

cases” and invoked only where “the remedies of modification or supplementation are inadequate to protect the interests of the individual.”<sup>15</sup>

To make this determination, the Superior Court should balance the interests of “the state in maintaining extensive arrest records to aid in effective law enforcement and those of the individual in being free from the harm caused by the existence of those records.” For example, “if an arrest results from an illegality or misconduct on the part of the police . . . the arrest record may not be indicative of the individual’s criminal propensity and the maintenance of that record may therefore be of little value to law enforcement. . . .”<sup>16</sup>

The Court held that the omission of plaintiff’s acquittal from his arrest record was not “an exceptional circumstance warranting the remedy of expungement instead of modification or supplementation.” However, the Court also held that the Superior Court’s concerns about the videotape raised:

“ . . . the type of special circumstances that might warrant expungement, in that it places in doubt whether there was any foundation whatsoever for [plaintiff’s] arrest and thereby may tend to diminish the interest of the state in maintaining the arrest record and to heighten [plaintiff’s] interest in having the record expunged.”<sup>17</sup>

(ii) Impact of the 1997 Amendments on *Meinken*

The balancing test announced by *Meinken* (and the Court’s statements about the exceptional nature of expungement) applies only when expungement is sought on the general grounds that the subject’s records are “inaccurate, incomplete, or misleading.” Where the other criteria set forth in O.C.G.A. § 35-3-37(d) for expungement of arrest records have been met, the plain language of the statute requires expungement.

A more difficult question is whether there is room to apply the *Meinken* balancing test at all after the 1997 amendments. Both the pre and the post 1997 versions of subsection (c) provide that if “an individual believes his criminal records to be inaccurate or incomplete, he may request the original agency” to “purge, modify or supplement them” and notify the GCIC

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<sup>15</sup>*Id.* at 864-65.

<sup>16</sup>*Id.* at 866.

<sup>17</sup>*Id.*

accordingly. Subsection (c) then goes on to authorize judicial relief for “inaccurate, incomplete or misleading” records.

However, the 1997 amendments added the phrase “as set forth in paragraph (3) of subsection (d) of this Code section” after the word “misleading.” So the current statute provides: “Should the record in question be found to be inaccurate, incomplete, or misleading *as set forth in paragraph (3) of subsection (d) of this Code section*, the Court shall order it to be appropriately expunged, modified, or supplemented by an explanatory notation.” (Italics denote language added by the 1997 amendments). The State may argue that a record is “inaccurate, incomplete, or misleading” only in the circumstances described in subsection (d)(3). However, that construction would render subsection (d)(7) a nullity and also fail to provide any remedy for simply false or incomplete information.

Alternatively, the amended language could mean that a record can be considered “misleading” only in the circumstances described in section (d)(3). This construction would arguably strengthen the argument made by the *Meinken* dissenters that expungement is appropriate only where criminal records contain factually inaccurate information, and incomplete information should be remedied only by supplementation.

However, the amended language is not the only provision in the post-1997 statute that describes the type of relief Superior Courts are allowed to grant. For example, the statute elsewhere maintains the pre-1997 language that the court “may order such relief as it finds to be required by law.” There is, of course, a presumption that the legislature was aware of existing law when the 1997 amendments were enacted but failed to express an intention to abrogate *Meinken*.<sup>18</sup> Indeed, the statute’s use of the phrase “required by law” necessarily includes the *Meinken* holding.<sup>19</sup> No case since the 1997 amendments has questioned *Meinken*’s continued viability.

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<sup>18</sup>See, e.g., *Carswell v. State*, 251 Ga. App. 733, 735, 555 S.E.2d 124 (2001) (“From the addition of words, it may be presumed that the legislature intended some change in the existing law; but it is also presumed that the legislature did not intend to effect a greater change than is clearly apparent either by express declaration or by necessary implication.”).

<sup>19</sup>*Hillman v. State*, 232 Ga. App. 741, 503 S.E.2d 610 (1998) (“... all statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it; that they are to be construed in connection and in harmony with the existing law; and that their meaning and effect will be determined in connection, not only with the common law and the Constitution, but also with reference to other statutes and the decisions of the courts.”).

The *Meinken* balancing test is a substantial benefit because it provides another, and potentially broader, avenue for expungement than those specifically itemized in subsections (d)(3) or (d)(7) of O.C.G.A. § 35-3-37. For example, a person acquitted at trial, or exonerated thereafter, on the basis of DNA evidence would not be eligible for expungement under subsections (d)(3) or (d)(7) but would nonetheless have a compelling argument that they should not be penalized with the stigma of a felony they did not commit.

### (e) The Process

If an individual believes his or her criminal records to be inaccurate, incomplete or misleading, he or she may request the original agency having custody or control of the records to “purge, modify, or supplement” them and to notify GCIC of such changes.<sup>20</sup> For example, if the district attorney in a particular county drops charges prior to indictment, that district attorney’s office is the agency with custody of the documents reflecting the dismissal and is the agency to which an alteration request should be made.

#### (i) Agency Applications

A frustrating, and unnecessarily time consuming, aspect of this process is that most agencies follow their own local procedures for handling such requests. For example, many agencies have their own unique forms that applicants must complete before a request will be processed.

More problematic is the fact that many agencies require original certified copies of disposition documents before a request will even be considered. This is often true even when the agency with custody of the disposition documentation is another branch of the governmental entity to which the expungement request is made. For example, the City of Atlanta may respond to an expungement request by instructing the applicant to submit an original and certified copy of the disposition documentation maintained by the City of Atlanta Police Department.

Even worse, law enforcement agencies and prosecutor’s offices routinely demand original disposition documentation even when the disposition is already reflected on the subject’s criminal record. So, counsel may represent

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<sup>20</sup>O.C.G.A. § 35-3-37(c).



a client whose record reflects that arrest number 1 was resolved by nolle pros. After reading O.C.G.A. § 35-3-37, counsel might think that the GCIC would automatically expunge this arrest, but this would be wrong. Counsel might also think that a letter (perhaps enclosing the subject's record and a photocopy of the disposition) would be sufficient, but again he/she would be disappointed. Instead, counsel will not be successful in getting many agencies to even consider the request unless and until an original, certified copy of the disposition is submitted. Suggestions for reforming this unnecessarily burdensome structure are discussed in Section C below.

(ii) Disputing Agency Decisions (Or Inaction)

Should the agency decline to act or should the individual believe the agency's decision to be unsatisfactory, the individual or his or her attorney may, within 30 days of such decision, enter an appeal to the Superior Court of the county of his or her residence or to the court in the county where the agency exists, with notice to the agency, to acquire an order by the court that the subject information be expunged, modified or supplemented.

This 30-day deadline is problematic when the agency fails to act. There is no deadline for the agency to act, and thus no bright line test for agency inaction. It is also unclear whether a second expungement request can be made if suit is not brought within 30 days of an agency's denial. In other words, if a client makes a request on his or her own, and brings the case to an attorney more than 30 days after a denial, can the client's attorney make a new request and get a new 30-day period?

If the prosecuting attorney having jurisdiction determines that the records should not be expunged, and the agency or GCIC fails to follow this recommendation, the prosecuting attorney (or the Attorney General) may appeal the decision to expunge a criminal history.<sup>21</sup>

The court is required to conduct a de novo hearing and may order such relief as it finds to be "required by law."<sup>22</sup> Such appeals are made in the same manner as appeals are entered from the probate court, except that the plaintiff is not required to post bond or pay the costs in advance. The appeal may be heard in chambers.

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<sup>21</sup>O.C.G.A. § 35-3-37(d)(8).

<sup>22</sup>O.C.G.A. § 35-3-37(c).

A decision of the agency shall be upheld by the court only if it is determined by clear and convincing evidence that the individual did not meet the criteria for expungement. The court in its discretion may award reasonable court costs including attorney's fees to the individual if he or she prevails in the appellate process. Any such action shall be served upon the agency, the GCIC, the prosecuting attorney having jurisdiction over the offense sought to be expunged and the Attorney General who may each become parties to the action.

(iii) Remedies

If the record in question is found to be "inaccurate, incomplete, or misleading as set forth" in O.C.G.A. § 35-3-37(d)(3), the court shall order it to be appropriately expunged, modified or supplemented by an explanatory notation.<sup>23</sup> Each agency or individual in the state with custody, possession, or control of any such record must "promptly" cause each and every copy thereof to be altered in accordance with the court's order. Notification of each such deletion, amendment and/or supplementary notation shall be promptly disseminated to anyone to whom the records in question have been communicated.

The expungement statute does not require the destruction of incident reports or other records that a crime was committed or reported to law enforcement. Further, expungement does not apply to custodial records maintained by county or municipal jail or detention centers. The agency that retains such information is required to take such action as may be reasonable to prevent disclosure of information to the public that would identify those whose records were expunged.<sup>24</sup>

When a record has been ordered expunged, the original criminal justice agency should do so by:

destroying the fingerprint cards, photographs, and documents relating exclusively to such person. Any material which cannot be physically destroyed or which the prosecuting attorney determines must be preserved under *Brady v. Maryland* shall be restricted by the agency

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<sup>23</sup>O.C.G.A. § 35-3-37(c).

<sup>24</sup>O.C.G.A. § 35-3-37(c).

and shall not be subject to disclosure to any person except by direction of the prosecuting attorney or as ordered by a court record of this state.<sup>25</sup>

The GCIC is required to restrict access to information pertaining to expunged records. The Center will only disclose the information to criminal justice officials for criminal investigation purposes upon written application.<sup>26</sup> A flow chart which attempts to simplify the expungement process is included as Appendix A to this Study.

## **B. The American Bar Association (ABA) Report**

In a speech at the 2003 ABA Annual Meeting, Justice Anthony Kennedy challenged the legal profession to help start a new public discussion about American sentencing and correction policies and practices. He expressed concern about the fairness and effectiveness of a criminal justice system that disproportionately imprisons minorities and then returns them to their communities without significant rehabilitative efforts and with the stigma of a criminal conviction. He pointed out that most states now spend more on their prisons than on their schools and concluded that “our resources are misspent, our punishments too severe, our sentences too long.”<sup>27</sup>

The ABA responded by establishing the Justice Kennedy Commission whose report to the 2004 Annual Meeting contained a series a policy recommendations regarding sentencing and corrections reform. Continuing the work of the Justice Kennedy Commission, the ABA Commission on Effective Criminal Sanctions (the “Commission”) has focused on policies aimed at neutralizing the effects of an arrest or criminal record.

In August of 2007, the Commission proposed new ABA policies on access to criminal history information. In a report detailing the proposal, the Commission found that job and housing applicants with criminal records are consistently rejected without regard to the actual risk that a potential hire or tenant would pose. The Commission cited research that showed people

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<sup>25</sup>O.C.G.A. § 35-3-37 (d)(4).

<sup>26</sup>O.C.G.A. § 35-3-37 (d)(5).

<sup>27</sup>Justice Anthony Kennedy’s August 9, 2003 speech to the ABA Annual Meeting.

with steady employment and stable housing are more likely to avoid criminal activity. Further, the Commission relied on research showing that if a person is not rearrested within the three years after conviction, the chances of that person re-offending drop each year until “the risk of a new criminal event among a population of non-offenders and a population of prior offenders becomes similar.”<sup>28</sup>

In a prior report to the ABA House of Delegates in February 2007, the Commission did not recommend limiting access to criminal records, preferring the more transparent option of a Certificate of Good Conduct as a means of neutralizing the effect of a criminal record.

However, the Commission specifically recommended in August of 2007 that jurisdictions limit access by non-law enforcement agencies to non-conviction records. Objections were raised by representatives of the media and the background screening industry. As a result, the Commission decided to withdraw this recommendation. It is not clear whether the same or similar recommendations will be submitted in the future.

### ***1. Access Recommendations***

The Commission recommended that records of closed criminal cases that did not result in a conviction should be automatically sealed from general public access, as should misdemeanor and most felony convictions after the passage of a specified period of law-abiding conduct. The Commission’s recommendation also provides that sealed records may be reopened upon a showing of good cause, and that a sealing order may be revoked upon a subsequent conviction. Further, credit reporting agencies and others should be prohibited from disclosing a sealed record, and appropriate remedies should be provided for any unauthorized disclosure. In addition, the Commission recommended that evidence of any individual’s conviction should be inadmissible in any negligent hiring case where the access to a criminal record has been limited.

The Commission noted that it was important to “eliminate formal legal barriers to employment and licensure, just as it is important to give offend-

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<sup>28</sup>Committee Report, pp. 7-8 (quoting KURLYCHEK, BRAME, BUSHWAY: “SCARLET LETTERS AND RECIDIVISM: DOES AN OLD CRIMINAL RECORD PREDICT FUTURE OFFENDING?” 5 *Criminology and Public Policy* 1101, 1117 (2006)).

ers a way to demonstrate their rehabilitation, and private employer incentives to hire them, as we have elsewhere recommended.”<sup>29</sup> However, the Commission found that such steps may not be sufficient to counter the hostile attitude towards ex-offenders “that seems to have become hard-wired into the fabric of the workplace.”<sup>30</sup> As a result, the Commission concluded that “. . . we are persuaded that the most effective and meaningful way to neutralize the effect of a conviction record is to permit offenders, after a certain period of time and under certain conditions, to put the past behind them by eliminating access to the record itself.”<sup>31</sup>

## 2. *Objections*

Database companies such as LexisNexis, business groups like the U.S. Chamber of Commerce and other ABA Committees opposed the resolution. The ABA Consumer Financial Services Committee of the section of business law said that the resolution would impinge upon banks’ and other financial institutions’ ability to comply with federal laws regarding background checks on employees. They argued that these checks are meant to keep people who have been involved in particular financial crimes from certain sections of the industry.

The ABA’s First Amendment & Media Litigation Committee and other media advocates criticized the proposal as impeding reporters’ abilities to oversee the criminal justice system and the public’s First Amendment right of access to judicial records of criminal proceedings. Another media group that fought the proposal was the Reporters Committee for Freedom of the Press.<sup>32</sup>

In support of its First Amendment argument, the Reporters Committee relied upon a First Circuit decision finding a Massachusetts statute unconstitutional.<sup>33</sup> The *Pokaski* decision invalidated a Massachusetts statute calling for the automatic sealing of certain criminal matters that did not result

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<sup>29</sup>Report, p. 8 (citing Report 103 C, report to the House of Delegates, ABA mid year meeting, available at [www.aba.net/org/cecs](http://www.aba.net/org/cecs)).

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*, p. 11.

<sup>33</sup>*Globe Newspapers Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989).

in a conviction. The court held that such records met the two-part test established by the Supreme Court because: (1) they had historically been opened to the public, and (2) “public access plays a significant positive role in the functioning of the particular process in question.” 868 F.2d at 502 (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986)). The *Pokaski* court left open the possibility that individual court-ordered sealing under a “compelling state interest test” might be permissible, but stated that records “cannot be sealed on the basis of a general reputation and privacy interest.” 868 F.2d at 507 n. 18.<sup>34</sup>

The Commission’s Report found that “two state supreme courts have rejected the *Pokaski* court’s view that the weight to be given to the privacy interest of an individual who has not been found guilty, when coupled with the state’s interest in encouraging reentry, is not sufficient to counter the public’s First Amendment interest in open court proceedings.”<sup>35</sup> The Commission was persuaded by the Florida Supreme Court’s view that: “the policy of public access to old records must be weighted against the long-standing public policy of providing a second chance to criminal defendants who have not been adjudicated guilty.”<sup>36</sup>

## **C. Public Policy Issues and Identification of Areas for Administrative and/or Legislative Change**

### ***1. Should Georgia law be modified to limit public dissemination of non-conviction data (arrest records)?***

There is an important distinction between permanently altering or amending records and limiting public access to these records. Currently under Georgia law, expungement is an all-or-nothing proposition. Either a record is expunged, complete with fingerprint card destruction, or access is virtually unlimited.

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<sup>34</sup>Relying on the *Pokaski* decision, the Massachusetts Supreme Court held that records of closed criminal cases may be sealed by a court only if there has been an individualized finding that sealing is necessary to effectuate a compelling state interest. *Comm. v. Doe*, 420 Mass. 142 (1995).

<sup>35</sup>American Bar Association Commission on Effective Criminal Sanctions Criminal Justice Section Report to the House of Delegates, p. 12 (August 2007) (citing *State ex rell Cincinnati Inquirer v. Winkler*, 805 N.E. 2d 1094 (Ohio 2004); and *State v. D.H. W.*, 686 So. 2d 1331 (Fla. 1996)).

<sup>36</sup>*Id.* (quoting *D.H. W.*, 686 So. 2d at 1336).

Arguably, the expungement statute currently contains enough flexibility to authorize courts to limit access on a case-by-case basis. However, the lack of clarity in the statute, and resulting lack of uniformity in application, is undesirable. A better approach is to limit the information contained in the reports that are publicly available.

The expungement statute should, therefore, be amended to provide that records of arrests not leading to conviction should not be reflected on the versions of criminal records that are publicly available to employers and other private agencies. The amended statute should require this to happen automatically as soon as the charge is disposed of without a conviction. Further, consistent with the presumption of innocence, such arrest records should not be made publicly available while charges are pending prior to disposition.

**2. *Should Georgia law be changed to provide access limitations to records of people who have prior convictions for minor offenses and who have had no recent criminal activity?***

Currently, Georgia law provides expressly for only expungement of arrest records that did not result in a conviction. However, the logic of the *Meinken* balancing test extends also to certain minor offenses that *did* result in a conviction. Applying the *Meinken* balancing test, there are undoubtedly a number of common scenarios for which the balance weighs in favor of limiting access as a matter of law. Reporting isolated misdemeanors after a certain period of time likely provides little social benefit. Similarly, other conviction records simply become stale over time. For example, the public has little or no interest in maintaining a 30-year old misdemeanor record for a person convicted of shoplifting with no subsequent criminal conduct. It may be the case that complete expungement is rarely appropriate in such circumstances, but limited public access, as discussed above, should include conviction records in certain circumstances. This category of access limitation may be more appropriate for case-by-case determination than an automatic procedure, although access should be automatically limited after a certain period.

**3. *Should legislation be passed that reaffirms the Meinken holding?***

The expungement statute should be amended to clarify that Superior Courts have discretion to order expungement of records that are rendered misleading by surrounding circumstances that may not be apparent from the face of

a criminal record. Because O.C.G.A. § 35-3-37 is so poorly organized, there is unnecessary confusion about whether “misleading” records are subject to expungement.

The *Meinken* fact pattern illustrates a case in which the extenuating circumstances might make an arrest record misleading in a way that a supplemental “charges dropped” notation may not reveal. Another example is a person completely exonerated at trial, or thereafter, in a mistaken identity case. A record reflecting such an arrest with charges dropped, at minimum, gives a completely innocent person a lifetime of explaining these circumstances. Clearly, there should be some judicial flexibility to craft appropriate remedies for special situations. The *Meinken* test provides this flexibility and it should be expressly codified as part of an amended version of O.C.G.A. § 35-3-37.

#### **4. Should the Georgia expungement statute be reorganized?**

As discussed above, there is substantial uncertainty surrounding O.C.G.A. § 35-3-37 simply because of the way the statute is organized. Much of this uncertainty arises from the way the 1997 amendment was appended to the original statute.

The statute should be amended so that there are separate subsections outlining:

- the requirements for expungement of arrest data prior to indictment or accusation;
- the requirements for expungement of arrest data after indictment or accusation;
- the discretion Superior Court judges have to order expungement in other circumstances;
- the procedure to seek expungement or appeal from adverse determinations; and
- the range of available remedies.

Currently, there are aspects of each of these items in more than one subsection of the statute, which results in a poorly worded statute. In the interests of clarity alone, the statute should be reorganized.



**5. Should Georgia law be modified to provide an opportunity for people with criminal records to obtain certificates of rehabilitation?**

The certificate of rehabilitation is a relatively non-controversial proposal that would provide a substantial benefit, and incentive, for a certain category of ex-offenders. A proposal for certificates of rehabilitation was a central aspect of the ABA Commission's February 2007 Report on Employment and Licensure of Persons with a Criminal Record, which did not generate the controversy associated with the August 2007 Report.<sup>37</sup>

What the Commission proposed was a procedure that would allow ex-offenders to "obtain a judicial or administrative order relieving the person of all collateral sanctions imposed by the law of that jurisdiction. . . ."<sup>38</sup> While perhaps phrased too broadly, the concept of a pathway to relief from particular collateral consequences for certain ex-offenders has a number of advantages and little down side.

First, a certificate of rehabilitation provides a powerful incentive to engage in socially beneficial conduct. Further, the certificate ameliorates the consequences of a criminal record without limiting the information available about the offense. As a result, the First Amendment concerns raised in objection to the ABA Commission's August recommendation are not implicated.

Clearly an absence of criminal conduct for an extended time period should be a prerequisite. Three years seems particularly appropriate in light of the studies finding that after three years the recidivism rates for former offenders are no higher than the public at large.<sup>39</sup>

Other appropriate requirements may also include drug rehabilitation, consistent employment, education, job training or other individually tailored requirements. It would provide additional flexibility to give judges discretion to authorize certain requirements to obtain a certificate at the time of sentencing. Although there should be a general set of criteria that creates

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<sup>37</sup>See discussion *supra*, at 47-50.

<sup>38</sup>AMERICAN BAR ASSOCIATION COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS REPORT ON EMPLOYMENT AND LICENSURE OF PERSONS WITH A CRIMINAL RECORD (February 2007), p. 2.

<sup>39</sup>Committee Report, pp. 7-8 (quoting KURLYCHEK, BRAME, BUSHWAY: "SCARLET LETTERS AND RECIDIVISM: DOES AN OLD CRIMINAL RECORD PREDICT FUTURE OFFENDING?" 5 *Criminology and Public Policy* 1101, 1117 (2006)).

a presumption of entitlement to a certificate for all ex-offenders, those criteria should be subject to judicial modification.

Ex-offenders who meet the criteria for a certificate could make application to a central administrative agency. There should then be a procedure to appeal denials to Superior Court. Such a procedure is similar to existing Georgia expungement procedure and would mesh well with the proposals discussed above for greater administrative centrality. To be meaningful, a certificate of rehabilitation should also provide prospective employers with an incentive to hire ex-offenders. The most important such incentive is legal protection from negligent hiring and retention lawsuits. Other possible incentives include some type of public service recognition or a tax credit.<sup>40</sup>

#### **D. Conclusion**

Criminal records have vast implications on the subject's ability to obtain employment, licenses, housing, credit and governmental benefits. Georgia law should reflect this seriousness by providing better procedures to ensure the accuracy of criminal records. In appropriate circumstances, it should be possible to delete arrest records that did not result in a conviction.

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<sup>40</sup>See discussion *infra* in Section V(G)(2).

## IV. THE IMPACT OF COLLATERAL CONSEQUENCES ON HOUSING OPPORTUNITIES FOR EX-OFFENDERS<sup>1</sup>

### A. Overview and Identification of Need

How important is housing for ex-offenders? Often, an ex-offender's most immediate need will be to find a place to live and most lack financial resources to do this. In fact, one of the findings of the Second Chance Act recently passed by Congress is that studies have shown that between 15 percent and 27 percent of prisoners expect to go to homeless shelters when released from prison.<sup>2</sup> These statistics highlight the significance of the availability of subsidized housing, as well as community assistance programs that help ex-offenders find private housing. However, criminal records often pose "roadblocks" both when ex-offenders apply for subsidized housing or when they attempt to rent from a private landlord.

Studies regarding the impact of safe and affordable housing have found that recidivism was dramatically reduced among former prisoners who had access to appropriate housing.<sup>3</sup> The Legal Action Center reports: "Access to decent, stable and affordable housing increases substantially the likelihood a person with a criminal record will obtain and retain employment and remain drug and crime-free."<sup>4</sup> Likewise, a study by the Corporation of Supportive Housing in New York showed that the use of state prisons and city jails dropped by 74% and 40%, respectively, when people with past criminal records were provided with supportive housing.<sup>5</sup> Therefore, ex-offenders with a safe and stable place

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<sup>1</sup>This Section draws heavily on Caroline Placey's Directed Research paper at Emory titled *THE CIVIL CONSEQUENCES OF ARREST AND CONVICTION IN PUBLIC HOUSING: AN EXAMINATION OF CURRENT ATLANTA HOUSING AUTHORITY POLICY AND PROCEDURES* (2006) (on file with the authors).

<sup>2</sup>The Second Chance Act, Pub. L. No. 110-199 (2008).

<sup>3</sup>See Center for Housing Policy, *THE HOUSING NEEDS OF EX-PRISONERS*, 178 *Hous. Research* (Apr. 1996) [Study conducted in England], available at <http://www.jrf.org.uk/KNOWLEDGE/FINDINGS/housing/H178.asp>.

<sup>4</sup>Legal Action Center (LAC), *SAFE AT HOME: A REFERENCE GUIDE FOR PUBLIC HOUSING OFFICIALS ON THE FEDERAL HOUSING LAWS REGARDING ADMISSION AND EVICTION STANDARDS FOR PEOPLE WITH CRIMINAL RECORDS 3* (Fall 2004), available at <http://hirenetwork.org/pdfs/Safe@Home.pdf> (last visited Aug. 15, 2008).

<sup>5</sup>*Id.*

to live are more likely to obtain employment, provide for themselves and their families and contribute to their community. If an individual has a job and a place to live, other problems, such as recovery from alcohol or drug addiction can be addressed more effectively.<sup>6</sup>

The focus in this section of the Study is on subsidized housing and specifically the Atlanta Housing Authority (AHA). AHA is organized under Georgia law to develop, acquire, lease and operate affordable housing for low income families.<sup>7</sup> Currently, AHA is the largest housing agency in Georgia and one of the largest in the nation, serving approximately 50,000 people.<sup>8</sup> AHA policies on the consideration of criminal records, as well as federal oversight laws, are analyzed below. This section also includes a discussion of the representation of clients before a housing authority and proposals for administrative change of AHA policies and procedures. It is worth noting in advance that AHA's modification of policies in the past few years reflect a more equitable attitude toward those with criminal records.

Public housing policies in the United States are governed by a complex combination of federal law and regulations, state laws and local policies developed by the public housing agencies themselves. The federal agency that monitors all of this is the Department of Health and Urban Development or "HUD." HUD gets its powers for "oversight" from several different statutes, starting with the United States Housing Act of 1937. This legislation is discussed below.

## **B. Congressional Oversight and Related Legislation**

### ***1. The United States Housing Act of 1937***

The United States Housing Act of 1937 ("Housing Act"), codified at 42 U.S.C. § 1437 *et seq.*, established the federal public housing program for the purpose of "promot[ing] the general welfare of the Nation by employing the funds and credit of the Nation . . . to assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low income families."<sup>9</sup> The Housing Act

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<sup>6</sup>*Id.*

<sup>7</sup>Atlanta Housing Authority website at <http://www.atlantahousingauth.org/profile/index.cfm>, Corporate Profile hyperlink.

<sup>8</sup>*Id.*

<sup>9</sup>42 U.S.C. § 1437(a)(1)(A), (B) (2007).

did not create a civil right to public housing. Indeed, the Act specifically notes that the “Federal Government cannot through its direct action alone provide for the housing of every American citizen, or even the majority of its citizens.”<sup>10</sup> Rather, the Housing Act established “the responsibility of the Government to promote and protect the independent and collective actions of private citizens to develop housing and to strengthen their own neighborhoods” by providing “public agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public.”<sup>11</sup>

## **2. *The Anti-Drug Abuse Act of 1988 and The Housing Opportunity Program Extension Act of 1996***

The Anti-Drug Abuse Act of 1988 (the “Anti-Drug Act”)<sup>12</sup> and the Housing Opportunity Program Extension Act of 1996 (the “Extension Act”)<sup>13</sup> provide directives for public housing authorities’ handling of applicants and residents with criminal records. The Anti-Drug Act amended the Housing Act, providing that “criminal activity, including drug-related criminal activity” committed on or near public housing grounds by any member or guest of a public housing tenant’s household “shall be cause for termination of tenancy” from public housing.<sup>14</sup>

The Extension Act, passed eight years later, allows public housing authorities power to exclude applicants and tenants based on evidence of substance abuse, criminal activity perpetrated by a member or guest of a tenant’s household without regard to the location of the activity or criminal activity committed prior to the tenancy.<sup>15</sup> The Extension Act was commonly

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<sup>10</sup>*Id.*

<sup>11</sup>42 U.S.C. § 1437(a)(1)(C), (2).

<sup>12</sup>Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (Nov. 18, 1988).

<sup>13</sup>Housing Opportunity Program Extension Act of 1996, Pub. L. 104-120, 110 Stat. 834 (Mar. 28, 1996).

<sup>14</sup>Anti-Drug Abuse Act of 1988, 102 Stat. 4181 at § 5101(5) (amending 42 U.S.C. § 1437d (1988)).

<sup>15</sup>Housing Opportunity Program Extension Act, 110 Stat. 834, § 9 (Safety and Security in Public and Assisted Housing).

referred to as the “One Strike and You’re Out” policy and was passed to implement President Clinton’s challenge to “HUD and local housing authorities to become more vigilant about the safety and security of public assisted housing communities.”<sup>16</sup>

While the 1988 Anti-Drug Abuse Act amendment limited consideration of criminal activity by a member or guest of a public housing tenant’s household to situations where the activity occurred “on or near the [public housing] premises,” the 1996 Extension Act made the same criminal activity grounds for termination of the lease regardless of whether the activity occurred “on or off such premises.”<sup>17</sup> The Extension Act then added provisions for criminal history screening and eviction, including a new section requiring law enforcement agencies to “provide information to public housing agencies regarding the criminal conviction records of adult applicants for, or tenants of, public housing for purposes of applicant screening, lease enforcement, and eviction,”<sup>18</sup> and banning any tenant evicted from public housing from receiving public housing assistance for the three-year period following eviction for drug-related activity unless the tenant “successfully completes a rehabilitation program approved by the public housing agency.”<sup>19</sup> The Extension Act also revised the Housing Act to allow the public housing agency to deny housing if it determines that any member of the household is abusing alcohol or using illegal drugs.<sup>20</sup>

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<sup>16</sup>The President’s Crime Prevention Council, One Strike and You’re Out Policy Helping Rid Public Housing of Gangs, Drugs and Violent Crime, The President’s Crime Prevention Council Q., Oct. 1997.

<sup>17</sup>Housing Opportunity Program Extension Act, 110 Stat. 834, § 9(a).

<sup>18</sup>*Id.* at § 9(b) (creating 42 U.S.C. § 1437d(q) (1996)).

<sup>19</sup>*Id.* at § 9(c) (creating 42 U.S.C. § 1437d(r) (1996)).

<sup>20</sup>*Id.* at § 9(d),(e) (revising 42 U.S.C. § 1437n (1996)). According to The President’s Crime Prevention Council, the “One Strike and You’re Out” policy, which was intended to “prevent criminals . . . [and] those with a pattern of illegal drug use or alcohol use” from living in public housing and to hinge continued tenancy on perfect lawfulness of all household members and their guests, resulted in both an immediate plummet in public housing crime and a surge in residents’ reported sense of security in their homes. The President’s Crime Prevention Council, *supra*, n. 16 (noting that drug-related arrests dropped more than 90 percent after a Macon, Georgia, housing authority enacted the policies, and in Toledo, both drug-related and non-drug-related crime dropped dramatically; a survey in Toledo showed that the percentage of residents reporting that they “felt safe living” in public housing jumped from 53 percent to 75 percent after two years).

### **3. The Veterans Affairs and HUD Appropriations Act of 1998**

The Veterans Affairs and HUD Appropriations Act (“Appropriations Act”), enacted in 1998, reiterated much of the language of the Extension Act and went on to exclude anyone “subject to a lifetime registration requirement under a State sex offender registration program” from eligibility for public housing<sup>21</sup> and to mandate a lifetime ban from public housing for anyone convicted of manufacturing methamphetamine on public housing premises.<sup>22</sup> It also mandated that public housing leases allow for eviction for “repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause.”<sup>23</sup>

Although the screening and eviction laws implicitly place the burden of proof on the denied applicant or evicted tenant to prove that the denial is inappropriate, federal housing law does provide for the right to petition an adverse action, to be heard by the housing authority and to possibly retain the housing benefit.<sup>24</sup> A person excluded from housing because of a lifetime state sex-offender registration requirement or another crime has the right to receive a copy of the registration information or criminal record and to contest the “accuracy and relevance of that information” before “an adverse action” can be taken based on the criminal record.<sup>25</sup> Similarly, the three-year ban on a tenant evicted for drug-related activity may be waived if “the evicted tenant successfully completes a rehabilitation program approved by the public housing agency.”<sup>26</sup> Current federal law also gives the public housing agency discretion to consider evidence of rehabilitation when a “pattern of use of a controlled substance or a pattern of abuse of alcohol” might otherwise have precluded tenancy.<sup>27</sup> Congress gave these mitigating provisions little

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<sup>21</sup>Veterans Affairs and HUD Appropriations Act, Pub. L. 105-276, 112 Stat. 2461, Subtitle F (Safety and Security in Public and Assisted Housing) (Oct. 21, 1998) (creating 42 U.S.C. § 13661-13664 (1998), among other provisions).

<sup>22</sup>*Id.* at § 428.

<sup>23</sup>*Id.* at Subtitle C (Section 8 Rental and Homeownership Assistance) (amending 42 U.S.C. § 1437f(0)(7)(C) (1998)).

<sup>24</sup>Housing Opportunity Program Extension Act of 1996, Pub. L. 104-120, § 9, 110 Stat. 834 (Mar. 28, 1996). 42 U.S.C. § 1437d(c)(4) (2006), § 1437f(c)(9)(C)(ii) (2006).

<sup>25</sup>42 U.S.C. § 13633 (2006); 42 U.S.C. § 1437d(q) (2006).

<sup>26</sup>Housing Opportunity Program Extension Act § 9(c).

<sup>27</sup>Housing Opportunity Program Extension Act § 9(e).

force, however, when it failed to provide a minimal right to housing or to specify a burden of proof any stronger than a “reasonable suspicion” before a public housing screener could deny benefits.<sup>28</sup>

#### **4. HUD’s Oversight of Local Housing Authorities**

U.S. legislation sets policy and guidelines for the Department of Housing and Urban Development. HUD’s regulations and audits heavily influence policies implemented by AHA and other housing authorities. HUD may withhold or terminate assistance payments or order other corrective action if it finds that a local housing agency has failed to comply substantially with any provision relating to the public housing programs.<sup>29</sup> Accordingly, AHA’s corporate policies must be evaluated against the backdrop of HUD’s approach to managing and auditing local public housing agencies. HUD screening and eviction rules include incentives to maintain stringent screening and eviction policies, and HUD’s audit of another local housing authority shows that despite President Bush’s State of the Union speech that same year, the agency continues to pursue the “get tough” policies still reflected in the federal housing code. There should be little doubt that these rules and audits heavily influence both AHA’s corporate policies and its interactions with individual applicants and tenants. Although in the language of the Housing Act, Congress purported to grant state housing agencies considerable discretion in creating their own programs and procedures,<sup>30</sup> it subjects the state housing agencies to evaluations of management practices, which includes HUD’s determination of whether the agency “implements

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<sup>28</sup>See generally, 42 U.S.C. § 1437 et seq.

<sup>29</sup>See 42 U.S.C. § 1437 d(j)(4)(A).

<sup>30</sup>42 U.S.C. § 1437(a)(1)(C) (2006). As allowed by federal law, the AHA policies note that screening criteria for individual housing projects generally follow AHA policies but, at the discretion of the site-based management, may exceed the AHA’s requirements as long as they do not conflict with those requirements. HOUS. AUTH. OF THE CITY OF ATLANTA, BD. OF COMM’RS, STATEMENT OF CORPORATE POLICIES GOVERNING THE LEASING AND RESIDENCY OF ASSISTED APARTMENTS, Attachments 3-4,5-5,6-5 (June 16, 2004); HOUS. AUTH. OF THE CITY OF ATLANTA, BD. OF COMM’RS, STATEMENT OF CORPORATE POLICIES GOVERNING THE LEASING AND RESIDENCY OF ASSISTED APARTMENTS, 6, Attachments 2-4,3-5,4-5 (Dec. 12, 2005 rev.). Otherwise, it is left to the housing project’s owner, within the bounds of the Fair Housing Act, to select tenants. 42 U.S.C. § 1437f(d) (1 )(A) (2006).



effective screening and eviction policies and other anticrime strategies.”<sup>31</sup> According to HUD policies, even an applicant with a history involving only property crime may affect the “right to peaceful enjoyment of the premises by other residents.”<sup>32</sup> To be judged successful, the local agency must be able to prove that it has adopted policies and implemented procedures that have resulted in denial of applicants with recent histories of “criminal activity involving crimes to persons or property and/or other criminal acts that affect the health, safety, or right to peaceful enjoyment of the premises by other residents” or applicants who are likely to use drugs or abuse alcohol “in a way that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.”<sup>33</sup>

The agency must also show that it has adopted policies and implemented procedures that have resulted in eviction of public housing tenants who exhibit the same behavior.<sup>34</sup> The fact that housing agencies receive positive “points” for denying applicants with criminal histories and evicting “public housing residents who engage in certain activity detrimental to the public housing community” is justified by the importance of the action to “public housing communities and program integrity, and the demand for assisted housing by families who will adhere to lease responsibilities.”<sup>35</sup>

If according to HUD’s evaluation an agency is determined to be “troubled,” it is subject to “incentives or sanctions for effective implementation of [recommended] strategies, which may include any constraints on the use of funds” that HUD deems appropriate.<sup>36</sup> Furthermore, if HUD finds that a local housing agency has “failed to comply substantially with any provision . . . relating to the public housing program,” it may withhold or

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<sup>31</sup>42 U.S.C. 42 § 1437d(U)(1).

<sup>32</sup>Memorandum from KEVIN EMANUEL MARCHMAN, Acting Assistant Secretary for Public and Indian Housing, to Public Housing Agencies, Secretary’s Representatives, State Representatives, Field Office Public Housing Directors, and Resident Management Corporations, Public Housing Management Assessment Program (PHMAP)-Indicator #8, Security “One Strike and You’re Out,” Notice PIH 96-52(HA), at 4 (July 25, 1996).

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at 5.

<sup>35</sup>24 C.F.R. § 960.203(b), § 966.4(l)(5)(vii)(A) (2001).

<sup>36</sup>42 U.S.C. § 1437d(j)(2)(C)(iii).

terminate assistance payments or order “other corrective action with respect to the agency.”<sup>37</sup>

An examination of a 2004 HUD audit of the Royal Oak Township Housing Commission Public Housing Program in Ferndale, Michigan, suggests that a local housing authority that gives applicants or tenants with criminal records the benefit of the doubt beyond that currently afforded by the AHA may be subject to disbursement of federal funds.<sup>38</sup> The Housing Commission was investigated by the Regional Inspector General for Audit as a result of two citizen complaints that alleged, among other things, that by admitting and retaining certain tenants with criminal histories the Housing Commission was mispending public housing funds.<sup>39</sup> The Inspector reviewed the Housing Commission’s application screening and eviction policies, discovering that once an applicant was admitted as a tenant, the Housing Commission followed an unspoken policy of implied waiver and would evict the tenant only upon violation of a term of the lease, such as nonpayment of rent.<sup>40</sup>

The Inspector found the Housing Commission in violation of HUD’s One Strike Policy for allowing admission of six new tenants with criminal convictions and for failing to evict one existing tenant with a known criminal conviction.<sup>41</sup> Although four of the six applicants that the Investigator said should have been denied housing had been convicted of either serious drug or violence offenses within the eighteen months prior to their move-in date, the aggravated stalking offense of one of the remaining applicants was almost eight years old, and the other applicant had been convicted not of a drug or violence offense, but of felony retail fraud.<sup>42</sup> Similarly, the resident the Inspector contended should have been evicted was convicted only of “felony fraud over \$500.”<sup>43</sup>

The Housing Commission responded that it followed 24 CFR § 966.4, which allows the local housing agency, at its discretion, to “give a tenant a chance to

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<sup>37</sup>42 U.S.C. § 1437d(j)(4)(A).

<sup>38</sup>OFFICE OF AUDIT, REGION V, CHICAGO, IL, OFFICE OF INSPECTOR GENERAL, DEP’T. OF HOUS. AND URBAN DEV., 2005-CH -1 003, ROYAL OAK TOWNSHIP (FERNDALE, MI) HOUSING COMMISSION PUBLIC HOUSING PROGRAM AUDIT REPORT (Nov. 29, 2004).

<sup>39</sup>*Id.* at 1.

<sup>40</sup>*Id.* at 18.

<sup>41</sup>*Id.* at 2, 19.

<sup>42</sup>*Id.* at 19.

<sup>43</sup>*Id.*

continue their residency in the location if certain standards are met,” which in this case included a signed agreement between the long-term residents and the Housing Commission that set out probationary terms specifying that the “offending party was no longer allowed on the premises and that the improper conduct would not be repeated.”<sup>44</sup> The Housing Commission further explained that, consistent with 24 CFR § 960.203(d), it considered the “time, nature and extent of the applicants [sic] conduct, including the seriousness of the offense,” and that, per federal and state law, it precluded “admission of applicants and tenants whose habits and practices reasonably may be expected to have a detrimental effect on the residents or project environment.”<sup>45</sup>

Despite the Housing Commission’s reasoned explanation, relying on the plain language of the applicable public housing regulation and its cooperation with a local HUD representative, the Inspector ignored the Housing Commission’s discretion argument and recommended that HUD require the Housing Commission to reimburse the state’s public housing program “from non-Federal funds for the inappropriately used monies” in the amount of \$45,220.<sup>46</sup> The Inspector further admonished the Housing Commission for “depriv(ing) more worthy applicants from living in its housing units” and forcing “deserving needy applicants with no criminal record . . . to stay on the Housing Commission’s waiting list and continue to pay higher housing costs and/or live in substandard housing conditions.”<sup>47</sup>

## **5. Georgia Law**

AHA, like other Georgia public housing agencies that accept federal funding, is a creature of state law.<sup>48</sup> The Georgia legislature found it necessary to

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<sup>44</sup>*Id.* at 33-34.

<sup>45</sup>*Id.* at 34 (citing 24 C.F.R. 960.202(a)(2)(iii)).

<sup>46</sup>*Id.* at 2, 19, 33, 34, 39 (\$45,220 was the amount of the operating subsidy provided to the tenants the Inspector deemed were inappropriate).

<sup>47</sup>*Id.* at 20. This is in keeping with HUD’s previous directive to local housing agencies: “In deciding whether to admit applicants who are borderline in the PHA’s evaluation process, the PHA should recognize that for every marginal applicant it admits, it is not admitting another applicant who clearly meets the PHA’s evaluation standards.” U.S. DEP’T OF HOUS. AND URB. DEV., PUBLIC HOUSING OCCUPANCY HANDBOOK, Dir. No. 7465.1 Rev-2, Ch. 4 (4-3, Mitigating Circumstances), 4-3(b)(3)(July 1991)(referencing 24 C.F.R. 960.205(d)), available at <http://www.hudclips.org>.

<sup>48</sup>See O.C.G.A. tit. 8, art. 1 (Housing Authorities).

establish public housing to alleviate “overcrowded and congested” private-sector living situations, which cause “an increase in and spread of disease and crime and constitute a menace to the health, safety, morals, and welfare of the residents of the state,” thereby requiring the state to invest an inordinate amount of public funds in public health and crime prevention.<sup>49</sup> The Georgia legislature encourages state housing authorities, such as AHA, to take advantage of federal funding opportunities which empower them “to do any and all things necessary or desirable to secure the financial aid or cooperation of the federal government in the undertaking, construction, maintenance, or operation of any housing project by such authority.”<sup>50</sup>

State law also empowers local public housing authorities to covenant with the federal government and “to confer upon the federal government such rights and remedies as the [authority] deems necessary to assure the fulfillment of the purposes for which the project was undertaken.”<sup>51</sup> Georgia law also requires that the administrator of public housing programs maintain “certified agency” status with HUD, as provided by HUD’s rules and regulations.<sup>52</sup>

## **6. Courts Defer to Agency Decisions**

Courts generally will defer to an agency’s ruling unless it is arbitrary and capricious.<sup>53</sup> In a “get-tough-on-crime” context, such broad deference enables housing agencies to promulgate and aggressively enforce rules or policies that exclude tenants with criminal records. In *Department of Housing and Urban Development v. Rucker*,<sup>54</sup> the Supreme Court indicated that it will uphold even the most punishing agency decisions as long as a federal statute clearly grants the agency that discretion. In *Rucker*, public housing tenants challenged HUD’s interpretation of 42 U.S.C. § 1437(d)(1)(6), arguing that the statute does not “require lease terms authorizing the eviction of

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<sup>49</sup>O.C.G.A. § 8-3-2.

<sup>50</sup>O.C.G.A. § 8-3-32(a).

<sup>51</sup>O.C.G.A. § 8-3-33(d)(9).

<sup>52</sup>O.C.G.A. § 8-3-206.

<sup>53</sup>*Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (Courts should adopt a deferential posture in reviewing administrative actions).

<sup>54</sup>535 U.S. 125 (2002).

so called ‘innocent’ tenants, and in the alternative, that if it does, then the statute is unconstitutional.”<sup>55</sup> The statute in question provided that “[e]ach public housing agency shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right of peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of the tenancy.”<sup>56</sup>

The evicted tenants/petitioners were an especially sympathetic group, including grandparents whose grandsons were caught smoking marijuana in the housing complex’s parking lot, a mother whose daughter was found three blocks away from the apartment with a crack pipe and cocaine, and a disabled man whose caregiver had been found in his apartment with cocaine—all of the petitioners claimed to have been evicted for crimes that they did not know were being committed and over which they had no control.<sup>57</sup> The Supreme Court held that 42 U.S.C. § 1437(d)(1)(6) “unambiguously requires lease terms that vest local public authorities with the discretion to evict tenants” for the behavior prohibited by the statute, regardless of whether the tenant “knew, or should have known” about the criminal activity of their household members or guests.<sup>58</sup> The Court explained that the statutory provision did not require that the tenants be evicted, but only that the local agency use lease language that would give the agency discretion to evict tenants for the prescribed behavior.<sup>59</sup> The court found that this explanation was reasonable because “it entrusts [the] decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from rampant drug-related or violent crime, the seriousness of the offending action, and the extent to which the leaseholder has taken all reasonable steps to prevent or mitigate the offending action.”<sup>60</sup> According to the Supreme Court, the

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<sup>55</sup>*Id.* at 129.

<sup>56</sup>42 U.S.C. § 1437(d)(1)(6).

<sup>57</sup>*Rucker*, 535 U.S. at 128.

<sup>58</sup>*Id.* at 130.

<sup>59</sup>*Id.* at 133-34.

<sup>60</sup>*Id.* at 134 (internal citations and punctuations omitted).

eviction of these innocent tenants was justified by Congress' "reasonable" intent to "provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs."<sup>61</sup>

Agencies still enjoy broad deference even when Congress has not directly addressed the challenged issue. In *Hussion v. Madigan*, the Eleventh Circuit considered the propriety of a local public housing agency's decision to eliminate administrative review of certain lease termination and eviction actions.<sup>62</sup> The plaintiffs, who had been evicted for failure to pay rent, argued that a federal statute that "provided at least an opportunity to appeal an adverse decision and to present additional information relevant to that decision to a person . . . who has authority to reverse the decision" required that the agency allow them to take an administrative appeal rather than leaving them with no recourse but to challenge the evictions in state court.<sup>63</sup> The housing agency maintained that the state court system fulfilled the statute's promise of a right "to appeal an adverse decision" and that the informal reviews hurt tenants by incurring costs that would inflate monthly rent.<sup>64</sup> The court held that the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* mandated that the court maintain a "deferential posture" and left the court powerless to "reject an administrative action clearly supported by a permissible reading of the statute."<sup>65</sup> The court maintained that it could not set aside the rule because it was promulgated through a procedure that was not "arbitrary and capricious."<sup>66</sup> Because the court found no evidence that "the agency relied on factors which Congress [did not intend it] to consider, entirely failed to consider an important aspect of the problem," or explained its decision in a way that was contrary to the evidence before it or was "so implausible that it could not be ascribed to a difference in view or the product of agency expertise," it upheld the Agency decision.<sup>67</sup>

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<sup>61</sup>*Id.* (citing 42 U.S.C. § 11901(1), (4)).

<sup>62</sup>950 F.2d 1546, 1549 (11th Cir. 1992).

<sup>63</sup>*Id.* at 1551-52.

<sup>64</sup>*Id.* at 1549, 1554.

<sup>65</sup>*Id.* at 1552 (referring to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

<sup>66</sup>*Id.*

<sup>67</sup>*Id.* at 1552-53.

## 7. *The Second Chance Act*

The Second Chance Act, which recently passed Congress, takes its name from President Bush's 2004 State of the Union speech, a portion of which is quoted in Section I of this Study.<sup>68</sup> Recognizing the magnitude of the problem facing society, the Congressional Findings include the following:

- (1) In 2002, over seven million people were incarcerated in federal, state or local prisons or jails or under parole or court supervision. Nearly 650,000 people are released from federal and state incarceration into communities nationwide each year.
- (2) There are over 3,200 jails throughout the United States, the vast majority of which are operated by county governments. Each year, these jails will release more than ten million people back into the community.
- (3) Nearly 2/3 of released State Prisoners are expected to be rearrested for a felony or serious misdemeanor within 3 years after release.<sup>69</sup>

The general approach of the Second Chance Act is to create and enhance existing social programs to assist the reentry efforts of ex-offenders. This is to be accomplished through the award of grants to local agencies and non-profit organizations. These programs cover areas such as employment, rehabilitation programs (including drug courts) and housing. In the section entitled "Improvements to Existing Programs," the Act emphasizes "providing coordinated supervision and comprehensive services for offenders upon release . . . including housing."<sup>70</sup>

Because the Second Chance Act focuses tightly on the period during which an inmate transitions from incarceration back into society, it is only marginally related to the longer term issue of ineligibility for public housing triggered by criminal records. Moreover, as noted, the Second Chance Act creates enhanced social programs; it does not change any laws or even provide guidance for the change of laws that may constitute roadblocks to

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<sup>68</sup>Second Chance Act, Pub. L. No. 110-199 (2008). *See also*, CHRIS SUELLENTROP, "THE RIGHT HAS A JAILHOUSE CONVERSION," *N.Y. Times*, Dec. 24, 2006.

<sup>69</sup>*Id.* at Sec. 3(b)(1) - (3).

<sup>70</sup>*Id.* at Sec. 101(a)(3).

reentry. The Act does, however, signal a significant Congressional shift from retributive justice to rehabilitation. Some commentators observed prior to the enacting of the Act that “the reentry movement” represents common ground between Democrats and Republicans, providing a basis for its passage by Congress.<sup>71</sup>

### **C. AHA’s Corporate Policies**

Despite the pressures placed on AHA through federal statutes, HUD management policies and audit power and the broad deference granted by the courts to agency decisions, AHA policies are reasonably tolerant of applicants and tenants with criminal histories, provided they can demonstrate that they do not pose a present threat to the peaceable enjoyment of the housing facilities by other tenants. The development of current policies is discussed below.

#### **1. *Bonner v. Housing Authority of Atlanta***

Prior to 1995, AHA’s policy was simply to automatically deny the housing application of anyone with any type of criminal history if the crime occurred within three years of the application.<sup>72</sup> That policy changed in 1995, when public housing applicants settled a class action suit against AHA.<sup>73</sup> In *Bonner v. Housing Authority of Atlanta*, the plaintiffs contended that AHA’s summary denial of housing benefits to applicants with criminal history was unnecessarily broad, sweeping in anyone accused of criminal activity, regardless of whether they had been convicted, rehabilitated, or even acquitted, and regardless of the relevance of the crime to the person’s suitability as a tenant.<sup>74</sup> The *Bonner* settlement is generally perceived to have outlined one of the most tolerant public housing policies in the

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<sup>71</sup>SUELLENTROP, *supra*, at n. 68.

<sup>72</sup>Sargent Shiver National Center on Poverty Law, ATLANTA HOUSING AUTHORITY TO CEASE SUMMARY DENIAL OF APPLICANTS WITH CRIMINAL HISTORY, *available at* <http://www.povertylaw.org/poverty-law-library/case/49700/49726> (last visited Aug. 15, 2008) (referring to *Bonner v. Hous. Auth. of Atlanta*, No. 1:94-CV-376-MHS (N.D. Ga. Oct. 11, 1995)).

<sup>73</sup>*Id.*

<sup>74</sup>*Id.*



country.<sup>75</sup> Under the *Bonner* settlement, AHA agreed to a detailed, more flexible screening process, under which it would still consider the applicant's criminal history but would limit the inquiry and would permit the prospective tenant to administratively appeal a denial.<sup>76</sup>

Under the settlement, AHA would require the applicant to report his or her criminal history in the five-year period preceding the application and "any criminal offenses involving violence against persons or illegal drugs without regard to time limitation."<sup>77</sup> If AHA denied the application on the basis of criminal history, it was required to provide written notice of the specific history that triggered the denial and to provide the applicant the opportunity to request, in writing, an informal review or hearing.<sup>78</sup> The settlement agreement provided that the hearing would take place "within a reasonable time" and that the applicant would be given notice of the date, time, and location of the hearing no fewer than seven days before it would take place.<sup>79</sup>

The settlement gave the petitioner the right to examine AHA's relevant documents, "to be represented by counsel, to cross-examine any witnesses, and to present any relevant evidence" at the informal hearing.<sup>80</sup> Where the criminal history provided by law enforcement agencies was incomplete, the petitioner would be given an extension of at least 30 days to provide additional documentation.<sup>81</sup> If it was impossible to find the needed documentation, the decisionmaker would decide the case based on the evidence presented and would not hold the fact that information was missing against the petitioner.<sup>82</sup> Regardless of the disposition of the criminal case that triggered the informal review, the review would focus on:

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<sup>75</sup>Human Rights Watch, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING, at § vii (Exclusions Based on Local Policies), available at <http://hrw.org/reports/2004/usa1104/> (last visited on Aug. 15, 2008).

<sup>76</sup>Sargent Shiver National Center on Poverty Law, *supra*, note 72 (referring to *Bonner*, No. 1:94-CV-376-MHS).

<sup>77</sup>*Bonner*, No. 1:94-CV-376-MHS at 4.

<sup>78</sup>*Id.* at 5.

<sup>79</sup>*Id.* at 6.

<sup>80</sup>*Id.* at 6-7.

<sup>81</sup>*Id.* at 8.

<sup>82</sup>*Id.* at 9.

“the circumstances of the criminal case(s); the severity of the applicant’s conduct; the presence of mitigating or aggravating circumstances; whether the criminal conduct indicates that the applicant would, if admitted to public housing, pose a danger to the health, safety, or welfare of other residents of [AHA]; whether the applicant has, since the criminal case, been rehabilitated so as not to pose such danger; whether there are other facts which would prevent the applicant from posing such a danger, as for instance, physical incapacity; and any other factors which may be required by HUD regulations.”<sup>83</sup>

Under the settlement, intentional falsification of criminal history on a housing application would be independent grounds for denying the application.<sup>84</sup> An applicant denied housing benefit on this basis would be entitled to an informal hearing during which the applicant could challenge the determination that the falsification was intentional.<sup>85</sup> At such hearing, the public housing administrator would consider such factors as whether the applicant understood the application’s questions, whether it was reasonable for the applicant to have forgotten or misunderstood the true nature of the misreported criminal history, and “whether the applicant was properly assisted by [AHA] staff.”<sup>86</sup>

## **2. The 2004 AHA Policies and the McDaniel-Glenn Tenants**

In 2004, almost ten years after the *Bonner* settlement, AHA policies still fell short of the Bonner promise. At the time that the Georgia Justice Project (GJP) was defending the McDaniel-Glenn tenants from eviction by AHA, it faced criminal screening policies that arguably still reflected the tough-on-crime approach reflected in federal statutes and HUD regulations.<sup>87</sup> Though the language of the 2004 AHA policy conformed with the *Bonner* settlement

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<sup>83</sup>*Id.* at 7.

<sup>84</sup>*Id.* at 10.

<sup>85</sup>*Id.* at 10-11.

<sup>86</sup>*Id.* (noting that as part of the evaluation, “[t]he hearing officer shall also consider the applicant’s literacy, mental capacity, and proficiency in the English language, and any other mitigating circumstances”).

<sup>87</sup>See related discussion of McDaniel Glenn representation in Sec. I(B)(2), *supra*.

in that it prohibited a summary denial of an application from a person with a criminal history—particularly an aged offense that did not involve violence or drugs—much of the policy did not reflect the flexibility and discretion that the *Bonner* settlement sought to promote.

Under the 2004 screening and renewal policies, AHA’s “reasonable belief” that an applicant or tenant seeking renewal of his or her lease had been involved in criminal activity was sufficient to deny the application.<sup>88</sup> Criminal activity that could give rise to denial of an application was categorized under three levels. If AHA reasonably believed that any member of an applicant’s household had committed a Level 1 offense—considered by AHA to be violent or drug-related offenses that could pose a threat to public health or safety—the policy provides for mandatory permanent denial.<sup>89</sup> AHA’s reasonable belief that a member of an applicant’s household had committed a Level 2 offense—one considered by AHA to involve “the threat or foreseeability of violence that may pose a threat to public health and safety” resulted in a presumed mandatory 20-year ban from AHA housing.<sup>90</sup> AHA’s “reasonable belief” that a member of an applicant’s household had committed a Level 3 offense—which AHA believes “may pose a threat to public health and safety but do[es] not involve violence, the threat or foreseeability of violence or drugs” within the five-year period prior to the public housing application—resulted in a presumed mandatory five-year ban from AHA housing.<sup>91</sup>

Discovery of any misrepresentation on the application for public housing would result in mandatory denial of housing benefits.<sup>92</sup> Denied applicants had ten days from the date of denial or the date of the notice of eviction to file

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<sup>88</sup>Hous. AUTH. OF THE CITY OF ATLANTA, Bd. OF COMM’RS, STATEMENT OF CORPORATE POLICIES GOVERNING THE LEASING AND RESIDENCY OF ASSISTED APARTMENTS, Part II, Art. Five (June 16, 2004) (setting “reasonable belief” as the standard for denial or eviction).

<sup>89</sup>*See id.* (June 16, 2004), at 10-11 (Level 1 Offenses Requiring Denial of Admission and Termination of Tenancy); *see also* Appendix A.

<sup>90</sup>*Id.* (June 16, 2004), at 11-12 (Level 2 Offenses Requiring 20-Year Denial of Admission and Termination of Tenancy); *see also* Appendix A.

<sup>91</sup>*Id.* (June 16, 2004), at 12 (Level 3 Offenses Requiring 5-Year Denial of Admission And Termination of Tenancy); *see also* Appendix A.

<sup>92</sup>*Id.* (June 16, 2004), at 13.

a written request for an informal hearing with a Management Agent who had no involvement with the challenged denial.<sup>93</sup> At the hearing, petitioner had the opportunity to prove that the tenancy would be no threat to the health, safety and welfare of the community by showing for example that an accusation had not been prosecuted, that the person with the criminal history had been substantially rehabilitated, or that the accused's conduct was not threatening to the health, safety and welfare of the housing community.<sup>94</sup> Under these policies, denial could be based on AHA's reasonable belief that the crime posed a threat to the health, safety or welfare of the community.<sup>95</sup>

### **3. The Revised Statement of Corporate Policies (Apr. 30, 2008)**

AHA has modified its policies since 2004 with the most recent revisions reflected in the Statement of Corporate Policies dated April 30, 2008. This Policy Statement is generally more permissive and gives AHA broader discretion to admit applicants with criminal records or retain tenants who commit certain crimes during tenancy.<sup>96</sup> The revised screening policies divide offenses into three new categories: (I) offenses specifically identified by HUD; (II) violent or drug-related offenses; and (III) criminal offenses not violent or drug related.<sup>97</sup> Unlike the 2004 policies, which used the mandatory "shall" language, the 2008 revision uses the more permissive "may" language.<sup>98</sup>

Under offenses referenced under category I (those specifically identified

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<sup>93</sup>*Id.* (June 16, 2004), at 23-24.

<sup>94</sup>*Id.* (June 16, 2004), at 13-14.

<sup>95</sup>*Id.* (June 16, 2004), at 13-14 (Applicant/Resident Response to Adverse Criminal History Information Decisions); 23-24 (Disputing Decisions of a Manager). AHA also could require that the applicant request the hearing in fewer than ten days if the denial was based on criminal activity and the Manager "has reasonably determined" that the applicant "poses a threat to the health and safety of the community." *Id.* at 23.

<sup>96</sup>HOUS. AUTH. OF THE CITY OF ATLANTA, BD. OF COMM'RS, STATEMENT OF CORPORATE POLICIES GOVERNING THE LEASING AND RESIDENCY OF ASSISTED APARTMENTS, Part II, Art. Seven (April 30, 2008 rev.) (Criminal History Screening). The policy also provides that residents may be subject to eviction if AHA determines after admission that the tenant's application should have been denied based on the criminal activities listed in 24 C.F.R. § 960.204. *Id.* at § 1(A).

<sup>97</sup>*Id.* (Apr. 30, 2008), at 19-21.

<sup>98</sup>*Id.* (Apr. 30, 2008), at 19-21 (noting that "Atlanta Housing Authority, Owner Entities, and/or Management Agents *may* deny admission to Applicants . . ." (emphasis added)).

by HUD), AHA may deny an applicant or terminate a lease of a current tenant upon determination that the resident or any member of the household in question:

- has been evicted from federal housing for a drug-related offense within the three years prior to application;
- currently uses illegal drugs;
- has been convicted for producing or manufacturing methamphetamine on federal housing premises;
- is currently subject to state-required sex offender registration for life; or
- abuses alcohol in such a way that “may threaten the health, safety, or right to peaceful enjoyment of the premises” by other residents.<sup>99</sup>

The Category I policy also expressly allows for the HUD criteria to be applied retroactively: tenancy may be terminated after admission to public housing if AHA determines later that the conditions applied to the applicant at the time of admission.<sup>100</sup>

Under Category II, AHA may deny admission to an applicant or evict a tenant if any member of the household is “reasonably believed to be engaged in any Violent or Drug-Related Offenses.”<sup>101</sup> Examples of Violent or Drug-related Offenses provided include homicide, murder, voluntary manslaughter; rape, sexual battery, other aggravated sex-related crimes; child molestation, child sexual exploitation; drug charges; kidnapping and false imprisonment; terrorism; arson; possessing, transporting, or receiving explosives or destructive devices with the intent to kill, injure, intimidate or destroy; assault and battery (simple and aggravated); trafficking, distribution, manufacture, sale, use, or possession of illegal firearms; carjacking; robbery; hate crimes; criminal damage to property endangering life, health and safety; aiding and abetting in the commission of a crime involving violence; and other violent or drug related offenses that may pose a threat to public health.<sup>102</sup>

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<sup>99</sup>*Id.* (Apr. 30, 2008), at 19.

<sup>100</sup>*Id.*

<sup>101</sup>*Id.* (Apr. 30, 2008), at 20.

<sup>102</sup>*Id.*

AHA may deny the application or terminate tenancy based upon its “reasonable belief” that a household member of an applicant or tenant has committed a Category III offense—one that is not violent or drug-related—only if the offense occurred in the five-year period prior to the application;<sup>103</sup> a Category III criminal history older than five years is simply not grounds for denial of housing. Also, rather than being strictly liable for misrepresentations on the application, an applicant denied admission on grounds of misrepresentations on the application would now have the opportunity to prove at an informal review that the misrepresentation was unintentional and therefore constitutes insufficient grounds for denial.<sup>104</sup> A vague catch-all provision allowing denial or termination of tenancy based on a “pattern of criminal activity” was also eliminated.

Other aspects of the policy were also updated to conform with the *Bonner* settlement. Under the revisions, a denied applicant or a tenant evicted on the basis of criminal activity must still submit a written petition for an informal hearing, but the period for submitting this petition has been extended to ten days after receipt of the notice of denial, rather than ten days from the adverse action.<sup>105</sup> Although no request for informal hearing will be honored unless it is submitted in writing, the revisions expressly allow the petitioner to request AHA assistance in making the request.<sup>106</sup> The petitioner is entitled to an informal review before an impartial person designated by the Management Agent who took no part in the denial decision and is not subordinate to anyone who took part in the decision.<sup>107</sup>

The issues the petitioner may raise for consideration in his or her defense during the informal hearing are specified in the revised policy. At the review, the petitioner is allowed to present, “and management agents will consider,” evidence of aggravating or mitigating circumstances, details of the petitioner’s conduct (such as “severity of the conduct and the seriousness of the offense”), and whether the petitioner has been rehabilitated or otherwise would not pose future danger to the “health, safety or welfare of

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<sup>103</sup>*Id.* (Apr. 30, 2008), at 21.

<sup>104</sup>*Id.* (Apr. 30, 2008), at 6.

<sup>105</sup>*Id.* (Apr. 30, 2008), at 22.

<sup>106</sup>*Id.*

<sup>107</sup>*Id.*

other residents.”<sup>108</sup> The revised policy allows the petitioner to have legal representation at the hearing and expressly provides that the petitioner “may request an opportunity to examine the application file and to copy any relevant documents” prior to the informal review; has the right to bring witnesses or letters of support to the review; and has the right to cross-examine any witnesses the Management Agent calls during the review.<sup>109</sup> The petitioner is also under no requirement to provide any additional information with regard to a crime to which the petitioner admits guilt unless the petitioner wishes the Management Agent to consider mitigating circumstances. A written decision must be provided to the petitioner within ten days of the informal hearing, and if the decision affirms the denial of benefits, it must “set forth the reasons for the denial in detail.”<sup>110</sup> There is no right to appeal the hearing officer’s decision after the informal hearing.

#### **D. Issues Related to Client Representation Before a Housing Authority**

As discussed above and in Section I, in 2005, the Georgia Justice Project (“GJP”) represented residents of the McDaniel Glenn apartment complex in the Mechanicsville neighborhood in southwest Atlanta. McDaniel Glenn is federally assisted housing administered by AHA through its subcontractor, the Lane Company (“Lane”). This complex had been identified for demolition and reconstruction as a “mixed use” complex under a Hope Six grant. In late 2004, the Annie E. Casey Foundation (“Casey”) and GJP entered into an agreement providing that GJP would provide legal representation for McDaniel Glenn residents who were at risk of becoming homeless due to AHA’s attempt to terminate their leases.<sup>111</sup>

GJP had two main objectives: (1) clarify and/or correct the residents’ criminal background reports and (2) represent the residents in informal

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<sup>108</sup>*Id.* (Apr. 30, 2008), at 23.

<sup>109</sup>*Id.* (Apr. 30, 2008), at 22.

<sup>110</sup>*Id.* at 23.

<sup>111</sup>Casey is a large philanthropic foundation started by Jim Casey, the founder of United Parcel Service (“UPS”), that commits substantial resources to inner-city problems including those associated with the homeless. GJP is a nonprofit group of lawyers, social workers, and job staff that represents indigent clients who have been accused of crime.

hearings before a representative of AHA's Managing Agent (Lane). GJP and AHA entered into a Memorandum of Understanding (MOU) generally describing the nature of the relocation and imposing certain confidentiality safeguards on documents obtained from AHA. GJP also reserved the right to appeal an adverse decision by the hearing officer to an attorney in the AHA Legal Department so that legal arguments could be adequately considered. GJP represented its clients in these informal conferences and filed a written appeal brief for those who did not receive favorable decisions from the hearing officer. Attorneys, paralegals and other support staff at King & Spalding played a major role in representing the residents during the informal conferences and the subsequent appeal. In addition to their much broader role in the relocation, Casey representatives provided overall coordination and facilitated communications with AHA.

The following important steps were involved in GJP's representations of the McDaniel Glenn residents:

### ***1. Client Interview***

Meetings with the residents were critical to explore, among other things, their account of the arrest or conviction alleged to support their eviction, the role if any they played in the conduct, the rehabilitative activities engaged in since the occurrence and the impact an adverse decision might have on the residents and their families.

### ***2. Record Verification and Review***

Review of the criminal record that AHA used for the eviction was also very important. In this relocation, AHA attached a copy of the criminal record that they had obtained from GCIC to the letter notifying the resident of eviction. However, in most instances, there was no specific reference to the arrests/convictions that allegedly supported the eviction. As a legal representative of the clients, GJP obtained the most current GCIC report in order to verify that it was consistent with the one attached to the eviction letter. GJP representatives also inspected and copied relevant portions of the client's records that were maintained, both at the AHA corporate headquarters and at the McDaniel Glenn housing site.



### **3. Correcting and Clarifying Records**

The next phase of the representation involved a thorough review and analysis of the arrest and conviction records identifying the entries that were incorrect or that arguably should not have been considered as a basis for eviction. Such entries include, but are not limited to: offenses discharged under the First Offender Statute; arrests with no indication of the disposition; dead docketed cases; charges that were subject to expungement; and charges that resulted in the individual being referred to and completing a pre-trial intervention program such as drug courts. This process included various contacts with law enforcement agencies, including police departments, courts and the district attorney's office. For pending criminal charges, it was necessary to coordinate the investigation with the client's attorney in the criminal case.

### **4. Informal Hearing Before Administrative Officer**

Depending on the facts of each case, GJP made one or more of the following arguments before the hearing officer:

- (a) Under principles of laches or equitable estoppel, the Housing Authority was barred from terminating a lease based on a record that had been previously disclosed to the Authority in the application or lease renewal context;
- (b) The Housing Authority should not terminate the tenant's lease absent serious criminal behavior that occurred within a reasonable time;
- (c) The Housing Authority should not terminate the tenant's lease based on arrest records that did not result in conviction;
- (d) The Housing Authority should consider the totality of the circumstances, and make an individualized determination based on the seriousness of the offense; when it occurred; the extent of the leaseholder's participation in the offense; the effects the eviction would have on the family (with special emphasis on households with young children at home); the extent to which the leaseholder had shown personal responsibility and rehabilitation (some of the clients have successfully completed alcohol and drug rehabilitation and/or anger management programs); and the disability status of the residents.

- (e) GJP also argued the inadequacy of notice of termination. The main issue here related to the termination notices to which AHA merely appended the client's entire criminal record. Where the record contained more than one entry, there was no way to determine the particular arrest or conviction that precipitated the decision. GJP argued that this communication did not provide sufficient due process notice, a position that was also raised in the dispossessionary warrant proceedings.

### ***5. Appeal to the AHA Corporate Officials/Legal Department***

As discussed in Section I, a team, including volunteer lawyers from GJP, intern law students from Georgia State University, and volunteer lawyers and staff from King & Spalding, represented 41 individuals who had been identified for lease termination based on arrest/conviction records retrieved from GCIC. As a result of the informal hearings that were conducted, the hearing officer rescinded 28 terminations and 13 were upheld. The Georgia Justice Project and King & Spalding presented a joint appeal brief on behalf of the 13 clients whose terminations were upheld and presented a 50-page appeal brief, including legal arguments and separate summaries for each of the 13 clients. While AHA did not formally respond to this appeal, an additional seven lease terminations were suspended, leaving only six GJP clients faced with eviction warrant proceedings.

### ***6. Dispossessionary Warrants***

When a Housing Authority insists in terminating the residents' lease after the informal conference or the legal arguments on appeal, the Agency will issue a dispossessionary warrant, which the resident can challenge in court. In the McDaniel Glenn proceedings, GJP clients were all advised at an early stage of the representation that, should a warrant be issued, they would have to obtain separate representation for that litigation. Both the Georgia Law Center for the Homeless and the Atlanta Legal Aid Society, Inc. represented some of the clients who were served with warrants. For the volunteer lawyer, non-profit group or others representing indigent clients on a pro bono basis, it should be recognized that defending a warrant requires a specialized expertise in landlord/tenant law.

## E. Proposals for Administrative Changes

### 1. Hearing Notice and Timing

The AHA corporate policies still fail to guarantee a reasonable amount of time between notice of time, date and location of the informal hearing and when the hearing actually takes place. In *Bonner*, AHA agreed that applicants would be “given no less than seven days’ advance notice of the date, time and place of the informal review and hearing.”<sup>112</sup> Given that AHA has clearly expressed its agreement regarding the meaning of the term “reasonable” in this context, the policies should be updated to reflect that definition. A 10-day timeframe is recommended.

The policies also fail to resolve what constitutes a “reasonable” amount of time between the applicant’s request for an informal review and when the informal review ultimately takes place. According to HUD policy, “[w]hen a PHA [Public Housing Authority] determines that (a) the applicant is ineligible, [or] (b) the applicant does not meet the PHA’s admission standards, . . . the PHA must notify the applicant promptly and state the basis for the determination. If the applicant requests it, the PHA must provide an informal hearing within a reasonable period of time after the applicant has been notified.”<sup>113</sup> It is recommended that AHA prevent delayed reviews by specifying and binding itself to what constitutes a reasonable time.

### 2. Arrest Records That Do Not Reflect the Disposition of a Case

HUD’s direction to local public housing agencies supports the argument that an arrest record, without more, should not be considered grounds for denying a housing application or evicting a tenant. According to the Public Housing Occupancy Handbook available on HUD’s website, public housing agencies “may consider an applicant’s arrest record, but should be careful about making a determination based solely on an arrest record if no convictions followed.”<sup>114</sup> Accordingly, AHA’s policy should make it clear,

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<sup>112</sup>*Bonner v. Hous. Auth. of Atlanta*, No. 1:94-CV-376-MHS, at 6 (N.D. Ga. Oct. 11, 1995).

<sup>113</sup>U.S. Department of Housing and Urban Development, PUBLIC HOUSING OCCUPANCY HANDBOOK, *supra*, note 46 at Ch. 4 (4-4, Notifying Applicants of Their Status), 4-4(a)(2) (referencing U.S. Housing Act of 1937, § 6(c)(3), and 24 C.F.R. 960.207).

<sup>114</sup>*Id.* at Ch. 4 (4-1, Applicant Evaluation), 4-1(b)(11) (referencing 24 C.F.R. 960.204, 960.205).

in conformance with this direction, that summary denial of an application shall not be based solely on an arrest record without consideration of other circumstances.

### **3. The Georgia First Offender Statute: O.C.G.A. § 42-8-62**

Under O.C.G.A. § 42-8-62, a first offender discharge “shall completely exonerate the defendant of any criminal purpose and shall not affect any of his or her civil rights or liberties.” It is arguable that this provision protects an applicant from denial of housing benefits on account of the applicant’s criminal offense if the applicant is eligible for discharge of that offense under § 42-8-62. As discussed in Sections II and III, the Georgia courts have not always upheld the civil application of § 42-8-62. In *Davis v. State*,<sup>115</sup> the Georgia Supreme Court reasoned that while the first offender guilty plea itself may not be considered, the underlying criminal activity may be considered and acted upon.<sup>116</sup> Also, in *Gamble v. Ware County Board of Education*,<sup>117</sup> the Georgia Court of Appeals held that an applicant for a public teaching position who was rejected by the public school board on the basis of the applicant’s prior positive drug test result was not improperly or unfairly denied the teaching position even though the criminal activity that had been the basis of the employment rejection was disposed of under the First Offender Act.<sup>118</sup> The court reasoned that the school board could, at its discretion, choose not to hire a teacher who the board believed would be “detrimental to the education of the students.”<sup>119</sup>

The Georgia cases interpreting the First Offender Statute within the confines of Georgia’s strong employment-at-will policy do not prevent AHA from modifying its policies to take into account the stated purpose of the statute that discharge under this law “shall not affect any of his or her civil rights or liberties.” Under such a revised policy, an arrest that has been discharged under the First Offender Statute would not be considered by the Agency.

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<sup>115</sup>269 Ga. 276 (1998).

<sup>116</sup>*Id.* at 277.

<sup>117</sup>253 Ga. App. 819 (2002).

<sup>118</sup>*Id.* at 829.

<sup>119</sup>*Id.*

#### **4. Transferability of Favorable Hearing Decisions**

Fair housing advocates have argued that a favorable decision with respect to whether a criminal record should result in denial of housing benefits should be transferable from one housing community to another.<sup>120</sup> Such transferability of favorable decisions would forestall the need for multiple reviews over the same issues if the applicant seeks to relocate to another housing community. Accordingly, AHA should consider revising its policies to implement the transferability of favorable decisions.

#### **5. Lease Termination on the Basis of Previously Disclosed Criminal Conduct**

In the McDaniel Glenn proceeding discussed above, AHA issued notices of lease termination based on criminal activities that were previously disclosed to the agency in the initial lease application. It can be argued, however, that AHA's failure to deny the initial application based on the criminal record constitutes a waiver which bars AHA from reconsidering the criminal record at the time of lease renewal or termination. In *Housing Authority of Decatur v. Brown*,<sup>121</sup> the Housing Authority allowed Mr. Brown to remain a tenant after he had been convicted of possession of a small quantity of marijuana found in his apartment after a raid.<sup>122</sup> Eight months later, while the tenant was in the hospital, his apartment was again raided, and individuals not invited into the apartment by the tenant were arrested for drug possession.<sup>123</sup> The Housing Authority began eviction proceedings against the tenant.<sup>124</sup> The Georgia Court of Appeals upheld the trial court's judgment in favor of the tenant, reasoning that although the tenant had possessed marijuana earlier, the Housing Authority manifested acquiescence to his

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<sup>120</sup>See Letter from Dennis Goldstein and Eric Kocher, Atlanta Legal Aid Society, Inc., to Gloria Green, General Counsel and Senior Vice President, Housing Authority of the City of Atlanta, *Rights of Applicants and Residents Under the Bonner Order and Under the Requirements of the Moving to Work Agreement* (Nov. 22, 2004) (on file with the authors) at 5, 7.

<sup>121</sup>180 Ga. App. 483 (1986).

<sup>122</sup>*Id.*

<sup>123</sup>*Id.*

<sup>124</sup>*Id.*

continued possession of his apartment for almost a year after his arrest.<sup>125</sup> The Court of Appeals then found that “[t]he trial court properly concluded that the Housing Authority, by its failure promptly to remove Brown from his leasehold, waived the right to terminate the lease based on the April 1985 misdemeanor.”<sup>126</sup> Similarly, in *Cuyahoga Metro. Hous. Auth. v. Hairston*,<sup>127</sup> the Ohio court found that the Housing Authority waived its right to evict a tenant where it was aware that marijuana was found in a tenant’s unit but continued to accept rent for seven months despite the breach of the lease.

The waiver or estoppel argument, however, may give way to judicial reluctance to hold government agencies accountable for the action of their employees, even when a citizen innocently and reasonably relies on such action to the citizen’s detriment.<sup>128</sup> As the Supreme Court noted, “[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience of the rule of law is undermined.”<sup>129</sup> Also, in *Churchill Tabernacle v. Federal Communications Commission*, the F.C.C. had approved a contract whereby the church, who owned the license to a radio station, created a corporation to run the station and later sold the license to the corporation, retaining certain broadcast and reversion rights.<sup>130</sup> The F.C.C. continued to renew the license annually until the tenth year, when it abruptly determined that the contract agreement was contrary to public interest and required the church to relinquish its rights to the license.<sup>131</sup> The court held that “equitable estoppel and res judicata do not ordinarily apply to administrative agencies” and that the agency was entitled to establish a new policy and apply that policy to deny an application for benefit renewal.<sup>132</sup>

Similarly, in *Savoury v. U.S. Attorney General*, the Eleventh Circuit con-

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<sup>125</sup>*Id.*

<sup>126</sup>*Id.*

<sup>127</sup>124 Ohio Misc. 2d 1 (2003).

<sup>128</sup>See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 326 (West, 2d ed. 2001).

<sup>129</sup>*Id.* (quoting *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 60 (1984)).

<sup>130</sup>160 F.2d 244, 245 (D.C. Cir. 1947).

<sup>131</sup>*Id.* at 246.

<sup>132</sup>*Id.* at 246, 248 n. 4.

sidered the case of an immigrant who had lawfully entered the United States as a visitor in 1984, and in 1988 was arrested on state drug charges.<sup>133</sup> In 1991, while the drug charges were pending, the immigrant married a U.S. citizen and applied for a change in his citizenship status.<sup>134</sup> He disclosed to the I.N.S. his pending criminal charge and his subsequent guilty plea to felony cocaine possession with intent to distribute.<sup>135</sup> He was nevertheless approved for lawful permanent resident status in 1992.<sup>136</sup> In 2002, after a brief trip out of the country, the immigrant was denied reentry to the United States, and the I.N.S. held him removable because of the 1992 conviction.<sup>137</sup> The Eleventh Circuit denied his appeal, holding that the government's failure to properly enforce the law when it granted his permanent resident status did not prevent it from later correcting its error, and noting that the Supreme Court has reversed every grant of equitable estoppel against the government that it has reviewed.<sup>138</sup> Therefore, AHA can argue that it has discretion to correct an "error" in admitting a tenant with a criminal history, even years after the fact.

Despite courts' reluctance to apply equitable estoppel against government agencies, the Supreme Court has recognized that there may be some cases in which "the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government."<sup>139</sup> Additionally, courts tend to hold a government agency responsible for its action when the agency is acting in a proprietary manner—rendering the agency, in practice, more like a private entity than a government entity. This is especially true when the rules the agency imposes are "anything but explicit," rendering reliance thereupon particularly reasonable.<sup>140</sup>

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<sup>133</sup>449 F.3d 1307, 1310 (11th Cir. 2006).

<sup>134</sup>*Id.*

<sup>135</sup>*Id.*

<sup>136</sup>*Id.*

<sup>137</sup>*Id.* at 1311.

<sup>138</sup>*Id.* at 1318 (citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422-23 (1990)).

<sup>139</sup>*Chaney v. United States*, 45 Fed. Cl. 309, 318 (1999).

<sup>140</sup>AMAN & MAYTON, *supra*, note 128, at 334 (citing *Portmann v. United States*, 674 F.2d 1155, 1163 (7th Cir. 1982)).

Except for the federal law that permanently precludes, without exception, anyone convicted of manufacturing or producing methamphetamine on public housing property<sup>141</sup> and anyone subject to lifetime sex offender registration<sup>142</sup> from public housing benefits, there does not appear to be any federal legislation that expressly permits retroactive denial of an application that had been previously approved even though it disclosed a prior criminal activity. Arguably, federal law, in providing that “*during the term of the lease, the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause,*” should limit the scope of grounds for eviction to events taking place during the lease.<sup>143</sup> Accordingly, AHA should consider revising its policies to preclude the denial of public housing benefits based on criminal records that have been previously considered in granting lease applications and renewals.

## **6. Individualized Determinations**

For both applicants and tenants, there should be individualized determinations which take into consideration factors such as the seriousness of the offense and when it occurred, efforts at rehabilitation, and impact on others, such as family members. AHA has certainly moved in this direction with the modifications that have been made to its application process. However, those explicit written procedures based on *Bonner* do not cover terminations of leases such as the situation that existed at McDaniel Glenn. For lease terminations, the written policies provide only a generalized procedure that allows a meeting with an “impartial designee” and a written decision of the result, without any specific protections of the right to have an attorney, cross-examine witnesses, present evidence, etc. More importantly, there is no specific reference to how the Agency will treat criminal records. In the McDaniel Glenn situation, as well as in other relocations, AHA has, in practice, provided an informal conference and procedure consistent with what has been described for the application process. The Agency’s written

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<sup>141</sup>42 U.S.C. § 1437n(f).

<sup>142</sup>42 U.S.C. § 13663.

<sup>143</sup>42 U.S.C. § 1437f(d)(1)(B)(ii), (o)(7)(C) (2006) (emphasis supplied).



policies should be revised to incorporate the procedures that have actually been utilized in these lease termination circumstances.

### **7. Appeal of Hearing Officer's Decision**

The AHA corporate policies do not address the right of applicants or residents to appeal the decision of the impartial hearing officer. In fact, one section of the policy provides that “the Management agent is under no obligation to meet with the Applicant after the conclusion of the requested meeting.”<sup>144</sup> As discussed above, in the McDaniel Glenn representation, GJP and King & Spalding filed an appeal to AHA corporate management for clients who had received adverse decisions from the hearing officer. There was no formal response to this appeal brief, but an additional seven lease terminations were suspended after it was filed.

AHA should revise its procedures to specifically provide for a right of appeal of the hearing officer's decision to a specified corporate official or member of the legal department. A similar right of appeal is currently provided for applicants to the Agency's Housing Choice Program.

### **F. Conclusion**

There is only so much public housing available in the United States and there is a question of fairness about who should compete for the housing that is available. The public housing agency also has to consider public safety and risk of liability for themselves if they lease to individuals with criminal records.<sup>145</sup> But these interests on the part of the housing agency should be balanced against the needs of ex-offenders who should not be faced with unreasonable barriers to housing. In many situations, if they do not obtain public housing, studies showed they are more likely to commit additional crimes.

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<sup>144</sup>HOUS. AUTH. OF THE CITY OF ATLANTA, BD. OF COMM'RS, STATEMENT OF CORPORATE POLICIES GOVERNING THE LEASING AND RESIDENCY OF ASSISTED APARTMENTS (April 30, 2008 rev.), Art. VII(1)(E), *available at* [http://www.atlantahousing.org/pdfs/Official\\_Statement\\_of\\_Corporate\\_Policies.pdf](http://www.atlantahousing.org/pdfs/Official_Statement_of_Corporate_Policies.pdf) (last visited Aug. 16, 2008).

<sup>145</sup>The Legal Action Committee observes that “[F]ew, if any cases, have involved a housing authority being held liable for the commission of a crime by a tenant. Rather, the courts have dealt more commonly with liability of the leaseholder when a guest has committed a crime on the public housing premises” (LAC Report at 4).

An important question to consider is whether housing authorities have drafted overly broad policies that disqualify individuals who pose no risk. Restrictive policies also have an impact on the families of persons with criminal records. If a good balance can be achieved, public safety will be protected and communities will be protected by reduced recidivism and relapse. The objective for public housing authorities should be to give applicants and tenants with past criminal records the same opportunity as other applicants to reside in public housing without giving them a preference. In other words, there should be appropriate individualized determinations. If an individual's criminal record indicates a real threat to the safety of those residing in community housing, it should be considered appropriate to deny him or her housing. However, it is counter-productive to apply overly broad policies that disqualify individuals who pose no risk.<sup>146</sup>

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<sup>146</sup>See generally, LAC Report at 9-14.

## V. The Impact of Collateral Consequences on Employment Opportunities

### A. Introduction

“When asked once to name the most important things in life, Sigmund Freud answered, ‘Love and work.’ . . .”<sup>1</sup> This section of the Study deals with the latter. In their recent book, *The New American Workplace*, James O’Toole and Edward E. Lawler, III explained the reasons for the importance of work as follows:

Decades of research establish the fact that three major human needs can be satisfied by gainful employment: (1) The need for the basic economic resources and security essential to lead good lives; (2) the need to do meaningful work and the opportunity to grow and develop as a person; and (3) the need for supportive social relationships. Good work, as we define it here, satisfies all three of those fundamental needs.<sup>2</sup>

Inability to find suitable work is, therefore, one of the most significant barriers to reentry by ex-offenders. Moreover, there is a logical connection between unemployment and recidivism: if someone cannot find work, that person is more likely to commit a crime that relates to that person’s (or family’s) basic needs. There are also psychological effects of unemployment that may make an individual more likely to commit crimes. Therefore, it is understandable that some studies have linked unemployment to higher rates of recidivism.<sup>3</sup> Other studies indicate that within one year of release, only 40% of ex-felons have legitimate employment.<sup>4</sup> This section of the Study covers the civil consequences related to efforts to seek gainful employment.

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<sup>1</sup>Rothstein & Liebman, Sec. I *supra* n. 12, at 4. “Recognition of the importance of work to human welfare and satisfaction cuts across historical, philosophical and political lines.” *Id.*

<sup>2</sup>JAMES O’TOOLE & EDWARD E. LAWLER, III, *THE NEW AMERICAN WORKPLACE* 8 (1st ed. 2006, Palgrave MacMillan).

<sup>3</sup>*See generally* PETER H. ROSSI & KENNETH J. LENIHAN, *MONEY WORK & CRIME*, (Academic 1980).

<sup>4</sup>JOAN PETERSILIA, NAT’L INST. OF JUSTICE, *WHEN PRISONERS RETURN TO THE COMMUNITY: POLITICAL, ECONOMIC, AND SOCIAL CONSEQUENCES, SENT’G & CORRECTIONS* (2000), available at <http://www.ncjrs.org/pdffiles1/nij/184253.pdf>.

## **B. The Results of the Legal Action Committee (LAC) Report**

As discussed in Section I, the Legal Action Committee's published study of the legal barriers facing people with criminal records ranked Georgia 47th out of the 50 states surveyed.<sup>5</sup> In the area of employment, the LAC Report identified "10 out of 10" barriers imposed in Georgia, the worst possible score.<sup>6</sup>

Is there a correlation between barriers for reentry and crime rates? As noted in Section I of this Study, Georgia has the second highest crime rate in the country. When this fact is considered in combination with the "worst score" on barriers to reentry related to employment, these circumstances should at least raise the question of whether some of the civil consequences imposed by Georgia law are justified. The possible correlation between the high crime rate and number of roadblocks to reentry is considered more fully in Section H(1) below.

## **C. The Availability of Criminal Records and Its Impact on Employment**

The collection, retention and disclosure of criminal records are matters of state law, and Sections II and III of this Study cover applicable Georgia law. This section of the Study includes only a summary of the issues that relate to employment.

Based on experience and practice, it is the opinion of the authors that an increasing number of employers: (1) make pre-employment inquiries regarding arrests and convictions; (2) check employment records through the state agency (GCIC in Georgia); and (3) deny employment opportunities based on the pre-employment inquiry and/or record check. This opinion is supported by empirical data. One relatively recent study of urban employers found that almost two-thirds of employers, when considering employment for relatively

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<sup>5</sup>LEGAL ACTION CENTER, AFTER PRISON: ROADBLOCKS TO REENTRY, GEORGIA REPORT CARD, available at [http://www.lac.org/lac/upload/reportcards/12\\_Image\\_Georgia.pdf](http://www.lac.org/lac/upload/reportcards/12_Image_Georgia.pdf). The Report observed that in Georgia, "employers can ask about arrests that never led to convictions and refuse to hire anyone with a criminal record, no matter their qualifications, unless in doing so they violate federal law." Additionally, there is "no opportunity for people with criminal records to obtain certificates of rehabilitation." *Id.*

<sup>6</sup>*Id.*

unskilled jobs, would refuse to hire someone with a conviction, regardless of the crime.<sup>7</sup> Almost one-third of the employers performed a background check on the most recently hired employees.<sup>8</sup> The authors suggest that this percentage likely has increased in recent years and currently is a lot higher.

Employers in Georgia can obtain arrest and conviction records from the GCIC by submitting a consent form signed by the applicant or employee that includes name, address, Social Security number, race, sex and date of birth.<sup>9</sup> An employer who denies employment opportunities based on a GCIC report must provide notice to this effect to the applicant or employee. The Agency's cover sheet to its report supplied in response to an employer's request for the criminal records of applicants or employees provides:

The information in this rap sheet is subject to the following caveats:

\* \* \*

When the information contained in a criminal history report causes an adverse employment or licensing decision, the individual, business or agency making the decision must inform the applicant of all information pertinent to the decision. The disclosure must include information that a criminal history record check was conducted, the specific contents of the record, and the effect the record had upon the decision. Failure to provide all such information to the person subject to the arrest decision is a misdemeanor offense under Georgia law. Additionally, any unauthorized dissemination of this record or information herein also violates Georgia law.<sup>10</sup>

Again, based on experience and practice, the authors suggest that many employers who deny employment based on GCIC reports do not provide this notice that is required by law.

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<sup>7</sup>Shawn D. Bushway, *The Stigma of a Criminal History Record in the Labor Market*, in *BUILDING VIOLENCE: HOW AMERICA'S RUSH TO INCARCERATE CREATES MORE VIOLENCE* 142, 144 (John P. May ed., 2000).

<sup>8</sup>*Id.*

<sup>9</sup>O.C.G.A. § 35-3-34(a)(1)(A); Ga. Comp. R. & Regs. r 140-2-.04 (1)(b)(1). The statute also provides that records can be obtained by submitting fingerprint cards to the GCIC. *Id.*

<sup>10</sup>See O.C.G.A. § 35-3-34(b); See also Ga. Comp. R. § Regs. r 140-2-.04(1)(b)(3).

Georgia employers can obtain access to felony conviction records without the consent of the applicant or employee. If the requesting entity provides sufficient identifying information, Georgia law authorizes the GCIC to electronically disseminate to both public and private agencies (including private employers) records of in-state felony convictions, pleas, and sentences without fingerprints or consent.<sup>11</sup> Moreover, records of Department of Correction inmates dating from 1984 are available on the Internet.<sup>12</sup>

The GCIC is prohibited from disseminating arrest records that were adjudicated under the First Offender Act when the person has been successfully discharged from first offender status.<sup>13</sup> There is no prohibition, however, on disclosure of a first offender's arrest record *prior* to discharge or, post-discharge, for certain serious offenses such as child molestation and sexual battery.<sup>14</sup> Other than this limited protection, Georgia employers have broad access to the criminal records of applicants and employees. Also, as discussed more fully below, Georgia law provides little restriction on the employer's use of this information to deny employment opportunities. The protections provided by federal law are discussed in Section E below.

#### **D. Restrictions on Employment Under Federal Law**

Individuals with criminal records may face some employment restrictions imposed by federal law. For example, under Department of Transportation (DOT) requirements, individuals with recent convictions for driving under the influence or using a commercial vehicle in a crime cannot receive commercial driver's licenses for a year, and those with more than one of these convictions are precluded for life.<sup>15</sup> Another example is credit unions that, under federal regulations, may lose their license to operate if they employ a person with a felony conviction for a crime involving dishonesty.<sup>16</sup> These federal laws

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<sup>11</sup>O.C.G.A. § 35-3-34 (a)(1)(C).

<sup>12</sup>GEORGIA DEPARTMENT OF CORRECTIONS, GDC INMATE QUERY, *available at* <http://www.dcor.state.ga.us/GDC/OffenderQuery/jsp/OffQryForm.jsp?Institution=>.

<sup>13</sup>See O.C.G.A. § 35-3-34(a)(1)(B).

<sup>14</sup>*Id.*

<sup>15</sup>49 U.S.C. § 31310 (b)(1)(A) and (c)(1)(A).

<sup>16</sup>12 U.S.C. § 1786(i) (federal statute regulating credit unions).

probably have limited application to indigent Georgians seeking employment. There are, however, numerous state laws regulating employment of individuals with criminal records. These laws are discussed below in Section F.

## **E. Protections Available Under Federal Law**

### ***1. Title VII of the Civil Rights Act of 1964***

Federal law provides no general prohibition on the use of arrest and conviction records by private employers. However, some protection is provided to certain classifications of applicants and employees covered under federal discrimination statutes. Title VII of the Civil Rights Act of 1964 prohibits discrimination against employees and applicants for employment based on race, color, sex, religion or national origin.<sup>17</sup> This federal statute prohibits both discriminatory treatment, as well as practices that have a discriminatory impact. The prohibition against discriminatory impact was established by the Supreme Court's decision in *Griggs v. Duke Power Co.*<sup>18</sup> In this landmark case, Duke Power used a high school education and the passing of two general intelligence tests as conditions for employment and transfer to certain production and maintenance jobs.<sup>19</sup> Both requirements disqualified African-Americans at a substantially higher rate than white applicants. The issue before the Supreme Court was whether the high school education and testing requirements constituted prohibited discrimination under Title VII. The Supreme Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice operates to exclude [African-Americans] cannot be shown to be related to job performance, the practice is prohibited."<sup>20</sup> The record in the case did not show a demonstrable relationship between these requirements and successful performance on the job.

The federal courts have applied the disparate impact prohibition in cases where the employer used arrest and conviction records to restrict employment

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<sup>17</sup>42 U.S.C. § 2000e-2(a)-(m) (basic Title VII prohibitions).

<sup>18</sup>401 U.S. 424 (1971). This case has also been described as the "fountainhead" of most of subsequent Title VII case law.

<sup>19</sup>The company used two professionally developed aptitude tests: the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test. *Id.* at 428.

<sup>20</sup>*Id.* at 431.

opportunities for persons in the classes protected by the law (e.g., African-Americans and Hispanics). One of the leading cases on an employer's use of arrest records is *Gregory v. Litton Systems, Inc.*<sup>21</sup> There, the district court considered Litton's policy of not hiring applicants who had been arrested "on a number of occasions" for things other than minor traffic offenses. The plaintiff in the case had been arrested on 14 different occasions in situations other than minor traffic incidents, but he had never been convicted of a criminal offense. The Court observed: "There is no evidence to support a claim that persons who have suffered no criminal convictions but who have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees."<sup>22</sup> Looking at national statistics, the Court found further that African-Americans are arrested substantially more frequently than Whites and concluded:

The policy of Defendant under which Plaintiff was denied employment, i.e., the policy of excluding from employment persons who have suffered a number of arrests without any convictions, is unlawful under Title VII. It is unlawful because it has the foreseeable effect of denying Black applicants an equal opportunity for employment. It is unlawful even if it appears, on its face, to be racially neutral and, in its implementation, has not been applied discriminatorily or unfairly as between applicants of different races. [Citations omitted] In a situation of this kind, good faith in the origination or application of the policy is not a defense. [The policy] is interdicted by the statute, unless the employer can show a business necessity for it. In this context, "business necessity" means that the practice or policy is essential to the safe and efficient operation of the business. [Citation omitted] As previously stated, the Court finds that the policy in question is not justified or excused by business necessity in this case.<sup>23</sup>

Following the *Gregory* case and others, the Equal Employment Opportunity Commission (EEOC) has issued "Policy Guidance" on an employer's

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<sup>21</sup>316 F. Supp. 401 (C.D.Cal.1970), *aff'd* 472 F.2d 631 (9th Cir. 1972).

<sup>22</sup>*Id.* at 402. The Court reasoned further that the evidence in the case was "overwhelmingly to the contrary." *Id.* at 403.

<sup>23</sup>*Id.* at 403. This case was decided before *Griggs*, but the District Court, in effect, anticipated the subsequent ruling by the Supreme Court.



consideration of arrest records in employment decisions. In a statement issued on September 7, 1990, the EEOC advised:

Since the use of arrest records as an absolute bar to employment has a disparate impact on some protected groups [African-Americans and Hispanics], such records alone cannot be used to routinely exclude persons from employment. However, conduct which indicates an unsuitability for a particular position is a basis for exclusion. Where it appears that the applicant or employee engaged in the conduct for which he was arrested and the conduct is job-related and relatively recent, exclusion is justified.<sup>24</sup>

The Commission further emphasized that if arrest records are considered in the employment decision as evidence of conduct, the employer must also consider the relationship of the charges to the positions sought and the likelihood that the applicant actually committed the conduct alleged in the charges. Therefore, according to the Commission, a blanket exception of people with arrest records “will almost never withstand scrutiny.”<sup>25</sup> The EEOC has vacillated on the question of whether merely requesting information regarding arrest records tends to discourage minority applicants and is, therefore, illegal.<sup>26</sup>

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<sup>24</sup>EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS AND EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000E ET SEQ. (1982), (issued Sept. 1990), available at [http://www.eeoc.gov/policy/docs/arrest\\_records.html](http://www.eeoc.gov/policy/docs/arrest_records.html). This publication indicates that an earlier policy statement issued on September 4, 1987 had found that “nationally, Blacks and Hispanics are convicted in numbers which are disproportionate to whites and that barring people from employment based on their conviction records will, therefore, disproportionately exclude those groups.” *Id.*

The EEOC has recently conducted public hearings on whether the Agency should revise its policy guidance on an employer’s use of criminal records in employment decisions. See *EEOC Weighs Guidance on Employer’s Use of Criminal Records in Employment Decisions*, DAILY LAB. REP. (BNA) No. 225, Nov. 24, 2008 at A-6.

<sup>25</sup>*Id.* at 3, citing *Gregory v. Litton Systems, Inc.*, *supra* note 21.

<sup>26</sup>Compare EEOC Compliance Manual: POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS IN EMPLOYMENT DECISIONS N:6005-6016 (1990) with EEOC Opinion Letter dated Dec. 1, 2005. See also Comment, *Arrest Records as a Racially Discriminatory Employment Criteria*, 6 HARV. C.R.-C.L.L. REV. 165 (1970). But see *Jimerson v. Kisco Co.*, 404 F. Supp. 338 (E.D. Mo. 1975) (Missouri District Court reasoning that an employer is not prohibited from asking an applicant to disclose an arrest record and disqualifying those who answer untruthfully).

*Green v. Mo. Pac. R.R. Co.*<sup>27</sup> is the leading Title VII case on an employer's use of conviction records. In that case, the Railroad followed an absolute policy of refusing consideration of employment to any person convicted of a crime other than a minor traffic offense. The Plaintiff applied for employment and in response to a question on the application disclosed that he had been convicted for refusing military induction. He explained further that he had served time in prison until his parole. Based on this information, the Railroad advised the Plaintiff that he was not qualified for employment because of his conviction and prison record. Green then filed suit on his own behalf, and as a representative of a class of those similarly situated.

In considering whether the Plaintiff had presented a *prima facie* case, the Eighth Circuit first identified ways in which a *prima facie* case can be established through statistical evidence. “[One approach] considers whether Blacks as a class (or at least Blacks in a specified geographical area) are excluded by the employment practice in question at a substantially higher rate than Whites.”<sup>28</sup> The Court then surveyed evidence presented by the Plaintiff at trial indicating that African-Americans are convicted of crimes at a rate at least two or three times greater than the percentage of African-Americans in the population of certain geographical areas. The Plaintiff's expert witness had testified that in urban areas, from 36.9% to 78.1% of all African-American persons would incur a conviction during their lifetimes, but only 11.6% to 16.8% of all white persons would acquire a conviction.<sup>29</sup> The Court also noted that the Company's own records indicated that a higher percentage of African-Americans than Whites were rejected because of conviction records. Based on this and other evidence, the Circuit Court concluded that the statistical evidence established that the Company's employment practices disqualified African-American applicants at a substantially higher rate than Whites, and that, therefore, a *prima facie* case of discrimination had been established. Therefore, following *Griggs v. Duke Power*, the Defendants were required to show that the employment practice in question was justified by “business necessity.” Considering this question, the Court reasoned:

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<sup>27</sup>523 F.2d 1290 (8th Cir. 1975).

<sup>28</sup>*Id.* at 1293. See also *Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299, 308-09 (1977) (disparate impact through statistics).

<sup>29</sup>523 F.2d at 1294.

We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. . . . To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.

Accordingly, we hold that appellate-Green and all other Blacks who have been summarily denied employment by MoPac on the basis of conviction records have been discriminated against on the basis of race in violation of Title VII and that the District Court should enjoin MoPac's practice of using convictions as an absolute bar to employment.<sup>30</sup>

In a second appeal in the case, the Eighth Circuit upheld the District Court's injunctive order prohibiting the Defendant from using an applicant's conviction record as an absolute bar to employment, but allowed it to consider a prior criminal record as a factor in making individual hiring decisions as long as the Defendant took into account "the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied."<sup>31</sup>

Following the two decisions by the Eighth Circuit in *Green* and other federal court cases, the EEOC issued a policy statement on conviction records in 1987.<sup>32</sup> This policy statement continued the Commission's underlying position that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on African-Americans and Hispanics. Therefore, the Commission continued to hold that such a policy or practice is unlawful under Title VII

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<sup>30</sup>*Id.* at 1298-1299.

<sup>31</sup>*Green v. Mo. Pac. R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977).

<sup>32</sup>EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000E ET SEQ. (1987), available at <http://www.eeoc.gov/policy/docs/convict1.html>.

in the absence of a justifying business necessity. However, the 1987 revision modified the previous requirements for establishing a business necessity. Under the revised Commission policy, an employer faced with adverse impact must now show three factors to justify business necessity: (1) the nature and gravity of the offense or offenses; (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought.<sup>33</sup>

## **2. The Americans with Disabilities Act**

The Americans with Disabilities Act (ADA) prohibits discrimination against a qualified individual with a disability because of that disability.<sup>34</sup> Discrimination includes treating applicants and employees differently because of a disability and also includes failure to make a reasonable accommodation for known physical and mental limitations of an otherwise qualified individual. “Disability” under this law is defined as a physical or mental impairment that substantially limits one or more life activities (*e.g.*, seeing, hearing, talking, walking, working).<sup>35</sup> A qualified individual is a person who can perform the essential functions of the job with or without reasonable accommodations.<sup>36</sup>

The ADA may have some application to an employer’s consideration of individuals with arrest or conviction records involving drugs or alcohol. It is not a violation of the ADA for an employer to test applicants or employees at any time for drug use or, under certain conditions, alcohol use. Nor is it a violation of the ADA for an employer to discipline an employee or refuse to hire an applicant because of current illegal drug use, misconduct or unsatisfactory job performance that is due to alcohol use. However, an individual who is a rehabilitated or recovering drug addict or an alcoholic (whether or

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<sup>33</sup>*Id.* at 1. The Commission concluded that its position was supported by the weight of judicial authority. *Id.* at 1 and n. 9. As noted above, the EEOC is currently reviewing its policy guidance in this area. *See* n. 24, *supra*.

<sup>34</sup>42 U.S.C. § 12101, 12112(a). Regulations accompanying the ADA can be found at 29 C.F.R. § 1630.

<sup>35</sup>*See* 29 C.F.R. § 1630.2(h) for definition of “impairment”; *see* 29 C.F.R. § 1630.2(i) for definition of “major life activity.”

<sup>36</sup>*See* 29 C.F.R. § 1630.2(m). If a person poses a direct threat of harm to himself/herself or others, that person is not qualified. *See* 29 CFR § 1630.15(b)(2).

not in recovery) may be, or could be regarded by an employer to be, a qualified individual with a disability under the ADA, in which event he or she would be protected against discrimination in the workplace.<sup>37</sup> Accordingly, an employer could risk exposure under the ADA by automatically denying employment opportunities to such an individual based solely on a prior arrest or conviction for drug or alcohol use.<sup>38</sup>

### **3. The Fair Credit Reporting Act**

The Fair Credit Reporting Act (FCRA)<sup>39</sup> covers employer use of “consumer reports” to make employment decisions. In particular, employers must: (a) make applicants or employees aware that a consumer report may be obtained, and (b) notify applicants or employees before and after information in a consumer report is used to make an adverse employment decision.

These rules are designed to reduce the chances of incorrect or incomplete consumer information becoming the basis of adverse employment decisions. Therefore, an employer using a “consumer report” must comply with the FCRA. A “consumer report” is defined as any communication—written or oral—on an individual’s credit, character, general reputation, personal characteristics, or mode of living, by a “consumer reporting agency.” A “consumer reporting agency” is defined as any entity or individual which “regularly engages in whole or in part in the practice of assembling or evaluating . . . information on consumers for the purpose of furnishing con-

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<sup>37</sup>42 U.S.C. § 12114(b), *See also* 28 C.F.R. § 1630.3(a). The EEOC regulations provide that the terms “disability” and “qualified individual with a disability” may not exclude an individual who: (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs; or (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use. 28 C.F.R. § 1630.3(a). In addition, the EEOC has taken the position that an employer cannot make the following pre-employment inquiry: “Have you ever been treated for drug addiction or alcoholism?” EQ. EMPL. COMP. MAN., EEOC GUIDANCE ON PRE-EMPLOYMENT INQUIRIES UNDER THE ADA N:2319-2327 (1995).

<sup>38</sup>Some would argue that the analysis is considerably more complicated. *See* Renae Parson & Thomas J. Speiss III, *Does the Americans with Disability Act Really Protect Alcoholism?* 20 LAB. LAW. 17 (2004).

<sup>39</sup>15 U.S.C. § 1681.

sumer reports to third parties.” . . .<sup>40</sup> The FCRA, therefore, applies to a wide range of reports, including credit reports, criminal background checks and reports on workers’ compensation claims, whether or not the information is a matter of public record. The FCRA does not apply, however, if the employer itself conducts a reference check.

Therefore, when an employer uses a third party to conduct a criminal record check, these activities may be covered by the FCRA even though they are not actually credit reports. In this situation, the employer must (1) provide applicants with notice of intent to conduct the check and obtain their authorization, and (2) if the employer intends to take adverse action on the report, it must inform applicants of this in writing and provide them with a copy of the consumer report and a statement of their rights under the FCRA.<sup>41</sup>

#### ***4. Procedures and Prerequisites for Asserting Claims Under Title VII and the ADA***

The Civil Rights Act of 1991 amended both Title VII and the ADA to increase the remedies available and to provide the right to a jury trial in these cases. Now, plaintiffs in these cases can recover compensatory damages (like damages for emotional distress) and punitive damages (which are awarded as punishment to the defendant to deter future wrongdoing).<sup>42</sup> There are caps on the sum of punitive and compensatory damages based on the size of an employer.<sup>43</sup>

There are certain procedural requirements for individuals who pursue claims under Title VII and the ADA. These procedures can be summarized as follows:

- (a) A charge must be filed with the EEOC within 180 days of the alleged unlawful employment practice.

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<sup>40</sup>*Id.* at § 1681a(p).

<sup>41</sup>*Id.* at § 1681b(b)(2) and § 1681b(b)(3).

<sup>42</sup>28 U.S.C. § 1981a(a)-(c).

<sup>43</sup>*See* 42 U.S.C. § 1981(a)(1). For employers with more than 500 employees, the cap is \$300,000. For employers with 200-500 employees, the cap is \$200,000. For employers with 100-200 employees, the cap is \$100,000. For employers with 15-100 employees, the cap is \$50,000. *Id.* at § 1981a(b)(3).

- (b) The EEOC then investigates and determines if there is reasonable cause to believe discrimination has occurred. If cause is found, the EEOC attempts to conciliate, and, failing conciliation, the Agency may bring suit. The EEOC should issue a right to sue to the charging party if there is no conciliation within 180 days.
- (c) If no cause is found, the EEOC will still issue a right to sue letter to the charging party.
- (d) The charging party has 90 days from the receipt of the right to sue letter to bring a civil action in federal district court.<sup>44</sup>

### **5. Federal Bonding and Tax Credits**

Employers can currently take advantage of a federal bonding program offered by the U.S. Department of Labor and administered through various state agencies.<sup>45</sup> In Georgia, the Federal Bonding Program is administered by the Georgia Department of Labor.<sup>46</sup> Under this Program, employers who hire persons classified as “high risk” under the company’s normal insurance program as a result of their criminal background are eligible for fidelity insurance bonds provided by the federal government. These bonds reimburse employers in amounts up to \$5,000 for any loss sustained by an employer due to forgery, larceny or embezzlement by an employee covered by the bond. The program is helpful, but limited in a number of ways. The program only provides coverage for the first six months of the ex-offender’s employment, after which the employer must purchase the bond from an insurer at “standard commercial bonding rates.”<sup>47</sup> Further, the program does not cover liability due to poor workmanship or job injuries, and certain eligibility requirements must be met, including that the employment in question must be a full-time position with a reasonable expectation of permanence.<sup>48</sup> Still,

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<sup>44</sup>42 U.S.C. § 2000e-5(e)-(f).

<sup>45</sup>See, e.g., The Federal Bonding Program, <http://www.bonds4jobs.com/program-background.html> (last visited September 8, 2008).

<sup>46</sup>Georgia Department of Labor, <http://www.dol.state.ga.us/pdf/forms/dol1073.pdf>.

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

the Federal Bonding Program should be considered a success, placing over 42,000 ex-offenders in jobs.<sup>49</sup>

The U.S. Department of Justice's Work Opportunity Tax Credit ("WOTC") offers a tax credit of up to \$2,400 for each new adult hire who has been convicted of a felony and has a hiring date which is not more than one year after the last date on which he/she was convicted or released from prison.<sup>50</sup> To be eligible for the full tax credit, an employer must certify that the eligible employee has worked a minimum of 400 hours and earns at least \$6,000 in wages annually.<sup>51</sup> The Georgia Department of Labor administers the WOTC, but unlike some other states, Georgia currently offers no similar statewide tax incentive program.<sup>52</sup>

### **6. Summary of Federal Rights Applicable to Individuals with Criminal Records**

An individual denied employment opportunities because of a criminal record may have a disparate treatment claim under Title VII if the individual is treated differently because of race. For example, if an African-American applicant is denied employment because of an arrest record while a White applicant with a similar record is hired, a disparate treatment claim under Title VII may exist. Or, if a Hispanic employee is terminated because of a drug charge when the employer's records show that this disciplinary policy has not been applied uniformly to Whites, a disparate treatment claim under Title VII may exist. These cases involve employment treatment actually motivated by the protected characteristic of race.

Ex-offenders who are denied employment opportunities may also have a disparate impact claim under Title VII. Normally, this would be the case

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<sup>49</sup>The Federal Bonding Program, <http://www.bonds4jobs.com/program-background.html> (last visited September 8, 2008). Only 460 of those ex-offenders placed in jobs were later proved to be dishonest workers. *Id.*

<sup>50</sup>26 U.S.C. § 51 (d)(4); *see also* US Department of Justice: Work Opportunity Tax Credit, <http://www.doleta.gov/business/incentives/opptax/> (last visited August 2, 2008).

<sup>51</sup>26 U.S.C. § 51 (a), (b), (i).

<sup>52</sup>Georgia Department of Labor: Tax Credits and Incentives, [http://www.dol.state.ga.us/em/learn\\_about\\_tax\\_credits\\_and\\_incentives.htm](http://www.dol.state.ga.us/em/learn_about_tax_credits_and_incentives.htm).



if an African-American or Hispanic is refused employment under a broad employment policy prohibiting hiring of individuals with arrest records or any conviction.

Applicants and employees who are alcoholics or recovering addicts may also have arrest records sometimes associated with their former use. For example, a recovering addict may have an arrest record for drug possession. An employer who denies employment because an individual is a recovering addict or alcoholic may run afoul of the ADA. However, an employer's obligation may depend on whether the decision is based on the protected status or some underlying conduct. In these cases, the underlying factual circumstances may determine individual rights and employer responsibilities. See Section E-2, *supra*.

As discussed in more detail below, an employer has a right and probably even a legal obligation to include inquiries about criminal records in its application process. The following question on an application form should pass legal scrutiny: "Have you ever been convicted of a felony? If the answer is 'yes,' please describe the circumstances (include the charges and dates)." Likewise, an employer should be able to deny or terminate employment for serious criminal conduct such as violent crimes, current drug use, and sale of drugs. In some circumstances, the position applied for should be considered (*e.g.*, for positions involving an element of trust, convictions involving dishonesty may be relevant).

## **F. Restrictions on Employment under Georgia Law**

### ***1. State Interest in Protecting the Public Safety***

State legislatures face a difficult task in their consideration of laws regulating the employment of ex-offenders. They must balance the strong interest of protecting the safety of the public (those who interact with offenders) with the likewise compelling interest of the ex-offender to find work to support his or her livelihood. In efforts to balance these interests, lawmakers can consider criminal record restrictions on certain professions (in order to protect the public) and they can consider laws that prohibit discrimination against individuals with an arrest and/or conviction record. As discussed below, the Georgia legislature has imposed various restrictions but has done little to prohibit discrimination.

## **2. Interest of the Employer**

Employers have an interest in hiring the most qualified employees and providing those employees with a safe and healthful work environment. A federal statute, the Occupational Safety and Health Act (OSHA),<sup>53</sup> requires that employers provide their employees with a “place of employment that is free from recognized hazards that are causing or likely to cause death or serious injury.”<sup>54</sup> Also, under Georgia law, all employers have a duty to exercise ordinary care when selecting employees.<sup>55</sup>

An employer who hires certain ex-offenders (*e.g.*, those convicted of violent crimes) may also face lawsuits from employees or customers based on negligent hire or negligent retention.<sup>56</sup> The legal claim here is that the employer hired or retained an employee with a known propensity for violence or other dangerous conduct. For example, if the employer retains an employee who was engaged in violent conduct and that employee subsequently injures another employee or customer, the claim of negligent retention could be raised. The employer has an interest in considering these potential claims if ex-offenders apply for employment.

## **3. Restrictions on Employment Under Georgia Law**

Like many states, Georgia imposes licensing restrictions on ex-felons for a large number of positions. One relatively old survey of licensing laws in the United States listed at least 1,948 different professions for which convictions would disqualify an applicant in at least one state.<sup>57</sup> No effort will be made here to comprehensively list the Georgia licensing restrictions on certain professions. However, a few examples may be illustrative: a felony conviction involving “moral turpitude” will preclude licensing

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<sup>53</sup>29 U.S.C. § 651 *et seq.*

<sup>54</sup>29 U.S.C. § 654(a)(1).

<sup>55</sup>O.C.G.A. § 34-7-20.

<sup>56</sup>*See e.g., Southern Bell Tel. Co. v. Sharara*, 167 Ga. App. 665 (1983), *Underberg v. Southern Alarm, Inc., et al.*, 284 Ga. App. 108 (2007).

<sup>57</sup>HUNT ET AL., NATIONAL CLEARINGHOUSE ON OFFENDER EMPLOYMENT RESTRICTIONS, LAWS, LICENSES AND THE OFFENDER’S RIGHT TO WORK (1973). Although this survey is obviously outdated, no more recent equivalent is available. *May, supra* note 17, at 194 n.50.

for (1) livestock brokers;<sup>58</sup> (2) mortgage agents;<sup>59</sup> (3) psychologists;<sup>60</sup> and (4) lawyers.<sup>61</sup>

Although not a direct restriction on employment, Georgia's regulation of the right to obtain a driver's license has a direct impact on the employment opportunities of ex-offenders. Georgia is one of 17 states that suspend the driver's license for six months or more for people convicted of drug offenses.<sup>62</sup> These issues are discussed in more detail in Section VI of this Study.

## **G. Protections Available Under Georgia Law**

The Legal Action Committee reports that 10 states have laws that prohibit employers from considering arrests if the arrest did not lead to a conviction.<sup>63</sup> Georgia is not one of these states. There is currently no general prohibition in Georgia on an employer's use of arrest and conviction records. Thus, employers can refuse to hire and terminate employment based on arrest and/or conviction records subject only to the restrictions applicable under federal law and Georgia's First Offender statute.<sup>64</sup>

### **1. First Offender Status**

If an offender is granted first offender status and successfully completes that program, that individual can respond to application questions about convictions in the negative.<sup>65</sup> Moreover, employers are prohibited from using the discharge as grounds for denying employment.<sup>66</sup> However, Georgia courts

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<sup>58</sup>O.C.G.A. § 4-6-10; *see also* *Bushway, supra*, n. 7, at 194 n. 50.

<sup>59</sup>O.C.G.A. § 7-1-1004.

<sup>60</sup>O.C.G.A. § 43-39-13.

<sup>61</sup>*In Re Collins*, 429 S.E.2d 908 (Ga. 1993).

<sup>62</sup>*See* O.C.G.A. § 40-5-75 (2006).

<sup>63</sup>LEGAL ACTION CENTER, *AFTER PRISON: ROADBLOCKS TO REENTRY, EMPLOYMENT*, available at <http://lac.org/roadblocks-to-reentry/main.php?view=law&subaction=4>.

<sup>64</sup>Moreover, there is no opportunity for people with criminal records to obtain "certificates of rehabilitation" that are available in other states, such as New York and Illinois. *See, e.g.* N.Y.CORRECT. LAW § 702; *see also* 730 Ill. Comp. Stat. § 5/5-5-5.

<sup>65</sup>O.C.G.A. § 42-8-62.

<sup>66</sup>1986 Op. Att'y. Gen. No. U86-25. *See also* O.C.G.A. § 42-8-63.

have held that an employer can use information of a prior conviction or arrest under the first offender statute to terminate employment.<sup>67</sup> This decision is based on Georgia's status as a strong "employment at will" state. The general idea is that absent an employee contract, an employee can quit at any time and the employer can terminate employment at any time for any reason or no reason. Most states have created exceptions to employment at will for discharges in violation of public policy or discharges that are inconsistent with employee handbooks or personnel policies. Georgia is one of the few states in the U.S. that has not recognized any exception.

## **2. No State Bonding or Tax Credits**

The Georgia Department of Labor administers the federal bonding and tax incentive programs discussed in Section V(E)(5), but unlike some other states, Georgia does not provide any state-sponsored programs. According to the National Hire Network, California, Illinois, Iowa, Louisiana, Maryland and Texas all provide tax incentives to employers who hire persons with criminal histories.<sup>68</sup> California offers a progressive program, which benefits employers who provide long-term, well paying jobs to ex-offenders. Under the California system an employer hiring an ex-offender<sup>69</sup> is eligible for a tax-credit in the amount of fifty percent of qualified wages<sup>70</sup> in the first year of employment, forty percent in the second year of employment, thirty percent in the third year of employment, twenty percent in the fourth year of employment and ten percent in the fifth year of employment.<sup>71</sup>

The authors suggest that the Georgia legislature should consider state tax incentives and bonding programs to encourage employers to hire ex-

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<sup>67</sup>*Mattox v. Yellow Freight Sys. Inc.*, 534 S.E.2d 561, 562 (2000).

<sup>68</sup>National Hire Network: State Tax Incentives to Benefit Employers Who Hire People with Criminal Records, [http://hirenetwork.org/state\\_tax\\_credits.htm](http://hirenetwork.org/state_tax_credits.htm) (last visited April 22, 2008).

<sup>69</sup>CAL. REV. & TAX. CODE § 23634 (b)(4)(A)(iv)(VI) (West 2004 & Supp. 2008) (defining qualified employee, generally and ex-offender, specifically).

<sup>70</sup>CAL REV. & TAX. CODE § 23634 (b)(1) (West 2004 & Supp. 2008) (defining the limitations on amount and type of wages eligible for the tax credit).

<sup>71</sup>CAL REV. & TAX. CODE § 23634 (a) (West 2004 & Supp. 2008).

offenders. In addition, legislation to protect employers from negligent hire and retention liability when they hire ex-offenders should be considered.

## **H. Public Policy Issues and Identification of Areas for Administrative and/or Legislative Change**

### ***1. Relevant Data on Recidivism and Crime Rates***

The Georgia Department of Corrections has estimated that lowering the recidivism rate in Georgia by 1% would save Georgia taxpayers \$7 million each year.<sup>72</sup> It is significant, therefore, that some empirical data links unemployment to higher rates of recidivism.<sup>73</sup> Put another way, it has been demonstrated that there is a “correlation between increases in money earned through legitimate means and decreases in illegal earnings.”<sup>74</sup> This is an area that deserves future study and analysis, especially using Georgia data. In addition to the obvious social issues raised, it is an economic issue for Georgia taxpayers.

In 2005, the indexed crime rate for 10,000 persons in Georgia was 4,751.1, which is one of the highest in the country.<sup>75</sup> As reported by the LAC, Georgia also has one of the highest number of roadblocks to reentry with “10 out of 10” in the area of employment. Is there a correlation? One approach to trying to answer this question is to compare crime rates in Georgia versus crime rates in New York and Illinois which are states with fewer barriers for reentry. In 2005, the indexed crime rate for 10,000 persons was 2,554.3 in New York and 3,631.8 in Illinois. These numbers are negatively correlated with each state’s barriers to employment by ex-offenders,

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<sup>72</sup>GEORGIA DEPARTMENT OF CORRECTIONS, RISK REDUCTION SERVICES, *available at* <http://www.dcor.state.ga.us/Divisions/OPT/RiskReduction/RiskReduction.html> (last visited August 15, 2008).

<sup>73</sup>*See generally* PETER H. ROSSI & KENNETH J. LENIHAN, *MONEY WORK & CRIME* (Academic 1980).

<sup>74</sup>AMY L. SOLOMON, KELLY DEDEL JOHNSON, JEREMY TRAVIS & ELIZABETH MCBRIDE, URBAN INSTITUTE, *FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY 14* (Oct. 2004), *available at* [www.urban.org/publications/411097.html](http://www.urban.org/publications/411097.html) (last visited August 15, 2008).

<sup>75</sup>THE DISASTER CENTER, UNITED STATES UNIFORM CRIME REPORT, STATE STATISTICS FROM 1960-2006, GEORGIA CRIME RATES 1960-2006, *available at* <http://www.disaster-center.com/crime/gacrime.htm>.

with New York having the least, Illinois having slightly more, and Georgia having one of the worst in the country.<sup>76</sup>

Can we hypothesize that the removal of barriers to obtaining employment will allow ex-offenders to more easily integrate into society, reducing the need to commit crimes? Some micro-survey data suggests that this is the case.<sup>77</sup> In the early stages of his Study, Gary Feldon, a law student at Emory University Law School at the time, considered the correlation between the severity of civil consequences of criminal convictions and arrests in 15 states as measured by the Legal Action Committee's report and the recidivism rates in these same states, based on a study conducted by the Department of Justice in 1987. Feldon did not find a significant correlation between any identified collateral consequence and reduced recidivism. However, he recognized that “. . . the lag time between the collection of the two sets of data and subjective judgments on the severity measurement may decrease the accuracy of these statistics, but this will likely only decrease the significance of the correlation.”<sup>78</sup>

## **2. Recommended Changes**

The authors of this Study suggest that the analysis and comparative data discussed above (including Georgia's high crime rate and its significant number of barriers to reentry in the area of employment) support the case for legislative and administrative change in our state. The following issues, some of which have been previously raised in Sections II and III, should be considered:

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<sup>76</sup>THE DISASTER CENTER, UNITED STATES UNIFORM CRIME REPORT, STATE STATISTICS FROM 1960–2005, GEORGIA CRIME RATES 1960–2005, *available at* <http://www.disastercenter.com/crime/gacrime.htm>; THE DISASTER CENTER, UNITED STATES UNIFORM CRIME REPORT, STATE STATISTICS FROM 1960–2005, NEW YORK CRIME RATES 1960–2005, *available at* <http://www.disastercenter.com/crime/nycrime.htm>; THE DISASTER CENTER, UNITED STATES UNIFORM CRIME REPORT, STATE STATISTICS FROM 1960–2005, ILLINOIS CRIME RATES 1960–2005, *available at* <http://www.disastercenter.com/crime/ilcrime.htm>. (all last visited August 15, 2008).

<sup>77</sup>Freeman, Richard, *Economics of Crime*, in THE HANDBOOK OF LABOR ECONOMICS 3C, Ch. 52.

<sup>78</sup>Gary Feldon, Collateral Effects of Arrest and Criminal Conviction in Georgia (2006) (unpublished directed research paper, Emory University School of Law) (on file with the authors).

- (a) Should Georgia law be changed to make it unlawful for employers to inquire about arrests that did not lead to conviction?
- (b) Should Georgia law be changed to make it unlawful for employers to deny or terminate employment based on arrests that did not lead to a conviction?
- (c) Should Georgia law be changed to make it unlawful for employers to deny employment based on convictions unless the conviction is related to the job or creates a safety risk?
- (d) Should Georgia law provide for “certificates of rehabilitation” that give relief from civil disabilities and employment bars imposed on ex-offenders?
- (e) Should Georgia have an agency or program dedicated to employment opportunities for ex-offenders (*e.g.*, job readiness training, vocational development, job placement services, etc.)?
- (f) What role can private organizations play in providing transitional employment services such as creating incentive for employers to hire ex-offenders?
- (g) Should Georgia’s First Offender Act be amended to prohibit an employer from refusing to hire or terminating an employee for an offense covered by the statute?
- (h) Should Georgia law require consent prior to disclosure of criminal records to employers?
- (i) Should the Georgia legislature consider tax incentive and bonding programs to encourage employers to hire ex-offenders?

Section VII (D) of this Study includes an identification of reentry issues related to employment that deserve initial focus. An extension of this Study should be the continued analysis of these issues and the development of specific proposals for the Georgia legislature and administrative agencies such as the GCIC. It is anticipated that law students and volunteer lawyers can be utilized to help achieve this result.

## **VI. The Impact of Arrests and Convictions on Federal and State Benefits Programs<sup>1</sup>**

### **A. Introduction**

Individuals with no experience with arrests or convictions likely take for granted their relatively painless ability to apply for student loans, get a drivers' license or vote. For individuals with a record, these tasks frequently become difficult if not impossible. This section first examines federal benefits programs available to the public and the problems those with arrest records encounter when applying for certain federal benefits. This section then delves into benefits programs in the state of Georgia and discusses the obstacles in place in our own backyard. Finally, this section concludes by identifying tangible areas where we as citizens can lobby for administrative and legislative change regarding access to benefits.

### **B. Federal Programs**

This section examines benefits and aid that are exclusively federal. These include the following: (1) educational assistance; (2) Social Security benefits; (3) Medicare and Medicaid; (4) immigration aid; (5) benefits for members of the armed forces and veterans; and (6) additional federal programs discussed briefly.

#### ***1. Educational Assistance / Student Loans***

Federal programs administering aid for educational assistance take an incredibly firm stance toward students with drug convictions. The federal statute, 20 U.S.C. § 1091(r)(1), entitled "Student Eligibility: Suspension of Eligibility for Drug-related Offenses," provides:

A student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the

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<sup>1</sup>This Section draws heavily on Elizabeth Gould's Directed Research paper at Emory titled "Government Benefits Denied as Collateral Consequences to Criminal Convictions" (2006) (on file with the authors).



student was receiving any grant, loan, or work assistance under this title shall not be eligible to receive any grant, loan, or work assistance under this title from the date of that conviction for the period of time specified in the following table. . . .<sup>2</sup>

The length of the ineligibility period correlates with the severity of the drug offense. If a student is convicted of *possession* of a controlled substance, that student is ineligible for federal student aid for one year for the first offense, two years for the second offense, and indefinitely for the third offense.<sup>3</sup> If a student is convicted of *sale* of a controlled substance, that student is ineligible for federal student aid two years for the first offense and indefinitely for the second offense.<sup>4</sup> States are not permitted to alter this federal legal barrier.<sup>5</sup> A 2006 amendment to 20 U.S.C. § 1091(r)(1) clarified that the restriction applies *only* to drug convictions occurring while a student was receiving financial aid.<sup>6</sup>

A 2006 challenge to the constitutionality of 20 U.S.C. § 1091(r)(1) in a South Dakota district court was unsuccessful.<sup>7</sup> A student group argued that a law denying federal financial aid to students convicted of drug offenses was a violation of both the equal protection component of the due process clause of the Fifth Amendment and the double jeopardy clause of the Fifth Amendment.<sup>8</sup> The court initially found that persons convicted of drug offenses were not a suspect class, so the statute only needed to meet the “rational basis” test. “Because [the statute] does not implicate a suspect classification or infringe on a fundamental right, the legislation must be upheld

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<sup>2</sup>20 U.S.C. § 1091(r).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*; LEGAL ACTION CENTER, AFTER PRISON: ROADBLOCKS TO RE-ENTRY, STUDENT LOANS, available at <http://lac.org/roadblocks-to-reentry/main.php?view=law&subaction=7> (last visited August 15, 2008).

<sup>6</sup>See 20 U.S.C. § 1091(r)(1); see also Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 8021 120 Stat. 4, 178 (codified as amended at 20 U.S.C. § 1091(r)).

<sup>7</sup>*Students for Sensible Drug Policy v. Spellings*, 460 F. Supp. 2d 1093 (D.S.D. 2006), *aff'd*, 523 F.3d 896 (8th Cir. 2008).

<sup>8</sup>*Id.* at 1095-1096.

if there is a rational basis for singling out students convicted of drug offenses which is related to a legitimate federal interest.”<sup>9</sup>

The court recognized that since the rational basis of review is “highly deferential to the legislative branch,” the classification of convicted drug offenders is afforded a “strong presumption of validity.”<sup>10</sup> The court found that the statute had a rational basis because it prevented taxpayers from subsidizing drug use on campus.<sup>11</sup> In reaching this result, the court recognized that students convicted of possessing small amounts of marijuana may be prevented from receiving federal student financial aid while those students convicted of serious sexual or other crimes would not suffer the same fate.<sup>12</sup> The court found, however, that “the mere fact that the classification results in some inequality or unfairness does not, in and of itself, offend the Constitution.”<sup>13</sup> An individual can reinstate eligibility if he or she is “rehabilitated,” meaning that the individual has completed a drug rehabilitation program and has passed unannounced drug tests.<sup>14</sup> The court then rejected the plaintiffs’ double jeopardy argument on the basis that Congress did not label denying federal financial aid to drug offenders a criminal penalty, and intended for the law to have a rehabilitative and deterrent effect rather than a punitive effect.<sup>15</sup>

One agency reports that low-income mothers have been particularly hard-hit by the ban on federal educational aid.<sup>16</sup> Particularly because of the “war on drugs” of the 1990s, between 1990 and 1996, the number of women convicted of felonies in state courts grew at over twice the rate of increase for men.<sup>17</sup> When low-income mothers are not able to attend college, their

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<sup>9</sup>*Id.* at 1096.

<sup>10</sup>*Id.* (quoting *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006).

<sup>11</sup>*Id.* at 1097.

<sup>12</sup>*Id.* at 1098.

<sup>13</sup>*Id.*

<sup>14</sup>20 U.S.C. § 1091(r)(2); see also *Spellings*, 460 F. Supp. 2d at 1098-1104.

<sup>15</sup>*Spellings*, 460 F. Supp. 2d at 1098-1104.

<sup>16</sup>See CENTER FOR LAW AND SOCIAL POLICY, “I NEED TO GET EDUCATED.” LIFT THE BAN ON FINANCIAL AID FOR HIGHER EDUCATION, EVERY DOOR CLOSED FACT SHEET SERIES No. 4 of 8, available at [http://www.clasp.org/publications/EDC\\_fact\\_sheets.pdf](http://www.clasp.org/publications/EDC_fact_sheets.pdf) (last visited August 15, 2008).

<sup>17</sup>*Id.*

employment opportunities decrease, along with their earning potential, and they are unable to sufficiently provide for their children.

## **2. Judicial Power to Deny Federal Benefits**

Federal and state judges have the power to deny individuals convicted of drug offenses federal benefits as part of sentencing.<sup>18</sup> 21 U.S.C. § 862 gives judges broad power to deny benefits as part of a sentence, but it has had only a limited impact, as judges rarely exercise the discretion afforded them by the statute.

Under the Denial of Federal Benefits Program, judges can cut off access to most federal benefits.<sup>19</sup> Congress intended this statute to create “user accountability” for those who receive federal benefits.<sup>20</sup> Judges have power to deny convicted drug offenders access to “any grant, contract, loan, professional license or commercial license provided by an agency of the United States or by appropriated funds of the United States.”<sup>21</sup> The Denial of Benefits program covers a wide variety of programs, including approximately 750 federal benefits.<sup>22</sup> It covers 162 benefits from the Department of Education alone.<sup>23</sup> Other programs covered include small business loans<sup>24</sup> and FEMA disaster assistance.<sup>25</sup> Judges can also deny individuals access to at least 82 federal licenses or permits.<sup>26</sup>

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<sup>18</sup>See 21 U.S.C. § 862.

<sup>19</sup>*Id.*

<sup>20</sup>“Those favoring the amendment acknowledged that there was not enough money to keep building more prisons and saw the Denial of Federal Benefits Program as a new form of punishment for drug-trafficking offenses.” Robert W. Musser, Jr., *Denial of Federal Benefits to Drug Traffickers and Drug Possessors: A Broad-Reaching But Seldom Used Sanction*, 12 FED. SENTENCING REP. 252, 252 (2000).

<sup>21</sup>21 U.S.C. § 862.

<sup>22</sup>Musser, *supra* note 20, at 253.

<sup>23</sup>*Id.*

<sup>24</sup>BUREAU OF JUSTICE ASSISTANCE, PROGRAMS: BENEFITS THAT MAY BE DENIED, *available at* <http://www.ojp.usdoj.gov/BJA/grant/dfbbenefits.html> (last visited August 15, 2008).

<sup>25</sup>Musser, *supra* note 20, at 253.

<sup>26</sup>*Id.*

The statute expressly excludes certain benefits, *i.e.*, a court cannot take them away.<sup>27</sup> A court cannot remove the following benefits: “retirement, welfare, Social Security, health, disability, veterans benefits, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.”<sup>28</sup>

Like the program suspending federal educational aid, the length of time a judge can deny federal benefits depends on the type of drug offense and the individual’s prior convictions. Individuals who violated drug-trafficking laws are ineligible for benefits for a longer period than those who break possession laws. Drug traffickers who are convicted of their third offense may be “permanently ineligible for all Federal benefits.”<sup>29</sup> Individuals convicted of drug possession or drug traffickers convicted of their first or second offense may be only denied the benefits for a period of time.<sup>30</sup> Individuals who declare themselves drug addicts and individuals the court finds rehabilitated can have access to benefits for long-term drug treatment.<sup>31</sup>

The chart on the following page summarizes the timeframes for which benefits can be denied for both sale and possession of drugs.

While many individuals could lose benefits under this statute, in practice judges rarely deny benefits as part of a sentence. From 1990–2000, only 5,763 individuals in state and federal court lost benefits under this statute.<sup>32</sup> This statute rarely affects federal defendants because most drug offenses have a mandatory minimum sentence that is longer than the period for which the court could suspend benefits.<sup>33</sup> It is also possible that judges refuse to deny

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<sup>27</sup>See 21 U.S.C. § 862.

<sup>28</sup>*Id.*

<sup>29</sup>21 U.S.C. § 862(a)(1)(C) (2006).

<sup>30</sup>21 U.S.C. § 862(a)–(b).

<sup>31</sup>“The benefits which are denied under this subsection shall not include benefits relating to long term drug treatment programs for addiction for any person, who if there is a reasonable body of evidence to substantiate such declaration, declares himself to be an addict and submits himself to a long-term treatment program for addiction, or is deemed to be rehabilitated pursuant to rules established by the Secretary for Health and Human Services.” 21 U.S.C. § 862(a)(2) (2006). During the period from 1990–2000 only thirty-one individuals had benefits reinstated. Musser, *supra* note 18, at 255.

<sup>32</sup>Musser, *supra* note 18, at 254.

<sup>33</sup>*Id.*

| Denial of Federal Benefits <sup>34</sup> |             |  |  |   |
|--|-------------|--|--|---|
|  |             | Offense  |  |   |
|  |             | First  | Second   | Third                                   |
| Type of Conviction                       | Trafficking | Discretion to make ineligible for up to five years | Discretion to make ineligible for up to ten years  | Permanently ineligible for all benefits |
|  | Possession  | Discretion to make ineligible for up to one year   | Discretion to make ineligible for up to five years (for second and all subsequent convictions) |   |

benefits because the Federal Sentencing Guidelines<sup>35</sup> do not provide guidance to sentencing judges on how to use this statute.<sup>36</sup> Likewise, state judges rarely exercise this power; judges in only seven states denied federal benefits from 1990–2000.<sup>37</sup>

Judges could use the Denial of Federal Benefits Program to bar individuals with drug convictions access to many of the benefits the federal government provides. Because judges rarely include this denial of benefits in sentencing, this program has not affected many people.

### **3. Social Security: Incarcerated Individuals are Ineligible**

The Social Security program provides retirement and disability benefits to qualified individuals. The government does not deny these benefits as a collateral consequence for a criminal conviction, but an individual is ineligible

<sup>34</sup>21 U.S.C. § 862(a)–(b).

<sup>35</sup>See U.S. SENTENCING GUIDELINE MANUAL § 5F1.6.

<sup>36</sup>Federal judges are not currently trained on the Denial of Federal Benefits Program by the Federal Judicial Center or Sentencing Commission. Musser, *supra* note 18, at 254.

<sup>37</sup>One county in Oregon accounted for one-third of all state denial of benefits during the 1990s. *Id.*

while he or she is incarcerated.<sup>38</sup> After release, an individual again becomes eligible for benefits unless that person has violated the terms of parole.<sup>39</sup>

#### **4. Medicare/Medicaid**

Federal statutory law provides that no state, under a state medical plan, is required to provide medical assistance to any person “convicted of a felony under Federal or State law for an offense which the State agency determines is inconsistent with the best interests of beneficiaries under the State plan.”<sup>40</sup>

##### **(a) Medicare**

Medicare, a federal health insurance program for the disabled and individuals over the age of 65, does not provide benefits to incarcerated individuals.<sup>41</sup>

##### **(b) Medicaid**

Medicaid, a federal health insurance program for low-income individuals and families, gives states the discretion to determine if eligibility should be suspended in the face of a conviction.<sup>42</sup> Applicable Georgia law is discussed below.

#### **5. Armed Forces**

The armed forces place some limits on individuals who have convictions: individuals with felony convictions cannot enlist, and individuals are not provided veterans benefits while incarcerated. There is an exception to the felony bar on enlistment for “meritorious cases.”<sup>43</sup> Individuals who are convicted of mutiny, treason, sabotage or assistance to the enemy are permanently ineligible for all veterans benefits.<sup>44</sup>

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<sup>38</sup>42 U.S.C. § 402(x)(1)(A). The government denies benefits when an individual is incarcerated for 30 or more days.

<sup>39</sup>*Id.*

<sup>40</sup>U.S.C. § 1396a(a)(23).

<sup>41</sup>*See* C.F.R. § 435.1009.

<sup>42</sup>*Id.*

<sup>43</sup>10 U.S.C. § 504(a).

<sup>44</sup>Individuals have to sacrifice all accrued and future benefits. 38 U.S.C. § 6104(a).

An individual must sacrifice veteran benefits while incarcerated.<sup>45</sup> During the period of incarceration, a person cannot receive any veterans benefits,<sup>46</sup> but spouses and children may receive the money the veteran would have received.<sup>47</sup> If a surviving spouse or child of a veteran who receives benefits is incarcerated, then that person receives no benefits, but other family members remain eligible for their portion of the assistance.<sup>48</sup>

Courts have upheld the statute denying benefits for veterans while they are incarcerated against constitutional challenges.<sup>49</sup> In *Latham v. Brown*, an incarcerated veteran sued the Department of Veterans Affairs to receive benefits, challenging the statute that denied these benefits on due process and equal protection grounds.<sup>50</sup> The court found that prisoners were not a suspect class needing special protection.<sup>51</sup> The government had a rational interest in suspending the benefits for prisoners because the limits allowed the government to prevent “[the] duplication of subsistence payments and of contraband purchases within prisons.”<sup>52</sup> This case suggests that the government has the power to suspend the access to any type of cash-payment benefit while an individual is incarcerated because suspending access to these programs would prevent duplicate payments and prevent contraband purchases.

## 6. Immigration

Under the current version of the United States’ ever-changing immigration policy, any undocumented worker convicted of “a crime involving moral

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<sup>45</sup>“No pension . . . shall be paid to or for an individual who has been imprisoned in a Federal, state or local penal institution as a result of conviction of a felony or misdemeanor.” 38 U.S.C. § 1505.

<sup>46</sup>Benefits are not paid “for any part of the period beginning sixty-one days after such individual’s imprisonment began and ending when such individual’s imprisonment ends.” 38 U.S.C. § 1505(a).

<sup>47</sup>38 U.S.C. § 1505(b).

<sup>48</sup>38 U.S.C. § 1505(c).

<sup>49</sup>*Latham v. Brown*, 4 Vet. App. 265 (1993), *aff’d* 11 F.3d. 1070 (Fed. Cir. 1993).

<sup>50</sup>*Id.*

<sup>51</sup>*Id.* at 267.

<sup>52</sup>*Id.* at 268.

turpitude” or a violation of any law involving a controlled substance cannot be admitted into the United States.<sup>53</sup> There are a few exceptions—if the crime was committed when the alien was a minor and more than five years before the alien applies for a visa, it is not considered.<sup>54</sup> Also, if the maximum possible penalty for the crime was not over one year of imprisonment *and* if the alien was not incarcerated for more than six months, the conviction will not serve as a bar to admission into the United States.<sup>55</sup> If, however, an alien has been convicted of more than one offense and spent five years or more in confinement, the alien cannot be admitted into the United States.<sup>56</sup>

In addition to being barred admission to the United States, there are several crimes that can trigger deportation.<sup>57</sup> These crimes are known as “aggravated felonies,” and include: (1) violent crimes for which sentences of five years or more as imposed; (2) money laundering, fraud, and theft (with an imposed sentence of five years or more); (3) immigration violations, such as document fraud and alien smuggling; and most notably, (4) almost all drug crimes, regardless of the sentence imposed.<sup>58</sup> An aggravated felon who is deported is barred from entering the United States for life.<sup>59</sup>

### C. State Programs

This section examines state benefits and aid, most of which are regulated under the federal government’s taxing and spending powers, thereby creating federal oversight. These programs include the following: (1) welfare,

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<sup>53</sup>See 8 U.S.C. § 1182(a)(2)(A).

<sup>54</sup>*Id.* at § 1182(a)(2)(A)(ii)(I).

<sup>55</sup>*Id.* at § 1182(a)(2)(A)(ii)(II).

<sup>56</sup>*Id.* at §1182(a)(2)(B).

<sup>57</sup>See CHRISTINA HENDRIX & OLIVIA ORZA, NO SECOND CHANCES: IMMIGRATION CONSEQUENCES OF CRIMINAL CHARGES, Ga. Bar J. at 27 (Dec. 2007); Center for Law and Social Policy, “Divided Families: Immigration Consequences of Contact with the Criminal Justice System,” *Every Door Closed Fact Sheet Series*, No. 8.

<sup>58</sup>See JUDITH BERNSTEIN-BAKER, DIVIDED FAMILIES: IMMIGRATION CONSEQUENCES OF CONTACT WITH THE CRIMINAL JUSTICE SYSTEM, IN EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 91, 92-93 (Center for Law and Social Policy 2002).

<sup>59</sup>*Id.* at 95.



(2) foster care, (3) drivers' licenses, (4) health care, (5) education, (6) state licensing boards, and (7) voting. This section focuses on those policies and programs in effect in Georgia.

## **1. Welfare**

### **(a) State Implementation of Federally-Regulated Welfare Programs— “TANF” (Temporary Assistance for Needy Families)**

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”) created the Temporary Assistance for Needy Families (“TANF”) program, a federally-regulated welfare program.<sup>60</sup> This federal statute prohibits individuals with drug felony convictions from participating in food stamps or TANF programs. Under the federal mandate, this is a lifetime ban that applies only to drug-related felonies, not other convictions. The federal statute allows states to opt out of the program.<sup>61</sup>

The prohibition applies to individuals with either a state or federal felony drug conviction when the conviction “has as an element of the possession, use or distribution of a controlled substance.”<sup>62</sup> Under this statute, individuals with felony drug convictions are permanently banned from receiving benefits.<sup>63</sup> While family members are still eligible for assistance, the assistance will not include support for the family member with the drug conviction.<sup>64</sup> The statute specifically states that such individuals are still eligible for other programs, including: (1) emergency medical care, (2) short-term, non-cash emergency disaster relief, (3) public health assistance for immunizations and testing and treatment for some communicable diseases, (4) prenatal care, (5) job training programs, and (6) drug treatment programs.<sup>65</sup>

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<sup>60</sup>21 U.S.C. § 862(a).

<sup>61</sup>*Id.*

<sup>62</sup>21 U.S.C. § 862a(a).

<sup>63</sup>*Id.*

<sup>64</sup>TANF and the Food Stamp program calculate the assistance in different ways. For TANF the assistance to the family is reduced by the amount that would have been provided for that individual. 21 U.S.C. § 862a(b)(1) (2006). The benefits under the Food Stamp program are calculated by considering the convicted individual not to be a member of the household, but any income that individual earns is considered income for the whole household. 21 U.S.C. § 862a(b)(2).

<sup>65</sup>21 U.S.C. § 862a(f) (2006).

Some states have opted out of the ban on eligibility. States can exempt certain individuals from the ban, allowing them to receive food stamps or TANF assistance.<sup>66</sup> States can also elect to opt out of the program entirely or limit the time-period for which individuals are ineligible for the TANF and food stamp programs.<sup>67</sup> Approximately thirty states have opted out or modified the ban.<sup>68</sup> Georgia has not.<sup>69</sup>

Constitutional challenges to this statute have failed thus far. In *Turner v. Glickman*,<sup>70</sup> plaintiffs challenged this statute as violating the due process, equal protection and double jeopardy protections.<sup>71</sup> In its equal protection and due process analysis, the Seventh Circuit determined that the statute did not involve a suspect classification and thus only needed to meet a rational basis review.<sup>72</sup> The court found that the statute was rational because the government has an interest in deterring drug use and reducing fraud in the Food Stamp program, and the restrictions were related to this interest.<sup>73</sup>

The plaintiffs also raised a double jeopardy challenge, arguing that the statute inflicted a second punishment for a criminal conviction.<sup>74</sup> In finding that the statute functioned as a civil penalty and not a criminal punishment, the court concluded that Congress intended it to be a civil penalty and the statute had the effect of a civil penalty.<sup>75</sup> Under the rationale of this opinion, the federal government seems to have the power to limit access to any state

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<sup>66</sup>21 U.S.C. § 862a(d) (2006).

<sup>67</sup>21 U.S.C. § 862a(d)(1) (2006).

<sup>68</sup>Eleven states have opted out of the ban on TANF benefits, while thirteen states opted out of the ban on Food Stamp benefits. Eighteen states have modified the ban placing conditions on when an individual is eligible to reapply for food stamps, and sixteen states have modified the conditions for eligibility for TANF benefits. The remaining nineteen states adopted the federal ban in its entirety. Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 *FORDHAM URB. L. J.* 1501, 1506-08 (2003).

<sup>69</sup>See O.C.G.A. § 49-4-184(a)(5).

<sup>70</sup>207 F.3d 419, 422 (7th Cir. 2000).

<sup>71</sup>*Id.*

<sup>72</sup>*Id.* at 424.

<sup>73</sup>*Id.* at 425.

<sup>74</sup>*Id.* at 429.

<sup>75</sup>*Id.*

assistance program funded in part by the federal government because the interests of deterring drug use and preventing fraud would be present in any such program.

**(b) Georgia’s TANF—O.C.G.A. § 49-4-180 et seq.**

The stated purpose of Georgia’s TANF statute is as follows:

[T]o provide necessary assistance to needy families with children on a temporary basis and to provide parents, legal guardians, or other caretaker relatives of children with the necessary support services to enable such parents, legal guardians or caretaker relatives to become self-sufficient and leave the program as soon as possible.<sup>76</sup>

Despite such language promoting self-sufficiency, Georgia’s TANF program provides no assistance to individuals convicted of any felony under the Georgia Controlled Substances Act.<sup>77</sup> As referenced above, Georgia has not opted out of the lifetime ban, and the statute does not allow eligibility through a rehabilitation program. Georgia’s statute also denies assistance to individuals “convicted of a serious violent felony.”<sup>78</sup> This provision goes a step beyond the federal statute and reflects a “tough on crime” agenda of Georgia’s lawmakers.

**(c) Additional Recipients of Assistance in Georgia**

**(i) Programs for the Elderly—O.C.G.A. § 49-4-32**

The state of Georgia provides monetary assistance to elderly individuals who lack “sufficient income or other resources to provide a reasonable subsistence compatible with decency and health.”<sup>79</sup> If an individual is convicted of a crime and detained, however, that individual forfeits the right to assistance.<sup>80</sup> Such forfeiture only lasts for the period of actual confinement.<sup>81</sup>

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<sup>76</sup>O.C.G.A. § 49-4-182(a).

<sup>77</sup>O.C.G.A. § 49-4-184(a)(5).

<sup>78</sup>O.C.G.A. § 49-4-184(a)(4).

<sup>79</sup>O.C.G.A. § 49-4-32(a).

<sup>80</sup>O.C.G.A. § 49-4-32(c).

<sup>81</sup>*Id.*

(ii) Programs for the Blind—O.C.G.A. § 49-4-52

The state of Georgia provides monetary assistance to blind individuals who lack financial assistance and are not otherwise receiving assistance under O.C.G.A. § 49-4-32.<sup>82</sup> Under the statute providing aid to the blind, all assistance is suspended if a person is jailed or imprisoned for conviction of a crime.<sup>83</sup>

(iii) Programs for the Disabled—O.C.G.A. § 49-4-81

Finally, the state of Georgia also provides monetary assistance to disabled individuals who lack sufficient income.<sup>84</sup> Interestingly, although the language of the governing statute, O.C.G.A. § 49-4-81, tracks the language of the statutes providing assistance to the elderly and the blind, it does not contain an exception for individuals convicted of crimes and/or imprisoned or incarcerated.

## **2. Foster Care**

(a) Federal Regulation of Funding—42 U.S.C. § 671

The federal government provides funds to states to pay for foster care and adoption programs. To receive federal funding, states must ensure that criminal records checks are performed for all prospective foster or adoptive parents.<sup>85</sup> If a prospective foster or adoptive parent has a drug-related felony on his or her record, he or she cannot be approved to be a foster or adoptive parent if the felony was committed within the past five years.<sup>86</sup>

(b) Georgia's Program

States are permitted to opt-out of the federal foster care program, and Georgia took this route. Georgia's foster care program is much less comprehensive than the federal program under 42 U.S.C. § 671. For indivi-

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<sup>82</sup>O.C.G.A. § 49-4-52(a).

<sup>83</sup>O.C.G.A. § 49-4-52(b).

<sup>84</sup>O.C.G.A. § 49-4-81.

<sup>85</sup>42 U.S.C. § 671(a)(20).

<sup>86</sup>42 U.S.C. § 671(a)(20)(a)(ii).

duals petitioning to be adoptive parents, Georgia's statute requires a criminal records check, along with a report to the court of the results.<sup>87</sup> The court then has the discretion to investigate the situation or take other steps it deems necessary. Individuals petitioning to be foster parents must receive "a satisfactory preliminary records check determination" and "a satisfactory fingerprint records check determination."<sup>88</sup>

### **3. Drivers' Licenses**

#### **(a) Federal Program—23 U.S.C.S. § 159**

Drivers' license programs are administered by individual states, but the federal government conditions the distribution of federal highway funding on the state's adoption of an automatic six-month minimum license suspension for all narcotics convictions. Each year, states receive a certain amount of funds from the Highway Trust Fund pursuant to 23 U.S.C. § 104. Ten percent of a state's federal highway funding is withheld if a state fails to enact and enforce a law that requires the revocation of the driver's license of every individual convicted of any drug offense or violation of the Controlled Substances Act.<sup>89</sup> The state can opt out of enacting such a law and still receive its full apportionment of federal highway funds only if the state's governor submits a written certification to Congress that both the governor and the legislature of the state are opposed to the enactment and enforcement of a law revoking the drivers' licenses of drug offenders.<sup>90</sup>

#### **(b) Georgia's Requirements—O.C.G.A. § 40-5-75**

In Georgia, an individual's driver's license is suspended for 180 days upon the first conviction for any drug offense, and will only be reinstated after the payment of a \$200 fee and completion of an approved alcohol and drug risk reduction program.<sup>91</sup> Upon the second drug conviction within a five-year

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<sup>87</sup>O.C.G.A. § 19-8-16(a).

<sup>88</sup>O.C.G.A. § 49-5-69.1(a).

<sup>89</sup>23 U.S.C. § 159(a)(2) to (a)(3).

<sup>90</sup>23 U.S.C.S. § 159(a)(3)(B).

<sup>91</sup>O.C.G.A. § 40-5-75.

timeframe, an individual's driver's license is suspended for three years, but the individual can apply for reinstatement after only one year.<sup>92</sup> Upon the third drug conviction within five years, an individual's driver's license is suspended for five years, but the individual can apply for reinstatement after two years.<sup>93</sup> Several additional restrictions on reinstatement apply after the third drug offense.<sup>94</sup>

In 1993, in response to a plaintiff's claim that it was unconstitutional to suspend his driver's license for the conviction of a drug offense that did not involve a motor vehicle, the Georgia Supreme Court ruled that O.C.G.A. § 40-5-75 is constitutional under both the United States and Georgia Constitutions.<sup>95</sup> The court found that the statute does not violate equal protection because protecting the safety of passengers and drivers is a rational basis for revoking the drivers' licenses of drug offenders.<sup>96</sup> The court also found that disparate treatment of drug offenders and people convicted of other crimes is acceptable because "[c]ommitting the crimes of murder, assault, rape, and other violent acts, although dangerous, do not normally interfere with the driving ability of the offender."<sup>97</sup>

#### **4. Health Care**

- (a) **Medicaid**—As referenced above, the federal Medicaid statute grants states the power to make individuals with prior felony convictions ineligible for benefits, but Georgia has not explicitly included criminal records as criteria to be considered. Rather, the Department of Community Health has the power to determine standards and the discretion to determine eligibility.<sup>98</sup>

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<sup>92</sup>*Id.*

<sup>93</sup>*Id.*

<sup>94</sup>*Id.*

<sup>95</sup>*Quiller v. Bowman*, 262 Ga. 769, 425 S.E.2d 641 (1993).

<sup>96</sup>*Id.* at 771.

<sup>97</sup>*Id.* at 772.

<sup>98</sup>The Department of Community Health has the power to "establish the amount, duration, scope, and terms and conditions of eligibility for and receipt of such medical assistance." See O.C.G.A. § 49-4-142(a).

The state defines who can access the program based upon income.<sup>99</sup> The state may consider other factors but none of these include if an individual has a criminal conviction.<sup>100</sup>

- (b) **PeachCare for Kids**—PeachCare for kids provides healthcare insurance for children whose parents do not have insurance.<sup>101</sup> The program provides insurance for children whose families have income “below 235 percent of the federal poverty level.”<sup>102</sup> Families have to pay premiums and may have to provide co-payments for services that are provided.<sup>103</sup> Participation in this program does not depend on if a child or his or her parents have criminal convictions.<sup>104</sup>

## 5. Education

Georgia law requires that any public post-secondary school student convicted of a drug-related felony must be immediately suspended from school for the remainder of the applicable term, semester or quarter, and the student must forfeit all academic credit otherwise earned or earnable for such term.<sup>105</sup> Private school students forfeit all state funds for any loans, grants or scholarship for the term in which they are convicted of a drug-related felony.<sup>106</sup> The state-imposed sanctions on students for felony drug convictions are minimum required sanctions and both public and private schools are free to impose additional or more

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<sup>99</sup>GEORGIA DEPARTMENT OF COMMUNITY HEALTH, MEDICAID ELIGIBILITY CRITERIA, available at [http://dch.georgia.gov/00/channel\\_title/0,2094,31446711\\_31945377,00.html](http://dch.georgia.gov/00/channel_title/0,2094,31446711_31945377,00.html) (last visited August 15, 2008).

<sup>100</sup>In determining eligibility, the state may also consider “whether you are pregnant, disabled, blind, or aged; your income and assets; and whether you are a U.S. citizen or a lawfully admitted alien.” Georgia Department of Community Health, Understanding Medicaid 3, [http://dch.georgia.gov/vgn/images/portal/cit\\_1210/21/31944892UnderstandingMedicaid708.pdf](http://dch.georgia.gov/vgn/images/portal/cit_1210/21/31944892UnderstandingMedicaid708.pdf) (last visited August 15, 2008).

<sup>101</sup>O.C.G.A. § 49-5-271.

<sup>102</sup>O.C.G.A. § 49-5-273(a).

<sup>103</sup>O.C.G.A. § 49-5-273(d)–(e).

<sup>104</sup>See O.C.G.A. § 49-5-273.

<sup>105</sup>O.C.G.A. § 20-1-23.

<sup>106</sup>O.C.G.A. § 20-1-24.

stringent sanctions for drug-related felony convictions and related conduct.<sup>107</sup> Therefore, under provisions contained in Georgia's Drug-Free Post-Secondary Education Act ("DPSEA"), students enrolled in Georgia's universities and colleges face the severe consequence of automatic suspension if convicted of a felony drug offense.<sup>108</sup> The Board of Regents of the University System of Georgia ("Board of Regents") is responsible for the application of DPSEA and maintains a strict policy of automatic suspensions for felony drug convictions.<sup>109</sup> The statute apparently has not been challenged in the Georgia courts, and it is unclear how many students actually have been suspended or expelled on the basis of a felony drug conviction since the law was enacted in 1990.

Georgia's Drug-Free Post-Secondary Education Act applies only to students attending Georgia private and public universities, colleges and post-secondary schools, which include two-year colleges and technical colleges.<sup>110</sup> Georgia local boards of education and individual schools are responsible for elementary and secondary student discipline. The Georgia State Board of Education Rules provide only skeletal requirements for public elementary and secondary school discipline, but remain flexible as to punishment for those students convicted of crimes outside of school.<sup>111</sup> Local boards of education are authorized to develop an appropriate disciplinary procedure for off-campus behavior that constitutes a felony charge and which makes the students' presence at school a potential danger or disruptive to the educational process.<sup>112</sup> While the local boards are authorized to make rules regarding suspension for off-campus felony convictions, there are no

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<sup>107</sup>O.C.G.A. § 20-1-25.

<sup>108</sup>O.C.G.A. § 20-1-20-26.

<sup>109</sup>O.C.G.A. § 20-1-27. *See also* Board of Regents of the University of Georgia: Policy Manual: Section 400: Student Affairs, available at <http://www.usg.edu/regents/policy-manual/400.phtml>. "Disciplinary sanctions for students convicted of a felony offense involving the manufacture, distribution, sale or possession or use of marijuana, controlled substances or other illegal dangerous drugs, shall include the forfeiture of academic credit and the temporary or permanent suspension or expulsion from the institution. All sanctions imposed by the institution shall be subject to review procedures authorized by the Board of Regents."

<sup>110</sup>*Id.*

<sup>111</sup>Ga. Comp. R. 160-4-8-.15.

<sup>112</sup>*Id.* at 160-4-8-.15(a)(15).



requirements or guidelines that limit the severity of those suspensions. Likewise, the Georgia Rules provide no requirements or guidelines relating to a mandatory minimum suspension.

Nevertheless, school suspensions based on arrests and convictions occurring outside of school have been upheld under Georgia law. In *Clark v. State*, a high school student challenged a ten-year sentence resulting from a guilty plea to robbery by intimidation.<sup>113</sup> Citing the double jeopardy clause of the Georgia Constitution, the defendant claimed that the state was punishing him twice for the same offense by authorizing both a school suspension and a jail sentence.<sup>114</sup> The court held that civil sanctions such as school suspensions may constitute “punishment” for the purposes of the double jeopardy clause.<sup>115</sup> However, a school suspension is considered a remedial measure rationally related to the health and welfare of other students and not punishment.<sup>116</sup> Therefore, the Court of Appeals upheld both the conviction and the sentence.<sup>117</sup> This case may provide a substantial barrier for a student challenging a school suspension under the theory of double jeopardy.

## **6. State Licensing Boards**

Georgia law grants licensing boards the broad discretion to deny licenses to individuals who have felony convictions, which can result in individuals with felony convictions being denied admission to many different professions.<sup>118</sup> Professional licensing boards have discretion to deny licenses when an individual has “been convicted of any felony or of any crime involving moral turpitude.”<sup>119</sup> The statute uses permissive language, meaning the licensing board has the discretion to grant or deny the license. The statutes authorizing many licensing boards track the language of this statute.<sup>120</sup>

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<sup>113</sup>*Clark v. State*, 220 Ga. App. 251 (1996).

<sup>114</sup>*Id.* at 252.

<sup>115</sup>*Id.* at 253.

<sup>116</sup>*Id.*

<sup>117</sup>*Id.*

<sup>118</sup>See O.C.G.A. § 43-1-19.

<sup>119</sup>*Id.*

<sup>120</sup>See, e.g., O.C.G.A. § 43-34-37 (licensing of physicians).

Some licensing boards follow different standards that may allow them to deny licenses if individuals have convictions for certain crimes. For example, an individual with “a criminal record” may be denied an agricultural license.<sup>121</sup> Other licensing boards will deny licenses for individuals who have committed crimes related to the regulated field. For example, an individual will not be licensed as a private detective if he or she was convicted of a crime involving possession or carrying a dangerous weapon.<sup>122</sup>

Licenses are important government benefits that provide an individual the opportunity to enter certain professions. Licensing boards may consider certain criminal convictions, which can result in those individuals being denied access to certain professions.

## 7. Voting

States have the power to determine whether someone with a criminal record can vote. While no state permanently disenfranchises everyone convicted of any crime, one state, Kentucky, has a lifetime bar for all felony convictions and four other states prohibit voting by those convicted of certain classes of crimes.<sup>123</sup> There are seven states that have a lifetime bar that can be lifted when an individual receives a restoration of civil rights.<sup>124</sup> Georgia bars individuals convicted of felonies involving “moral turpitude” from voting while they are completing a criminal sentence.<sup>125</sup> The voting rights of convicted felons in Georgia should be automatically restored upon completion of the sentence.<sup>126</sup>

In the Legal Action Center study, Georgia scored in the mid-range compared to other states concerning the restrictiveness of its disenfranchisement policy.<sup>127</sup> Georgia was tied with Florida in scoring the best in com-

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<sup>121</sup>O.C.G.A. § 2-5-5(a)(1).

<sup>122</sup>O.C.G.A. § 43-38-6(b)(4).

<sup>123</sup>Mukamal & Samuels, *supra* note 59.

<sup>124</sup>*Id.*

<sup>125</sup>*Id.*

<sup>126</sup>*Id.*

<sup>127</sup>Legal ACTION CENTER, AFTER PRISON: ROADBLOCKS TO REENTRY, STATE REPORT CARDS, available at <http://lac.org/roadblocks-to-reentry/main.php?view=state> (last visited August 15, 2008); see also RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, THE VANISHING BLACK ELECTORATE: FELONY DISENFRANCHISEMENT IN ATLANTA, GEORGIA 4 (2004).

parison to other southern states.<sup>128</sup> However, there are seven states that only restrict people who are incarcerated or serving parole sentences from voting and 12 states disenfranchise only the people who are in jail. There are two states (Vermont and Maine) that place no restriction on the right to vote for people who have been convicted of a crime.<sup>129</sup>

Commentators have noted the disproportionate impact that voter disenfranchisement has on the African-American population, and in particular, African-American males.<sup>130</sup> Although black men comprise only 6 percent of the national population, they represent almost half of the prison population—45 percent.<sup>131</sup> Projections indicate that one-third of all African-American males will spend some time in prison.<sup>132</sup> As a result, a higher percentage of black men are ineligible to vote because of felony convictions.<sup>133</sup> In Georgia, an estimated one out of every eight African-American males is ineligible to vote because of felony convictions and sentences.<sup>134</sup> Of those disenfranchised African-American male voters, one-third lost their voting rights because of drug-related convictions and sentences.<sup>135</sup>

#### **D. Public Policy Issues and Identification of Areas for Administrative and/or Legislative Change**

1. Should laws regulating Temporary Assistance to Needy Families (TANF) and food stamps be modified? The federal statute (21 U.S.C. § 862(a)) prohibits people with drug felony convictions from participating in food stamps or TANF programs for life. States are

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<sup>128</sup>*Id.*

<sup>129</sup>*See* Mukamal & Samuels, *supra* note 59, at 1512.

<sup>130</sup>*Id.* at 1502; *see also* King & Mauer, *The Vanishing Black Electorate: Felony Disenfranchisement in Atlanta, Georgia: The Sentencing Project*, p. 4 (Sept. 2004), available at <http://www.sentencingproject.org/pdfs/atlanta-report.pdf>.

<sup>131</sup>King & Mauer at 4.

<sup>132</sup>*Id.* at 2.

<sup>133</sup>*Id.* at 3.

<sup>134</sup>*Id.*

<sup>135</sup>*Id.*

allowed to opt out of the program and approximately 30 states have opted out or modified the ban. Georgia has not opted out.<sup>136</sup>

2. Under Georgia law, driver's licenses are suspended for at least 180 days for individuals convicted of a drug offense regardless of whether the conduct was related to driving.<sup>137</sup> The federal statute requires states to revoke licenses for this timeframe, but states can opt out of the provision and continue to receive federal funding. A majority of the states has done that, but Georgia has not.<sup>138</sup> Should this Georgia law be modified?
3. Under Georgia law, a student at a public post-secondary school who is convicted of a drug felony while attending school must be suspended until the end of the semester/quarter/term. *See* O.C.G.A. § 20-1-23. Should this law be modified?
4. Under Georgia law, a student at a private post-secondary school convicted of a drug felony while attending school is denied state funds for any loans, grants or scholarships. *See* O.C.G.A. § 20-1-24. Should this law be modified?
5. Should Georgia law be modified to allow offenders to vote when serving the probation phase of a sentence?

## E. Conclusion

Both the state and federal government limit the benefits that individuals with criminal convictions can receive. Some of these limitations are related to the purposes of the statutes, but others are not. This is especially the case with individuals who have drug offenses and are denied access to important benefits. As a result of these “roadblocks,” individuals released from prison may not have access to public services that could make the difference in changing that person's life and ending the common cycle of recidivism.

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<sup>136</sup>*See* O.C.G.A. § 49-4-184 (covering Georgia's TANF program); Debbie A. Mukamal and Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 *FORDHAM URB. L.J.* 1501, 1506-08 (2003).

<sup>137</sup>The suspension can be for a longer timeframe for multiple convictions. *See* O.C.G.A. § 40-5-75(a)(1).

<sup>138</sup>Mukamal & Samuels, *supra*, note 59, at 1516. Twenty-seven states do not automatically revoke driver's licenses for drug offenses. *Id.*

## **VII. SUMMARY AND CONCLUSION**

### **A. Overview of Objectives of the Study**

Georgia lags behind most of the nation in the reintegration of ex-offenders with many of the problems caused by civil consequences. The Georgia Department of Corrections has estimated that reducing the recidivism rate in Georgia by 1% would save Georgia taxpayers seven million dollars each year.<sup>1</sup> Therefore, this is more than a social problem; it is also an economic issue for Georgia taxpayers.

These “roadblocks” to reentry that exist in Georgia are even more substantial for our poor citizens who have no funds to hire lawyers to help navigate the legal maze. The mission of the Study is to improve this situation. The long-term goals are to provide a resource to represent these individuals through an increasing network of volunteer lawyers and to create change in a legal system that imposes unreasonable barriers to reentry in some circumstances. Hopefully, this Study can provide a foundation to help achieve these goals through the activities discussed below.

### **B. Representation of Clients and the Transfer of Knowledge and Experience to Other Partnering Agencies in the State**

Through the Coming Home effort, the Georgia Justice Project expanded its representation of clients in 2007 to include the collateral consequences of arrests and convictions. The Study will provide a resource for this representation. After the publication of the Study, efforts will be made to transfer the related knowledge and experience to other partnering agencies in the State, including Public Defenders, the Georgia Legal Services Program, United Way, Atlanta Legal Aid Society, Georgia Law Center for the Homeless, the Atlanta Volunteer Lawyers Foundation, the Regional Commission for the Homeless, the Southern Center for Human Rights, and the Applesseed Foundation.

### **C. Educational Development**

During Fall semester 2006, six law students at Emory University School of Law conducted research and submitted papers on the legal obstacles for

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<sup>1</sup>Georgia Department of Corrections Risk Reduction Services Homepage, <http://www.dcor.state.ga.us/Divisions/OPT/RiskReduction/RiskReduction.html> (last visited Aug. 17, 2008).

ex-offenders in Georgia and comparative information on other states. A class on the subject matter of this Study was taught at Mercer University School of Law during Spring semester, 2008. This course was taught as a survey of the civil and legal circumstances in Georgia that create these barriers to reentry and assignments were designed to advance the preparation of this Study. The Syllabus for this class is included as Appendix C. After publication of the Study, efforts will be made to promote the teaching of a course on this topic at other law schools in Georgia (and possible development of a Clinic). Efforts will also be made to develop and teach a Continuing Legal Education (CLE) program on Collateral Consequences during 2009 and in subsequent years. In addition, the authors of the Study and lawyers at the Georgia Justice Project will participate in educational and training programs presented to referral sources and other state agencies.

#### **D. Coordination of Efforts to Develop and Implement Strategies for Administrative and Legislative Change in Georgia**

The authors of the Study and other volunteer lawyers will assist with the coordination of efforts to develop and implement strategies for administrative and legislative change in Georgia. The following areas have been identified for initial focus:

##### ***1. The Collection and Dissemination of Criminal Records***

- (a) Should Georgia law be modified to prohibit public dissemination of non-conviction data (arrest records where the case was dismissed) except to criminal justice agencies and other individuals and agencies for research, evaluative and statistical purposes? As discussed in the Study, this change is consistent with recent recommendations of the American Bar Association, Commission on Effective Criminal Sanctions.<sup>2</sup>
- (b) Should Georgia law be changed to provide for the expungement of arrest records where the individual has successfully completed

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<sup>2</sup>ABA Commission on Effective Criminal Sanctions, [www.abanet.org](http://www.abanet.org). At present, these recommendations have not been adopted by the ABA; *see also* recommendation made in a public hearing conducted by the EEOC in November, 2008 (some witnesses advocated a “ban the box” approach in which a criminal arrest record is removed from the application). *See* BNA article referenced in Section V, n. 24, *supra*.

a pre-trial diversion program and the underlying case has been dismissed? In terms of number of participants, the county drug courts in Georgia constitute significant pre-trial diversion programs, and these programs have been effective in reducing the rate of recidivism for those arrested for drug-related offenses.<sup>3</sup> Normally, the underlying charge is dismissed after successful completion of the drug court program (which may be from 12 to 18 months in duration), but the arrest is not subject to expungement under the Georgia Statutes.<sup>4</sup> An important question here is whether there is a compelling reason to treat the graduates of drug courts and pre-trial diversions differently than first offenders of serious crimes where expungement is available.

## ***2. The Impact of Collateral Consequences on Housing Opportunities***

Section IV of the Study covers the civil consequences of criminal records on housing opportunities for ex-offenders. The difficulties that those with criminal records have in obtaining housing (both private and public) are significant barriers to the successful integration of ex-offenders into society. This section of the Study analyzes the post-conviction consequences associated with housing and includes sections on applicable federal statutes, Atlanta Housing Authority corporate policies, client representation before the Housing Authority, and concludes with a policy discussion that identifies issues for possible change in Georgia. We recognize that the public housing agency has an obligation to consider public safety and risk of liability for themselves if they lease to individuals with criminal records. However, this should be balanced against the needs of ex-offenders who should not be faced with unreasonable barriers to housing. Certainly, there is a legitimate argument that public housing agencies should give applicants and tenants with past criminal records the same chance as other applicants, without giving them a preference. In other words, there should be individualized

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<sup>3</sup>Donald Plummer, "Officials Learn How Drug Courts Lower Costs, Rate of Recidivism," Atlanta Journal/Constitution, June 23, 2005, pg. 1D; *see also* Tommy Day Wilcox, Eight-Year Annual Report: Bibb County Special Drug Court Program, April 15, 2003 at 13 (Judge Wilcox reported a recidivism rate of only 11.5% which compares favorably to the national rate of 45% for those who have not entered a drug court program).

<sup>4</sup>*See* O.C.G.A. § 35-3-37.

determinations which take into consideration such factors as seriousness of the offense, when it occurred, whether there was a conviction, efforts at rehabilitation, and the impact on families and others. The Atlanta Housing Authority has made significant modifications to their procedures that certainly move in this direction, at least as far as the application process is concerned. However, for lease terminations, there is only a generalized procedure which contains no reference to how the Agency will treat criminal records.

### ***3. Collateral Consequences on Employment Opportunities***

As discussed in Section V of the Study, difficulty in finding employment is one of the greatest burdens to the reintegration of ex-offenders in society. There are several areas of Georgia law related to employment that constitute “roadblocks to reentry.” The LAC Report gave Georgia a score of 10 out of 10 roadblocks to employment, with 10 representing the worst score a state could receive.<sup>5</sup>

Ex-offenders who apply for employment usually face questions about their arrest and conviction record. Further, a private or public employer in Georgia can, with consent, obtain arrest/conviction records from the GCIC. As referenced in this section of the Study, this report frequently contains information that is incomplete and/or incorrect. In many instances, the employer rejects the applicant based simply on a record of arrest without any consideration of whether the arrest resulted in conviction. Georgia law does not restrict an employer’s right to consider arrests not leading to conviction, and the state does not have standards prohibiting employment discrimination based on an arrest or conviction record.

It should be recognized that the employer has an interest in hiring the most qualified employees and providing those employees with a safe and healthful work environment. Also, under Georgia law, all employers have a duty to exercise ordinary care when selecting employees.<sup>6</sup> The employer who hires certain ex-offenders (those convicted of violent crimes) may also face lawsuits from employees or customers based on negligent hire or re-

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<sup>5</sup>Legal Action Center, *After Prison: Roadblocks to Reentry*, Report Card, Georgia, available at [http://www.lac.org/roadblocks-to-reentry/upload/reportcards/12\\_Image\\_Georgia.pdf](http://www.lac.org/roadblocks-to-reentry/upload/reportcards/12_Image_Georgia.pdf) (last visited Aug. 17, 2008).

<sup>6</sup>See O.C.G.A. §34-7-20.



tion.<sup>7</sup> The employer has an interest in considering these potential claims if ex-offenders apply for employment, but that interest should be balanced against the rights of the ex-offender to obtain gainful employment.

Section V of the Study covers these civil consequences and includes discussion on employer access to criminal records; restrictions on employment under both federal and state law; protections available under federal law and the corresponding lack of protection under Georgia law; and concludes with the identification of public policy issues and areas for possible administrative and/or legislative change in Georgia. The following focus areas have been identified:

- (a) Should Georgia law be changed to make it unlawful for employers to inquire about arrests that did not lead to conviction?
- (b) Should Georgia law be changed to make it unlawful for employers to deny or terminate employment based on arrests that do not lead to a conviction?
- (c) Should Georgia's First Offender Act be amended to prohibit an employer from firing an employee for an offense covered by the statute? Once a defendant has been exonerated and discharged pursuant to the First Offender statute, GCIC and criminal justice agencies are generally prohibited from disclosing records of the defendant's arrest, charge and sentence.<sup>8</sup> However, the statute does not prohibit prospective employers from inquiring about an applicant's arrest record separately from information obtained from the GCIC or local criminal justice agencies or from actually terminating employment based on this arrest record.<sup>9</sup>

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<sup>7</sup>See e.g., *Southern Bell Tel. Co. v. Sharara*, 167 Ga. App. 665 (1983); *Underberg v. Southern Alarm, Inc., et al.*, 284 Ga. App. 108 (2007). The legal claim here is that the employer hired or retained an employee with a known propensity for violence or other dangerous conduct.

<sup>8</sup>See O.C.G.A. §35-3-34(a)(1)(B).

<sup>9</sup>See *Mattox v. Yellow Systems, Inc.*, 243 Ga. App. 894 (2000) stating that "[T]he violation of [O.C.G.A. § 42-8-63] does not give rise to a private cause of action because the statute does not specify a civil remedy."

#### **4. The Impact of Arrest and Conviction Records on Federal and State Benefit Programs**

This section (Section VI) includes subsections on federal benefits such as educational assistance, Social Security and Medicare/Medicaid and state programs, including welfare, foster care, driver's license, healthcare, education and voting. The section concludes with a discussion of public policy issues and the identification of areas for possible administrative and/or legislative change in Georgia. Focus issues include:

- (a) Should laws regulating Temporary Assistance to Needy Families (TANF) and food stamps be modified? The federal statute (21 U.S.C. § 862(a)) prohibits people with drug felony convictions from participating in food stamps or TANF programs for life. States are allowed to opt out of the program and approximately 30 states have opted out or modified the ban; Georgia has not.<sup>10</sup>
- (b) Should state law which suspends driver's licenses for those convicted of a drug offense be modified? While states are responsible for issuing licenses, Congress has used its taxing and spending power to condition states' receipt of highway repair funds on the condition that states suspend driver's licenses for drug offenses.<sup>11</sup> The federal statute requires states to revoke or suspend the driver's license of any individual convicted of a drug offense for at least six months.<sup>12</sup> States can opt out of this provision and continue to receive the federal funding. A majority of states have done that but Georgia has not.<sup>13</sup> Under Georgia law, driver's licenses are suspended for at least 180 days for individuals convicted of a drug offense regardless of whether the conduct was related to driving.<sup>14</sup>

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<sup>10</sup>See O.C.G.A. § 49-4-184 (covering Georgia's TANF program); Debbie A. Mukamal and Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 Fordham Urb. L. J. 1501, 1506-08 (2003).

<sup>11</sup>See 23 U.S.C. § 159.

<sup>12</sup>23 U.S.C. § 159(a)(3)(A)(i).

<sup>13</sup>Mukamal and Samuels, *supra*, at 1516. Twenty-seven states do not automatically revoke driver's licenses for drug offenses. *Id.*

<sup>14</sup>See O.C.G.A. § 40-5-75(a)(1). The suspension can be for a longer timeframe for multiple convictions.

## E. Conclusion

In their article “Statutory Limitations on Civil Rights of People with Criminal Records,” Ms. Mukamal and Mr. Samuels conclude:

In keeping with our national heritage and ideals, the United States must ensure that people with criminal records are given a fair chance to succeed and become productive members of society, judged on their merit and not on stereotypes or prejudice.<sup>15</sup>

We cannot say it any better.

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<sup>15</sup>Mukamal and Samuels, *supra*, at 1518.



## APPENDIX A

### EXPUNGEMENT FLOW CHART\*

O.C.G.A. § 35-3-37

#### **STEP ONE:** Was the case:

A. *resolved by a conviction?*

If so, **stop**, the case is not eligible for expungement, even if convicted of only some of the charges. (Subsections d (3)(A) & d (7)(A))

B. *disposed of under the First Offenders Act?*

If so, **stop**, the case is not eligible for expungement, though if completed, the probation officer should alert GCIC and the arrest will be sealed from public view. (Subsection d (3)(A))

C. *still open?*

If so, **stop**, the case is not eligible for expungement. (Subsection d (3)(A))

D. *resolved by acquittal?*

An argument could be made for expungement under Subsection (c).

E. *dismissed?*

If so, the case may be eligible for expungement. **PROCEED** to **STEP TWO**.

#### **STEP TWO:** Was the case dismissed:

A. *prior to formal charges?*

(Accusation or indictment, though a citation may suffice in traffic cases.) The more common terms for a dismissal prior to formal charges include: “Not presented to the grand jury” (NPGJ), “not on docket” (NOD), “not accused,” “no accusation filed,” and “no bill.” If not, see B. If so, the case is eligible for expungement unless one of the exceptions in STEP THREE applies. **PROCEED** to **STEP THREE**.

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\*This chart was originally prepared by John Grantham in 2007 while he was an attorney with the Georgia Justice Project.

- B. *after formal charges have been brought?*  
(Accusation or indictment, though a citation may suffice in traffic cases.) The more common terms for a dismissal after formal charges have been brought include: “Nolle prosequi” (abbreviated “nol pros”) and “Dead Docket.” The case is eligible for expungement provided that none of the following exceptions nor any of the exceptions in Step Three apply. First apply this test.

Was the charge dismissed for any of the following reasons:

- 1) the individual pled guilty to another charge arising from the same incident;
- 2) the government was barred from introducing material evidence against the individual on legal grounds including, but not limited to, the grant of a motion to suppress or motion in limine;
- 3) a material witness refused to testify or was unavailable to testify against the individual unless such witness refused to testify based on his or her statutory right to do so;
- 4) the individual was incarcerated on other criminal charges and the prosecuting attorney elected not to prosecute for reasons of judicial economy;
- 5) the individual successfully completed a pretrial diversion program, the terms of which did not specifically provide for expungement of the arrest record;
- 6) the conduct which resulted in the arrest of the individual was part of a pattern of criminal activity which was prosecuted in another court of this state, the United States, another state, or foreign nation; or
- 7) the individual had diplomatic, consular, or similar immunity or inviolability from arrest or prosecution.

If any of these conditions apply, **stop**, the charges cannot be expunged. If not, **PROCEED** to **STEP THREE**.

**STEP THREE:** Does the individual requesting expungement:

- A. *have any pending criminal charges of any kind?* (Subsections d (3)(A) & d (9))  
If so, **stop**, the case cannot be expunged until the open case is resolved.

- B. *have a conviction within the last five years (excluding any period of incarceration) that is the same or similar to the charges one is seeking to expunge?* (Subsections d (3)(B) & d (9))

If so, **stop**, the case cannot be expunged at this time.

If neither of these exceptions apply, **PROCEED** to **STEP FOUR**.

**STEP FOUR:** Apply for expungement:

- A. Make request in writing to the original agency having custody or control of the records (e.g., police department, district attorney or court) to expunge the records and notify GCIC accordingly. The various agencies have their own forms for this process.
- B. Some agencies require certified copies of disposition documents before the application will be considered.
- C. After a determination by the agency, the person has 30 days to appeal the decision to Superior Court.
- D. There is no deadline for the agency to act, thus no brightline test for agency inaction.
- E. The Court is required to conduct a de novo hearing and order such relief as “required by law.” The decision by the agency should be upheld only if supported by clear and convincing evidence.
- F. The Court has discretion to order attorney fees and costs to the individual who prevails in the appellate process.

## APPENDIX B

### Summary of the Impact of Criminal Records on the Receipt of Certain Federal and State Benefits\*

- A. Federally subsidized student loans and other financial assistance—The federal statute (20 U.S.C. § 1091) suspends eligibility for financial assistance when a student is convicted of a state or federal drug offense involving conduct occurring during the time the student was receiving the assistance. The length of suspension depends on the nature of the offense (possession or distribution); ranging from one year for a first-time possession to indefinite suspension for a third time possession or second time distribution. An individual can reinstate eligibility if he or she participates in a drug rehabilitation program that includes unannounced drug tests.
- B. Social Security—The Social Security program provides both retirement and disability benefits. A criminal record does not preclude receipt of these benefits, but the benefits are not available to individuals while they are incarcerated. See 42 U.S.C. § 402(x).
- C. Department of Veteran’s Affairs (VA) Benefits—A criminal record does not preclude receipt of VA benefits, but a veteran cannot receive these benefits while incarcerated. See 38 U.S.C. § 1505.
- D. Other Federal Benefits—Under the federal statute (21 U.S.C. § 862), federal and state judges have the power to deny (or suspend for various times) almost all federal benefits for individuals convicted of drug offenses. A few benefits are excluded (e.g., retirement, Social Security, and Veteran’s benefits). The statute gives judges broad power to deny benefits, but it has only a limited impact because the power is discretionary and judges rarely use it.
- E. Temporary Assistance to Needy Families (TANF) and Food Stamps—The federal statute (21 U.S.C. § 862a(a)) prohibits people with felony drug convictions from participating in food stamps or TANF pro-

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\*This summary is not intended to include all federal and state benefits that may be impacted by a criminal record. For example, the summary does not include employment issues or subsidized housing benefits.



grams. This is a lifetime ban that applies only to drug-related felonies, not to other convictions. States are allowed to opt out of the program. Georgia has not.

Georgia Code Annotated § 49-4-184 (covering Georgia’s TANF Program) provides:

(a) An applicant is not eligible for assistance under this article and a recipient shall no longer be eligible for assistance under this article if:

\* \* \*

(4) The applicant or recipient is convicted of a serious violent felony as defined in subsection (a) of Code Section 17-10-6.1 on or after January 1, 1997;

(5) The applicant or recipient is convicted of any felony under Article 2 of Chapter 13 of Title XVI, the “Georgia Controlled Substance Act,” on or after January 1, 1997.

F. Georgia Programs for the Elderly, Blind and Disabled—Georgia has programs providing assistance to the old-aged (O.C.G.A. § 49-4-32), the blind (O.C.G.A. § 49-4-52) and the disabled (O.C.G.A. § 49-4-81). The old age and blind programs deny aid to incarcerated individuals, but the disabled program does not contain a disqualification based on conviction of a crime or incarceration.

G. Foster Care—The federal government removes some funding for state foster care assistance if the state allows individuals with certain criminal convictions to serve as foster parents. States can opt out of these requirements and Georgia has. Georgia has substituted its own eligibility standards. Under the Georgia system, a criminal records check must be conducted for each parent, but the statute does not specify convictions that will ban an individual from serving as a foster parent. The Court has discretion to investigate the matter. See O.C.G.A. § 19-8-16.

H. Driver’s Licenses—While states are responsible for issuing licenses, Congress has used its taxing and spending power to condition states’ receipt of highway repair funds on the condition that states suspend driver’s licenses for drug offenses. See 23 U.S.C. § 159. The federal statute

requires states to revoke or suspend the driver's license of any individual convicted of a drug offense for at least six months. See 23 U.S.C. § 159(a)(3)(A)(i).

States can opt out of this provision and continue to receive the federal funding. However, Georgia has not opted out and, under Georgia law, driver's licenses are suspended for at least 180 days for individuals convicted of a violation of the Georgia Controlled Substances Act. The suspension can be for a longer timeframe for multiple convictions. See O.C.G.A. § 40-5-75(a)(1).

I. Health Care—

- A. Medicare—A criminal record does not preclude receipt of Medicare but individuals who are otherwise eligible will be denied these benefits while they are incarcerated. See 42 U.S.C. § 1395(c).
- B. Medicaid—The federal Medicaid statute grants states the power to make individuals with prior felony convictions ineligible for benefits, but Georgia has not explicitly included criminal records as criteria to be considered. The Department of Community Health has discretion to determine conditions of eligibility. See O.C.G.A. § 49-4-142; see also THE GEORGIA DEPARTMENT OF COMMUNITY HEALTH, UNDERSTANDING MEDICAID: A HANDBOOK ABOUT MEDICAID SERVICES IN GEORGIA, page 1 (available at <http://www.georgia.gov-medicaid/>); THE GEORGIA DEPARTMENT OF COMMUNITY HEALTH, A SNAPSHOT OF GEORGIA MEDICAID, page 1 (available at <http://www.dch.georgia.gov/>) (December 2007).
- C. PeachCare for Kids—PeachCare for Kids involves health care insurance for children whose parents do not have insurance. The benefit is available based on income and participation does not depend on whether a child or his parents have criminal convictions. See O.C.G.A. § 49-5-273.

- J. Education (Georgia law)—
  - A. A student at a public post secondary school who is convicted of a drug felony while attending school must be suspended until the end of the semester/quarter/term. See O.C.G.A. § 20-1-23.
  - B. A student at a private post secondary school convicted of a drug felony while attending school is denied state funds for any loans, grants, or scholarships. See O.C.G.A. § 20-1-24.
- K. Voting—In Georgia, a person who is convicted of a felony involving moral turpitude is not allowed to vote until completion of the sentence including probation. The voting rights of convicted felons should be automatically restored upon completion of the sentence. See O.C.G.A. § 21-2-216.

## **APPENDIX C**

Mercer University School of Law

Class No.: Law 250.01

Civil Consequences of Arrests and Convictions

Instructor: H. Lane Dennard

Spring, 2008

Prepared: December, 2007

Note: This Syllabus is subject to revision.

### **SYLLABUS**

#### *Class Time and Location:*

Starting January 17, 2008, the class will meet each Thursday in Room H from 12:00 to 2:00 p.m. in accordance with the Academic Calendar for 2007–2008.

#### *Contact Information:*

H. Lane Dennard

Office: 2340 Christopher's Walk

Atlanta, Georgia 30327

Tel: (404) 572-2507 (King & Spalding office)

(404) 352-5025 (Home office)

E-mail: ldennard@bellsouth.net

#### *I. Overview*

Both in Georgia and in the nation, an increasing percentage of our population has been incarcerated. According to a recent report, between 1982 and 2002, the Georgia prison population almost tripled, increasing from 13,884 to 46,534 people. Georgia's release patterns reflect the admission trends: 16,124 prisoners were released from Georgia prisons in 2002, more than one and one-half times the number released in 1982. When these individuals leave jail or prison, they face an array of civil problems, many of which are not intended by the justice system in our country. These often harsh consequences stand as substantial impediments to people who want to return to lives as contributing members of society. In fact, these barriers may be so substantial that they

are counter-productive, causing some of those released to return to criminal activity in order to support their livelihood. The overall impact of these roadblocks for ex-offenders constitutes a social and economic drain on our state. The Legal Action Center in Washington recently published a study of the legal barriers facing people with criminal records and ranked the states according to the number of “roadblocks” that were in place. Georgia was ranked as the fourth worst state for individuals with a criminal record.

Mercer, the Georgia Justice Project and the class instructor are involved in the development of a program including a written Study on the legal representation of indigent Georgians faced with these civil consequences in areas like housing, employment, government programs, voting, etc. A second prong of this work is the development of strategies to foster administrative and legislative change in Georgia. Both the Georgia Justice Project and Mercer have received grants from the Georgia Bar Foundation to support this work.

This course will be taught as a survey of the civil laws and legal circumstances that create these barriers to reentry. Assignments will be designed to advance the preparation of the referenced Study.

### ***II. Readings and Preparation:***

The class will be conducted in seminar format and there is no required text. An outline of the course, as well as required and supplemental readings, are presented below in the Class Schedule. There is no requirement that students read the Supplemental Sources. They are included to provide optional follow-up on a given topic and information that may be helpful in the preparation of specific assignments and the required paper.

### ***III. Paper:***

A paper (length 15 to 20 pages) will be required in lieu of a final exam. Students will be allowed to choose a topic from a list of proposed topics that will be distributed and discussed in class meeting #1.

### ***IV. Class Attendance and Participation:***

Class attendance and participation are very important elements of this course. If you are unprepared for a particular class, please tell the instructor before the class begins.

## ***V. Grading:***

Grades will be based on the required paper and class participation.

## **CLASS SCHEDULE**

### **Class Meeting #1:**

#### *Topics:*

- Introductions
- Overview of course
- Discussion of paper and suggested topics
- Discussion of the Study: Representation of Indigent Georgians Faced With the Civil Consequences of Arrests and Convictions (Distribute and discuss Introduction section)
- Report by the Legal Action Committee
- Report of the Re-entry Policy Council

#### *Required Reading:*

- Legal Action Center, *After Prison: Roadblocks to Re-Entry: A Report on State Legal Barriers Facing People with Criminal Records*, pp. 7–23. [LAC Report], [www.lac.org/lac/index.php](http://www.lac.org/lac/index.php).
- Report on the Re-Entry Policy Council: *Charting the Safe and Successful Return of Prisoners to the Community*, pp. 2–13, [www.reentrypolicy.org/report/download](http://www.reentrypolicy.org/report/download).

#### *Supplemental Sources:*

- Paige M. Harrison & Allen J. Beck, *Prison and Jail Inmates at Midyear 2005*, U.S. DEP'T OF JUST. BUREAU OF JUST. STATS. BULLETIN 1 (May 2006) (as of June 30, 2005, Georgia had the second highest crime rate in the country), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim05.pdf>.
- Nancy G. La Vigne & Cynthia A. Mamalian, Urban Institute Justice Policy Center, *Prisoner Reentry in Georgia* 18 (2004), [http://www.urban.org/uploadedpdf/411170\\_Prisoner\\_Reentry\\_GA.pdf](http://www.urban.org/uploadedpdf/411170_Prisoner_Reentry_GA.pdf).
- Georgia Department of Corrections Risk Reduction Services Homepage, [www.dcor.state.ga.us/Divisions/OPT/Reentry/RiskReduction/RiskReduction.html](http://www.dcor.state.ga.us/Divisions/OPT/Reentry/RiskReduction/RiskReduction.html)

(Georgia Department of Corrections estimates that lowering the recidivism rate in Georgia by 1% would save Georgia taxpayers seven million dollars each year.)

## **Class Meeting #2**

### *Topics:*

Further discussion of Introduction section of Study  
The availability of arrest and conviction records and its impact  
Georgia Crime Information Center (GCIC) Procedures (collection and dissemination)  
Sanctions for non-compliance  
Confidentiality of first offender status  
Juvenile records  
Pre-trial intervention and diversion records

### *Required Reading:*

Review Introduction section of the Study supplied in prior class  
O.C.G.A. § 35-3-34 (GCIC Authority)  
Ga. Comp. R. & Regs. 140-2-.1,-.04.  
Georgia Crime Information Center, Obtaining Criminal History  
Record Information, Frequently Asked Questions, [www.ganet.org/gbi/crimhist.html](http://www.ganet.org/gbi/crimhist.html). Georgia First Offender Act – O.C.G.A. §§ 42-8-60-65.

### *Supplemental Sources:*

G.C.I.C. Applicant Electronic Submissions Manual  
Georgia Bureau of Investigation, Georgia Crime Information Center,  
<http://www.state.ga.us/gbi/gcic.html>  
Georgia Bureau of Investigation, GCIC, Annual Reports: Fiscal Years  
2001–2006, [http://www.state.ga.us/gbi/Annual\\_Report.html](http://www.state.ga.us/gbi/Annual_Report.html).  
Ga. Comp. R. & Regs. 140-1-.04,-.06; 140-2.01,-.09; 140-2-.11,-.12  
(selected GCIC Regulations).  
*Mattox v. Yellow Freight Sys. Inc.*, 243 Ga. App. 894, 534 S.E.2d 561  
(2000)

### **Class Meeting #3**

#### *Topics:*

- Correcting, supplementing and purging criminal records
- Expungement (Review Expungement form)
- Analyze impact of 1997 amendments, including review of legislative history
- Judicial Review of agency decisions (O.C.G.A. § 35-3-37(c)).
- Discretionary pardons and restoration of rights
- Public policy issues and identification of areas for possible administrative and/or legislative change in Georgia

#### *Required Reading:*

- O.C.G.A. § 35-3-37 (Expungement).
- Strohecker v. Gwinnett Co. Police Dept.*, 182 Ga. App. 853 (1987).
- Meinken v. Burgess*, 262 Ga. 863 (1993).
- Drake v. State*, 170 Ga. App. 846 (1984).
- GA CONST. art. 4, § 2, ¶ II.

#### *Supplemental Sources:*

- Warren v. State*, 239 Ga. App. 468 (1999).
- Ga. Comp. R. & Regs. § 475-3-.10(3).
- Ga. Comp. R. & Regs. § 140-2-.10.
- O.C.G.A. § 42-9-56.

### **Class Meeting #4**

#### *Topics:*

- Housing
- The importance of housing for ex-offenders
- The impact of criminal records
- Federal law sets policy and guidelines (Department of Housing and Urban Development (“HUD”))
- HUD’s regulations and audits influence heavily the policies of local authorities
- Judicial deferral to agency decisions



*Required Reading:*

Legal Action Center (LAC), SAFE AT HOME: A REFERENCE GUIDE FOR PUBLIC HOUSING OFFICIALS ON THE FEDERAL HOUSING LAWS REGARDING ADMISSION AND EVICTION STANDARDS FOR PEOPLE WITH CRIMINAL RECORDS 3 (Fall 2004), available at <http://www.hirenetwork.org/publications.html>.

*Dep't. of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002).

*Hous. Auth. of Decatur v. Brown*, 180 Ga. App. 483 (1986).

*Supplemental Sources:*

42 U.S.C. §§ 1437, 1437d, 1437f, 1437n, 11901, 13661-13664.

O.C.G.A. §§ 8-3-2, 8-3-32, - 33, 8-3-206, 42-8-62.

24 C.F.R. §§ 960.202-204, 966.4.

The Anti-Drug Abuse Act of 1988.

The Housing Opportunity Program Extension Act of 1996.

The Veteran Affairs and HUD Appropriations Act (42 U.S.C. §§ 13661-13664).

Center for Housing Policy, THE HOUSING NEEDS OF EX-PRISONERS, 178 HOUS. RESEARCH (Apr. 1996) [Study conducted in England], available at <http://www.jrf.org.uk/KNOWLEDGE/FINDINGS/housing/H178.asp>.

*Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (Courts should adopt a deferential posture in reviewing administrative actions).

*Hussison v. Madigan*, 950 F.2d 1546 (11th Cir. 1992).

**Class Meeting #5:**

*Topics:*

Housing (continued)

The Atlanta Housing Authority's corporate policies

AHA's use of criminal records

Application of GCIC procedures

Representation of clients in cases before AHA and other housing authorities

Sample case: McDaniel-Glenn

Representation of clients in dispossessory warrant proceedings

*Required Reading:*

Hous. Auth. of the City of Atlanta, Bd. of Comm'rs, STATEMENT OF CORPORATE POLICIES GOVERNING THE LEASING AND RESIDENCY OF ASSISTED APARTMENTS (April 25, 2007 rev.) (AHA policies), available at <http://www.atlantahousing.org/profile/index.cfm>.  
Article on McDaniel-Glenn relocation by AHA (distribute electronically).  
*Bonner v. Hous. Auth. of Atlanta, Ga*, No. 1:94-CV-376-MHS (N.D. Ga. 1995).

*Supplemental Sources:*

*Cuyahoga Metro. Hous. Auth. v. Harrison*, 780 N.E.2d 828 (Ohio Mun. 2003).  
*Chaney v. United States*, 45 Fed. Cl. 309 (1999) (identifying elements of equitable estoppel when promise is made by government agent).

**Class Meeting #6**

*Topics:*

Housing (continued)  
Public policy issues and identification of areas for administrative and/or legislative change  
Study of AHA policies and procedures to identify “gaps” in coverage  
Develop specific proposals for change

*Required Reading:*

Review AHA policies, *supra*.  
Second Chance Act, H.R. 1593, 109th Cong. (2007).  
LAC Report, *supra*; sections on Roadblocks to Reentry, Public Housing; What is the Law, State Profiles, Georgia, [www.lac.org/lac/index.php](http://www.lac.org/lac/index.php).

*Supplemental Sources:*

Human Rights Watch, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING, at § VII (Exclusions Based on Local Policies), <http://hrw.org/reports/2004/usa1104/7.htm>.  
Sargent Shriver National Center on Poverty Law, ATLANTA HOUSING AUTHORITY TO CEASE SUMMARY DENIAL OF APPLICANTS WITH CRIMINAL HISTORY, <http://www.povertylaw.org/poverty-law->

library/case/49700/49726 (referring to Bonner v. Hous. Auth. of Atlanta, *supra*).  
U.S. Department of Housing and Urban Development, FY 2006-FY 2011 HUD STRATEGIC PLAN (Mar. 31, 2006).

## **Class Meeting #7**

### *Topics:*

Employment  
The importance of work  
The significance of unemployment as a barrier to re-entry  
Data regarding the impact of employment on recidivism rates  
Georgia's "Report Card" from the LAC Report  
Employer access to arrest and conviction records (GCIC procedures)  
Access to records covered by First Offender Act  
Exceptions for juvenile records

### *Required Reading:*

Legal Action Center, *After Prison: Roadblocks to Reentry, Report Card, Georgia*, available at [http://www.lac.org/lac/upload/reportcards/12\\_Image\\_Georgia.pdf](http://www.lac.org/lac/upload/reportcards/12_Image_Georgia.pdf)  
O.C.G.A. § 42-8-60, 62 (First Offender Statute) (Review of statute covered in Class No. 2).  
O.C.G.A. § 35-3-34 & 35.  
Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 Conn. L. Rev. 1281 (2002).

### *Supplemental Sources:*

*Sims v. State*, 214 Ga. App. 443, 448 S.E.2d 77 (1994).  
Jeffrey K. Liker, *Wage and Status Effects of Employment on Affective Well-Being among Ex-Felons*, 47 AM. SOC. REV. 264 (1982).  
See generally PETER H. ROSSI, & KENNETH J. LENIHAN, *MONEY WORK & CRIME*, (Academic Press 1980).  
JOAN PETERSILIA, NAT'L INST. OF JUSTICE, *WHEN PRISONERS RETURN TO THE COMMUNITY: POLITICAL, ECONOMIC, AND SOCIAL CONSEQUENCES*, SENT'G & CORRECTIONS (2000), <http://www.ncjrs.org/pdffiles1/nij/184253.pdf>.

- Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N. D. L. REV. 187 (1995).
- Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, FED. PROBATION, Sept. 1996, at 10, 13 (1996).
- Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U REV. L. & SOC. CHANGE 527, 538 (2006).

## **Class Meeting #8**

### *Topics:*

- Employment (continued)
- Restrictions on employment under federal law
- Protections for ex-offenders available under federal law
- Restrictions on employment under Georgia law
- Protections available under state law (no general prohibition in Georgia on employer use of arrest and conviction records)
- Protection provided by the First Offender Act

### *Required Reading:*

- Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
- Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975).
- Gregory v. Litton Sys., Inc.*, 316 F. Supp. 41 (C.D. Cal. 1970), *aff'd*, 472 F.3d 631 (9th Cir. 1972).
- EEOC Policy Statement on the use of arrest and conviction records, [www.eeoc.gov/policy/docs/arrest\\_records.html](http://www.eeoc.gov/policy/docs/arrest_records.html), [www.eeoc.gov/policy/docs/convict1.html](http://www.eeoc.gov/policy/docs/convict1.html).

### *Supplemental Sources:*

- Green v. Mo. Pac. R.R. Co.*, 549 F.2d 1158 (8th Cir. 1977).
- O.C.G.A. § 34-7-1 (Ga. at will statute)
- Uniform Guidelines on Employee Selection Procedures (29 C.F.R. § 1607); (see §§ 1607.3-1607.6).
- Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 LAB. LAW, 19 (2007).

## Class Meeting #9

### *Topics:*

- Employment (continued)
- Employer and public interests (discuss interests and appropriate balance)
- Comparison of Georgia with other states (e.g., New York, Illinois, Tennessee and Kentucky)
- Analyze data concerning the relationship between recidivism rates, crime rates and barriers to re-entry into the workforce for ex-offenders.
- Compare crime rates in Georgia vs. New York and Illinois (states with fewer barriers for re-entry)

### *Required Reading:*

- Mountain v. S. Bell Tel. & Tel.*, 421 S.E.2d 284 (Ga. App. 1992).
- Underberg v. S. Alarm, Inc.*, 643 S.E.2d 374 (Ga. App. 2007).
- Ron Zapata, Storm Brews Over Bid to Curb Convict Hire Bias, Employment Law 360 (Sept. 28, 2007) (distribute electronically).
- LEGAL ACTION CENTER, AFTER PRISON: ROADBLOCKS TO REENTRY, REPORT CARD (See Georgia, New York, Illinois, Tennessee), [www.lac.org/lac/main.php?view=report](http://www.lac.org/lac/main.php?view=report).

### *Supplemental Sources:*

- R. FREEMAN, Can We Close the Revolving Door?: Recidivism vs. Employment of Ex-Offenders in the U.S., New York University, The Urban Institute Reentry Roundtable Discussion Paper, 2 (May 19–23, 2003), *available at* <http://www.ssw.umich.edu/events/CASD/freeman.pdf>.
- R. FREEMAN, The Economics of Crime, in 3 HANDBOOK OF LABOR ECONOMICS, 3529-71 (ORLEY C. ASHENFELTER AND DAVID CARD EDs., 1999).
- The Disaster Center, United States Uniform Crime Report, State Statistics from 1960–2005, Georgia Crime Rates 1960–2005, *available at* <http://www.disastercenter.com/crime/gacrime.htm>.
- The Disaster Center, United States Uniform Crime Report, State Statistics from 1960–2005, New York Crime Rates 1960–2005, *available at* <http://www.disastercenter.com/crime/nycrime.htm>.

The Disaster Center, United States Uniform Crime Report, State Statistics from 1960–2005, Illinois Crime Rates 1960–2005, available at <http://www.disastercenter.com/crime/ilcrime.htm>.

Solomon, Johnson, Travis & McBride, From Prison to Work: The Employment Dimensions of Prisoner Reentry 14 (Oct. 2004), available at [http://www.urban.org/UploadedPDF/411097\\_From\\_Prison\\_to\\_Work.pdf](http://www.urban.org/UploadedPDF/411097_From_Prison_to_Work.pdf)

O.C.G.A. § 34-7-1 (employment at will statute).

Balmer v. Elan Corp., 278 Ga. 227 (2004) (Georgia employment at will case)

## **Class Meeting #10**

### *Topics:*

The impact of arrest and conviction records on federal and state benefit programs

Federal programs (including educational assistance and other federal benefit programs)

Social Security

Immigration

### *Required Reading:*

20 U.S.C. § 1091(r) (Student Eligibility).

21 U.S.C. § 862 (Denial of Federal Benefits to drug traffickers and possessors).

Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 8021 (Student Eligibility).

*Students for Sensible Drug Policy Found. v. Spellings*, 460 F. Supp. 2d 1093 (D.S.D. 2006).

Leinwand, Donna, “Ex-cons’ Sentences Don’t Always End with Release,” *USA Today*, July 22, 2007, available at [http://www.usatoday.com/news/nation/2007-07-22-ex-cons\\_N.htm](http://www.usatoday.com/news/nation/2007-07-22-ex-cons_N.htm).

Legal Action Center, “After Prison: Roadblocks to Re-Entry: A Report on State Legal Barriers Facing People With Criminal Records,” pgs. 12–13, available at [http://www.lac.org/lac/upload/lacreport/LAC\\_PrintReport.pdf](http://www.lac.org/lac/upload/lacreport/LAC_PrintReport.pdf).

*Supplemental Sources:*

- Robert W. Musser, Jr., *Denial of Federal Benefits to Drug Traffickers and Drug Possessors: A Broad-Reaching But Seldom Used Sanction*, 12 FED. SENT. R. 252 (2000).
- Michelle L. VanWiggeren, Comment, *Experimenting with Block Grants and Temporary Assistance: The Attempt to Transform Welfare by Altering Federal-State Relations and Recipients' Due Process Rights*, 46 EMORY L. J. 1327 (1997).
- Christina Hendrix & Olivia Orza, *No Second Chances: Immigration Consequences of Criminal Charges*, Ga. Bar J. at 27 (Dec. 2007).
- 42 U.S.C. § 402(x)(1)(A), (Old-age and survivors insurance benefit payments).
- 42 U.S.C. § 1396a(a)(23), (State plans for medical assistance).
- 8 U.S.C. § 1182(a)(2)(A)-(B), (Inadmissible aliens).
- Center for Law and Social Policy, "I Need to Get Educated': Lifting the Ban on Financial Aid for Higher Education," *Every Door Closed Fact Sheet Series*, No. 4.
- Center for Law and Social Policy, "Divided Families: Immigration Consequences of Contact with the Criminal Justice System," *Every Door Closed Fact Sheet Series*, No. 8.

**Class Meeting #11**

*Topics:*

- Federal and state benefit programs (continued)
- State programs
- Welfare (federally-regulated welfare programs) (TANF—"Temporary Assistance for Needy Families")
  - Programs for the elderly - O.C.G.A. § 49-4-32
  - Programs for the blind - O.C.G.A. § 49-4-52
  - Programs for the disabled - O.C.G.A. § 49-4-81
  - Foster care and adoptive parent
  - Driver's licenses
  - Health care (PeachCare for Kids and Medicaid)

*Required Reading:*

- Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 *FORDHAM URB. L. J.* 1501 (2003) (Emphasis on pp. 1506–1518).
- O.C.G.A. §§ 49-4-180-184 (selected provisions from Georgia’s “TANF”).
- O.C.G.A. § 49-4-32 (Article 2: Old-age assistance: Eligibility for assistance under this article).
- O.C.G.A. § 49-4-52 (Article 3: Aid to the blind: Eligibility for assistance under this article).
- O.C.G.A. § 49-4-81 (Article 4: Aid to the disabled: Eligibility for assistance under this article).
- 42 U.S.C.A. § 671 (State plan for foster care and adoption assistance).
- O.C.G.A. § 19-8-16 (Investigation by child-placing agency or other agent).
- 23 U.S.C.A. § 159 (Revocation or suspension of drivers’ licenses of individuals of convicted drug offenses).
- O.C.G.A. § 40-5-75 (Suspension of licenses by operation of law).
- Quiller v. Bowman*, 262 Ga. 769, 425 S.E.2d 641 (1993).

*Supplemental Sources:*

- Turner v. Glickman*, 207 F.3d 419 (7th Cir. 2000).
- Aaron J. Marcus, *Are the Roads a Safer Place Because Drug Offenders Aren’t On Them?: An Analysis of Punishing Drug Offenders with License Suspensions*, 13 *KAN. J. L. & PUB. POL’Y* 557 (2004).
- Brookings Institution Welfare Reform and Beyond Initiative, “Driver’s License Suspension Policies,” June 2005, available at <http://www.nedlc.org/center/license.pdf>.
- Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C. §§ 601-604.
- O.C.G.A. §§ 49-5-270-273 (PeachCare for Kids).
- Center for Law and Social Policy, “A Critical Bridge to Success: Making Public Benefits Accessible to Parents with Criminal Records,” *Every Door Closed Fact Sheet Series*, No. 5.



## **Class Meeting #12**

### *Topics:*

- Federal and state benefit programs (continued)
- Education
- Professional Licensing
- Voting
- Public policy issues
- Identification of areas for administrative and/or legislative change

### *Required Reading:*

- O.C.G.A. §§ 20-1-23 (Disciplinary action for student of public educational institution).
- O.C.G.A. § 20-1-24 (Discipline action for student of nonpublic educational institution).
- O.C.G.A. § 20-1-25 (Additional sanctions permissible).
- O.C.G.A. § 43-1-19 (Grounds for refusing to grant or revoking licenses; application of ‘Georgia Administrative Procedure Act’; subpoena powers; disciplinary actions; judicial review; reinstatement; investigations; complaints; notice; failure to appear; voluntary surrender; application of section; other law).
- O.C.G.A. § 21-2-216 (Qualifications of electors generally; reregistration of electors purged from list; eligibility of nonresidents who vote in presidential elections; retention of qualification for standing as elector).
- Legal Action Center, “After Prison: Roadblocks to Re-Entry: A Report on State Legal Barriers Facing People With Criminal Records,” pg. 14 and 18 (sanctions on voting and student loans), available at [http://www.lac.org/lac/upload/lacreport/LAC\\_PrintReport.pdf](http://www.lac.org/lac/upload/lacreport/LAC_PrintReport.pdf)

### *Supplemental Sources:*

- King, Ryan S. and Marc Mauer, “The Vanishing Black Electorate: Felony Disenfranchisement in Atlanta, Georgia,” The Sentencing Project (Sept. 2004), available at [http://www.sentencingproject.org/Admin/Documents/publications/fd\\_vanishingblackelectorate.pdf](http://www.sentencingproject.org/Admin/Documents/publications/fd_vanishingblackelectorate.pdf).
- Margaret C. Love, “Table #6: Consideration of Criminal Record in Licensing and Employment,” March, 2007, [www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486](http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486).

### **Class Meeting #13**

*Topics:*

Summary of selected public policy issues and areas for administrative/  
legislative change

Reports on papers

### **Class Meeting #14**

*Topics:*

Closing comments

Reports on papers

## **ABOUT THE AUTHORS**

### **H. Lane Dennard, Jr.**

Lane Dennard graduated from Mercer University in Macon, Georgia and the University of Georgia School of Law in Athens. He is a Retired Partner at King & Spalding in Atlanta where he represented management in the field of Labor and Employment Law for over 30 years. Since retirement in 2003, he has taught employment law courses as an Adjunct Professor at both Emory and the University of Georgia. During Spring Semester, 2008, he served as Practitioner-in-Residence at Mercer and taught a course on the subject matter of this Study.

### **Patrick C. DiCarlo**

Patrick DiCarlo received his undergraduate and law degrees from the University of Georgia. He is a partner at Alston & Bird in Atlanta, where he focuses his practice on ERISA and Securities Litigation. He has participated as a guest lecturer at law schools in Georgia, including the class at Mercer on Civil Consequences. In addition to his work on the Study, he has, in conjunction with the Georgia Justice Project, represented pro bono clients in this area.

### **Jennifer D. Fease**

Jennifer Fease graduated from Lee University in Cleveland, Tennessee and Vanderbilt University School of Law. She is an associate in the Business Litigation Practice Group at King & Spalding in Atlanta. She participated as a guest lecturer in the class at Mercer on Civil Consequences and is the author of Section VI of the Study entitled “The Impact of Arrests and Convictions on Federal and State Benefit Programs.”

### **Latif Oduola-Owoo**

Latif Oduola-Owoo graduated from the University of Lagos in Nigeria and the Brooklyn Law School. During the time that he participated in the Study, Mr. Oduola-Owoo was an associate in the Intellectual Property Practice Group at King & Spalding in Atlanta. He participated as a guest lecturer in the class at Mercer and is the author of Section IV of the Study entitled

“The Impact of Collateral Consequences on Housing Opportunities for Ex-Offenders.” He is currently with Arrington, Oduola-Owoo & Mason in Atlanta.

**Herman J. Hoying**

Herman Hoying graduated from Northwestern University and received his law degree from Washington & Lee University. During the period of time that he worked on the Study, Mr. Hoying was an associate in the Business Litigation Practice Group at King & Spalding in Atlanta. He is the author of Section II of the Study entitled “The Maintenance, Dissemination and Correction of Arrest and Conviction Records.” Mr. Hoying is currently with Morgan, Lewis & Bockius in San Francisco.