

THE DOUBLE BIND: OBSTACLES TO EMPLOYMENT AND RESOURCES FOR SURVIVORS OF THE CRIMINAL JUSTICE SYSTEM

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In Pennsylvania, individuals who come into contact with the criminal justice system, regardless of the outcome of their case(s), are marked for life. This mark, in the form of criminal history record information, attaches a wide range of collateral consequences that expand an individual's punishment beyond that which is originally contemplated by the criminal justice system. Generally, collateral consequences are indirect civil penalties that spring from criminal convictions.¹ Collateral consequences often have a negative impact on employment,² housing (public³ and private⁴), public benefits,⁵ occupational licensing,⁶ voting rights,⁷ immigration status,⁸ and social stigma. In Pennsylvania, even non-conviction data, such as arrests not leading to conviction, acquittals, or not guilty verdicts are part of an individual's criminal history record

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¹ Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634 (2006).

² See, e.g., Older Adult Protective Services Act, 35 PA. CONS. STAT. §§ 10225.501-10225.508 (2012) (limiting employment in caring for elderly adults based on conviction of certain offenses), *unconstitutional as applied by Nixon v. Commonwealth*, 329 A.2d 277 (2003).

³ See, e.g., Screening and Eviction for Drug Abuse and Other Criminal Activity, Notice H 2002- 22, Final Rule, 4 (Oct. 29, 2002), available at <http://www.hud.gov/offices/adm/hudclips/notices/hsg/02hsgnotices.cfm> (explaining how local public housing authorities have wide discretion to admit or deny admission and to evict individuals because of their criminal or arrest records); *Philadelphia Housing Authority (PHA) and Criminal Activity*, COMMUNITY LEGAL SERVICES OF PHILADELPHIA, <http://www.clsphila.org/Content.aspx?id=548> (last visited Mar. 1, 2012) (stating that the Philadelphia Housing Authority (PHA) has the right to deny admission to public housing due to their criminal record).

⁴ See, e.g., David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5, 6 (2008) (noting the rise in criminal background screening in private rental housing).

⁵ See, e.g., NAN FEYLER, COMMUNITY LEGAL SERVICES OF PHILADELPHIA, *IMPACT OF CRIMINAL RECORD ON PUBLIC BENEFITS IN PENNSYLVANIA* (2008), available at <http://www.clsphila.org/files/criminal%20background%20chart%202009.pdf> (describing when criminal record can have impact on eligibility for public benefits in Pennsylvania).

⁶ See, e.g., 18 PA. CONS. STAT. § 9124 (2012) (noting that occupational licenses can be denied based on criminal records).

⁷ See, e.g., AM. CIVIL LIBERTIES UNION, *VOTING WITH A CRIMINAL RECORD: HOW REGISTRATION FORMS FRUSTRATE DEMOCRACY* (2008), available at http://www.aclu.org/files/pdfs/racialjustice/votingwithacriminalrecord_report.pdf (discussing the riskiness of those with criminal records relying on voter registration forms for an explanation of their voting rights, and the impact of criminal records on voting rights more generally).

⁸ See, e.g., Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705 (2011) (critiquing how criminal records are used in immigration and removal proceedings).

information. Because non-conviction data is publicly available for review, collateral consequences spring from conviction as well as non-conviction data.⁹

Due to technological advances in electronic data, which provide easy access to criminal history record information,¹⁰ the use of criminal background checks for employment,¹¹ housing,¹² and access to social services¹³ has become routine. While it is unlawful in Pennsylvania for an employer to use non-conviction data in hiring decisions,¹⁴ employers often adopt blanket criminal history record information policies, which reject any individual with any type of criminal history record information, even non-conviction records.¹⁵ Accordingly, it is becoming increasingly difficult for individuals with criminal history record information to find gainful employment or access safe and adequate housing and other social services. The collateral consequences of criminal history record information disproportionately affect the poor, Black and Hispanic communities in Pennsylvania and systematically impede wealth accumulation by stunting an individual's economic opportunities. This further perpetuates and compounds past inequities. In Pennsylvania, a petition for expungement and/or redaction is one tool that advocates can use to reduce the effects of criminal history record information.¹⁶

The Philadelphia Lawyers for Social Equity's Criminal Record Expungement Project (C-REP) works to lower the barriers to employment, public benefits, and public housing encountered by those who have criminal history record information through direct representation, community education, and legislative advocacy.¹⁷ Since November 2010, C-REP has filed 505 expungement and/or redaction petitions in the Court of Common Pleas of Philadelphia on behalf of low-income

⁹ In Pennsylvania, there is a common law right for an individual to review court records. *See Commonwealth v. Fenstermaker*, 530 A.2d 414, 418-20 (Pa. 1987) (noting the common law right to inspect public records, including judicial documents). Further, PA. CONST. art. V, § 10(c) vests the Pennsylvania Supreme Court with the authority to prescribe rules governing the practice, procedure and conduct of all Pennsylvania courts, including those applicable to court records available through electronic databases. The public may access Pennsylvania's criminal record docket sheets by visiting <http://ujsportal.pacourts.us/docketsheets/cp.aspx>.

¹⁰ As of 2003, 71 million state criminal records were accessible through automated databases. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2003: A CRIMINAL JUSTICE INFORMATION POLICY REPORT 13 (2006), available at <http://www.bjs.gov/content/pub/pdf/sschis03.pdf>. *See generally* James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177 (2008) (discussing the proliferation of criminal record databases due to technological advances in computers).

¹¹ *See, e.g.*, SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS SHRM POLL 3 (Jan. 22, 2010), available at <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx> (showing that only 7% of employers responding to poll did not conduct criminal background checks for any candidates).

¹² *See, e.g.*, Thacher, *supra* note 4, at 5.

¹³ *See, e.g.*, Jacobs & Crepet, *supra* note 10, at 177 (noting the increased use of criminal records to determine eligibility for social welfare benefits).

¹⁴ *See Cisco v. United Parcel Servs.*, 476 A.2d 1340, 1343 (Pa. Super. Ct. 1984) (noting that it is against public policy for an employer to use non-conviction data during the hiring process).

¹⁵ MICHELLE NATIVIDAD RODRIGUEZ & MAURICE ESMELLE, THE NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY:" THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 13-14 (2011), available at http://nelp.3cdn.net/e9231d3aee1d058c9e_55im6wopc.pdf.

¹⁶ *See* 18 PA. CONS. STAT. § 9122 (2011) (covering the expungement of criminal record information).

¹⁷ *See About C-REP*, PHILADELPHIA CRIMINAL RECORD EXPUNGEMENT PROJECT, <http://www.paexpungementproject.org/about/> (last visited May 26, 2012).

clients.¹⁸

The following is not intended to be an exhaustive survey on criminal history record information issues, but a framework for discussion. Through C-REP's clients' own words, readers will gain first hand accounts of how criminal history record information affects them in all facets of their lives. The expungement process is often the only time these clients have had positive contact with the criminal justice system, as the expungement process works to empower marginalized individuals and communities.¹⁹

I. SCOPE OF THE PROBLEM

The United States imprisons a greater percentage of its population than any other country in the world, including China, Russia, and all of the regimes that were overthrown during the Arab Spring.²⁰ As of mid-2008, Philadelphia had the fourth highest incarceration rate in the country, among the fifty jurisdictions in the United States with the largest jail populations.²¹ In Pennsylvania, as in most states in the U.S., people of color are more likely to be incarcerated and convicted than whites, despite the fact that people of color made up just 20.5% of Pennsylvania's population in 2010.²² The incarceration rate for blacks is 9.2% higher, and for Hispanics is 5.6% higher, than the rate for non-Hispanic whites in the state prison and local jail systems.²³ As of December 31, 2009, 25,357 – or 49.4% – of those incarcerated in a Pennsylvania Department of Corrections facility were black.²⁴ It is clear that the social burden of having criminal history record information affects people and communities of color at disproportionate rates, further stigmatizing already marginalized populations.

The problem posed by criminal history record information affects offenders at the point when they most need access to employment opportunities – their reentry into society. The explosion of arrests for minor offenses exacerbates this problem. In 2010, 56.9% of all individuals in Pennsylvania Department of Corrections facilities were serving a sentence of two years or less.²⁵ In other words, a majority of individuals currently incarcerated will soon reenter

¹⁸ Internal Memorandum from the Philadelphia Criminal Record Expungement Project (Apr. 1, 2012) (on file with C-REP) [hereinafter Internal C-REP Memo]. Note that as of April 1, 2012, C-REP also had 302 expungement/redaction petitions pending before the Philadelphia Court of Common Pleas. *Id.*

¹⁹ C-REP's litigation strategy is two-fold: to immediately ameliorate the direct collateral consequences of criminal record history information, and to empower individuals to organize into a "class-for-itself." See Steve Bachmann, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 35 (1984) (discussing the lawyers' goal of assisting in the transformation of a "class-in-itself" into a "class-for-itself").

²⁰ ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST (8th ed. 2008), available at http://www.prisonstudies.org/info/downloads/wppl-8th_41.pdf.

²¹ PEW CHARITABLE TRUSTS & PHILADELPHIA RESEARCH INITIATIVE, PHILADELPHIA'S CROWDED COSTLY JAILS: THE SEARCH FOR SAFE SOLUTIONS 7 (2010), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Philadelphia_Research_Initiative/Philadelphias_Crowded_Costly_Jails_rev.pdf.

²² *State and County QuickFacts: Pennsylvania*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/42000.html> (last visited May 26, 2012).

²³ Paige M. Harrison & Allen J. Beck, *Prison and Jail Inmates at Midyear 2005*, BUREAU OF JUSTICE STAT. BULL., May 2006, at 11, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim05.pdf>.

²⁴ DEAN LATEGAN ET AL., PA. DEP'T OF CORR., ANNUAL STATISTICAL REPORT 2010 25 (2010), available at http://www.portal.state.pa.us/portal/server.pt/document/1212131/annual_report_2010_pdf.

²⁵ *Id.* at 15.

the neighborhoods and cities that are their, and our, homes. Approximately 700,000 individuals are released each year from state and federal prisons.²⁶ In 2010, 18,417 individuals were released from Pennsylvania Department of Corrections facilities.²⁷ If recent history is any indication, the number of individuals reentering society with criminal history record information will continue to grow.

It is obvious that access to employment opportunities is the only stable path out of poverty. In 2010, 46.2 million people in the U.S. lived in poverty, the largest number historically recorded by the U.S. Census Bureau.²⁸ At that time, 1,648,184 Pennsylvanians lived in poverty,²⁹ including 522,189 children.³⁰ Also in 2010, approximately 26.7% of Philadelphia's population lived below the poverty line.³¹ In February 2012, the national unemployment rate was 8.3% across all races and ethnicities,³² while in the same month 2,593,000 blacks were unemployed nationwide, making the national unemployment rate for blacks 14.1% in February.³³ In December 2011, 489,246 people in Pennsylvania were unemployed, making the statewide unemployment rate 7.7%,³⁴ and in the Philadelphia-Camden-Wilmington area alone, 235,013 people were unemployed – an unemployment rate of 7.9%.³⁵ In 2010, blacks accounted for 13% of the unemployed people in Pennsylvania, and only 9% of the state's population.³⁶

Criminal history record information is a major contributing factor to the high rate of unemployment of black citizens.³⁷ C-REP's clients, all of whom are impoverished and two-thirds

²⁶ See Heather C. West et al., *Prisoners in 2009*, BUREAU OF JUSTICE STAT. BULL., Dec. 2010, at 4, available at <http://www.bjs.gov/content/pub/pdf/p09.pdf>.

²⁷ LATEGAN ET AL., *supra* note 24, at 35, Table 29.

²⁸ Press Release, U.S. Census Bureau, Income, Poverty and Health Insurance Coverage in the United States: 2010 (Sept. 13, 2011), available at http://www.census.gov/newsroom/releases/archives/income_wealth/cb11-157.html.

²⁹ ALEMAYEHU BISHAW, U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY BRIEFS, POVERTY: 2009 AND 2010 2 (2011), available at <http://www.census.gov/prod/2011pubs/acsbr10-01.pdf>.

³⁰ SUZANNE MACARTNEY, U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY BRIEFS, CHILD POVERTY IN THE UNITED STATES 2009 AND 2010: SELECTED RACE GROUPS AND HISPANIC ORIGIN 9 (2011), available at <http://www.census.gov/prod/2011pubs/acsbr10-05.pdf>.

³¹ *Poverty Status in the Past 12 Months, 2010 American Community Survey 1-Year Estimates for Philadelphia County*, AMERICAN FACTFINDER, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_S1701&prodType=table (last visited May 26, 2012).

³² News Release, Bureau of Labor Stat., U.S. Dep't of Labor, The Employment Situation – April 2012, at Table A-1 (May 4, 2012), available at <http://www.bls.gov/news.release/pdf/empst.pdf>.

³³ *Id.* at Table A-2.

³⁴ *Local Area Unemployment Statistics: Pennsylvania, Databases, Tables & Calculators by Subject*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, <http://data.bls.gov/timeseries/LASST42000003> (last visited May 26, 2012).

³⁵ News Release, Bureau of Labor Stat., U.S. Dep't of Labor, Metropolitan Area Employment and Unemployment – January 2012, at Table 2 (Mar. 23, 2012), available at http://www.bls.gov/news.release/archives/metro_03232012.pdf.

³⁶ CTR. FOR WORKFORCE INFO. & ANALYSIS, PA. DEP'T OF LABOR & INDUS., A PROFILE OF PENNSYLVANIA'S UNEMPLOYED PEOPLE 22 (2010), available at <http://www.portal.state.pa.us/portal/server.pt?open=18&objID=921146&mode=2>.

³⁷ See generally Jordan Segall, *Mass Incarceration, Ex-Felon Discrimination & Black Labor Market Disadvantage*, 14 U. PA. J. L. & SOC. CHANGE 159 (2011) (discussing the relationship between the disproportionate incarceration of black Americans, criminal record information, and unemployment).

of whom were unemployed at the time of intake are almost universally held back by their criminal history record information.³⁸ An overwhelming majority of C-REP clients reported that they were seeking C-REP services in order to find employment.³⁹ It is clear to C-REP that there is a significant population seeking gainful employment in order to create and sustain stable, lawful lives. At every turn, these individuals are hampered by their criminal history record information.

The scope of this problem is stark and sobering. It is estimated that anywhere from 65-92 million Americans have criminal history record information on file in a state repository,⁴⁰ and approximately one-fifth of all Philadelphians have a criminal record.⁴¹ The trend continues: in 2009, the Philadelphia Police Department arrested 83,965 individuals, 58,341 of whom were black.⁴² In 2010, there were 55,292 new misdemeanor or felony cases filed in the Philadelphia Municipal Court.⁴³ Cases were withdrawn or dismissed in 22,782 instances, while only 4,842 defendants pled guilty.⁴⁴ In the same year, 16,010 new criminal cases were filed in the Court of Common Pleas of Philadelphia.⁴⁵ Charges were withdrawn or dismissed in only 2,938 of the total cases pending in the Philadelphia Court of Common Pleas – or 17% of the time – and the defendant pled guilty in 10,255 of the cases – or 59.2% of the time.⁴⁶ C-REP believes, based on its interactions, that a majority of those who pled guilty were punished not with incarceration, but with probation or fines. Despite the less serious nature of the punishment imposed by the criminal justice system in these cases, the collateral consequences of the conviction will magnify the punishment for these individuals' lifetimes, decreasing access to employment, housing, and social services.

The costs of conviction are borne by individuals, their families,⁴⁷ and taxpayers, and are

³⁸ All C-REP clients are under 200% of the federal poverty line. See *Get Help*, PHILADELPHIA CRIMINAL RECORD EXPUNGEMENT PROJECT, <http://www.paexpungementproject.org/get-help/> (last visited May 26, 2012), for C-REP's intake requirements.

³⁹ Internal C-REP Memo, *supra* note 18.

⁴⁰ RODRIGUEZ & EMSELLEM, *supra* note 15, at 3 (noting that an estimated 65 million adults have criminal records); BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2008, at 3 (2009) *available at* <https://www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf> (finding that over 92 million Americans had criminal history record information in a state repository as of December 31, 2008).

⁴¹ Fair Criminal Record Screening Standards, PHILADELPHIA CODE § 9-3501(1)(c) (2012), *available at* [http://www.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/title9regulationofbusinessstradesandpro/chapter9-3500faircriminalrecordscreening?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:philadelphia_pa](http://www.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/title9regulationofbusinessstradesandpro/chapter9-3500faircriminalrecordscreening?f=templates$fn=default.htm$3.0$vid=amlegal:philadelphia_pa).

⁴² Howard N. Snyder & Joseph Mulako-Wangota, *Arrest Data Analysis Tool*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm> (Choose "Pennsylvania" under "Select one state"; choose "Philadelphia Police Dept" under "Select one agency"; choose "2009" under "Select one year"; and choose "Offense by Age and Race" under "Select one table"; and then click "Generate Results.") (last visited May 26, 2012).

⁴³ ADMIN. OFFICE OF PA. COURTS, SUPREME CT. OF PA., 2010 CASELOAD STATISTICS OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA 139 (2011), *available at* <http://www.pacourts.us/NR/rdonlyres/506E317A-0A57-498C-9F44-2F6B738E3F08/0/2010Report.pdf>.

⁴⁴ *Id.*

⁴⁵ *Id.* at 10.

⁴⁶ *Id.* at 11.

⁴⁷ See generally JEREMY TRAVIS ET AL., JUSTICE POLICY CTR., URBAN INST., FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY (2005), *available at* http://www.urban.org/uploadedpdf/310882_families_left_behind.pdf (remarking on the effect increased incarceration levels have on families, and particularly on children).

prohibitively burdensome to all. Individuals who have been incarcerated are more likely to be unemployed,⁴⁸ and when they are employed, formerly incarcerated individuals earn between 14.5% and 26.4% less in wages than those who have not been incarcerated⁴⁹ – a disparity that increases recidivism.⁵⁰ In 2010, it cost \$32,986 per year to house a prisoner in a Pennsylvania Correctional facility,⁵¹ and \$34,675 per year to house a prisoner in a Philadelphia jail.⁵² The Pennsylvania Department of Corrections 2010-2011 budget was approximately \$1.7 billion, due to the massive number of incarcerated individuals in the system,⁵³ and the Philadelphia Prison System alone costs taxpayers approximately \$290 million per year.⁵⁴ Perhaps as problematic are the societal costs presented by the difficulties that huge swaths of our population face, when seeking employment, in terms of losses to the tax base, impoverishment of children and communities, desperation, and recidivism – which are all much harder to estimate.

II. MERE ENCOUNTERS: BRUSHES WITH IN/JUSTICE

The Philadelphia Police Department has a long history of engaging in unlawful police practices that target communities of color.⁵⁵ These unlawful practices continue to this day.⁵⁶ In Philadelphia, people of color are subjected to invasive personal searches at highly disproportionate rates.⁵⁷ In 2009, the Philadelphia Police Department stopped, frisked, and

⁴⁸ Amanda Geller et al., *The Effects of Incarceration on Employment and Wages: An Analysis of the Fragile Families Survey* 24 (Ctr. For Research on Child Wellbeing, Working Paper No. 2006-01-FF, 2006), available at <http://www.saferfoundation.org/files/documents/Princeton-Effect%20of%20Incarceration%20on%20Employment%20and%20Wages.pdf>.

⁴⁹ *Id.*

⁵⁰ See LISE MCKEAN ET AL., DEVELOPING JUSTICE COALITION, CURRENT STRATEGIES FOR REDUCING RECIDIVISM 19 (2004), available at <http://targetarea.org/researchdoc/recidivismfullreport.pdf>.

⁵¹ Hon. Doris Smith-Ribner, *State Summit Promotes Greater Efforts to Prepare Inmates for Re-Entry to Society*, AOPC CONNECTED (Admin. Office of Pa. Courts, Harrisburg, Pa), Feb. 2012, at 4, available at <http://www.pacourts.us/NR/rdonlyres/43883A30-906F-4BDF-90C1-80EBD8A2CB55/0/issue411.pdf>.

⁵² PEW CHARITABLE TRUSTS, *supra* note 21, at 3 (calculating the daily cost to house a prisoner at \$95 per day).

⁵³ JOHN WETZEL, PA. DEP'T OF CORR., COST & POPULATION 2 (2011), available at http://www.portal.state.pa.us/portal/server.pt/document/1056163/2011_cost_and_population_pdf.

⁵⁴ PEW CHARITABLE TRUSTS, *supra* note 21, at 2.

⁵⁵ See, e.g., Settlement and Monitoring Agreement and Stipulations of the Parties, *NAACP v. City of Philadelphia*, C.A. No. 96-6045 (E.D. Pa. 1996) (resulting in a settlement agreement that required the City of Philadelphia to implement policy and training to ensure police officers' actions complied with the Fourth and Fourteenth Amendments of the U.S. Constitution); *Arrington v. City of Philadelphia*, C.A. No. 88-2264, 1989 U.S. Dist. LEXIS 19117, at *2-3 (E.D. Pa. Feb. 13, 1989) (involving unlawful police stops of black males); *Cliett v. City of Philadelphia*, C.A. No. 85-1846, 1985 U.S. Dist. LEXIS 14832, at *1-2 (E.D. Pa. Oct. 17, 1985) (noting the approval of a consent decree in response to unlawful search and seizure by Philadelphia police); *Spring Garden United Neighbors, Inc. v. City of Philadelphia*, 614 F. Supp. 1350 (E.D. Pa. 1985) (involving unlawful police sweeps in Puerto Rican neighborhood).

⁵⁶ See Consent Decree at 1, *Bailey v. City of Philadelphia*, C.A. No. 10-5952 (E.D. Pa. June 21, 2011), available at <http://www.aclupa.org/downloads/Baileyconsentdecree.pdf> (discussing allegations that Philadelphia police officers engaged in unconstitutional stop and frisk practices).

⁵⁷ Complaint at 21, *Bailey v. City of Philadelphia*, C.A. No. 10-5952 (E.D. Pa. Nov. 4, 2011), available at <http://www.aclupa.org/downloads/Baileycomp.pdf>.

searched 253,333 individuals, and over 183,000 – or 72.7% – of those stopped were black.⁵⁸

The Philadelphia District Attorney's Charging Unit has broad discretion to bring all manner of charges that are arguably plausible, and to respond to whatever facts are available to them at that time.⁵⁹ The District Attorney's Charging Unit has strong motives to charge aggressively: it is almost always the case that individuals that enter a plea do so in exchange for some charges being dropped.⁶⁰ This encourages bargaining behavior at the charging stage, such as strategic overcharging in order to extract a plea agreement.⁶¹ For instance, an individual who, based on the facts of the case, may or may not have committed a simple assault during an altercation at a bar may find himself charged with aggravated assault, terroristic threats, possession of an instrument of a crime, and reckless endangerment of another person.⁶² The idea behind these multiple charges is that because the defendant faces so many serious charges, the individual will plea to the lesser included offense(s) to avoid harsher penalties.⁶³ "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."⁶⁴ C-REP often sees clients who have been charged with ten or more crimes for one incident.⁶⁵ Overcharging is such a historic issue in the Philadelphia District Attorney's office that Seth Williams, the current District Attorney, reorganized the District Attorney's Charging Unit to curtail past overcharging practices.⁶⁶ Overcharging not only unfairly extracts plea agreements, but it also leads to unnecessary incarceration in other ways as well. It is estimated that 28% of individuals currently in the Philadelphia Prison System are incarcerated "due to overcharging . . . and/or a defendant's inability to pay his or her bail."⁶⁷

Bail and defense costs are tied to overcharging in the individual's current case as well as

⁵⁸ *Id.*

⁵⁹ *See, e.g.,* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1255-56 (2008) (discussing incentives to overcharge); *see also* Ana Maria Gutierrez, *The Sixth Amendment: The Operation of Plea Bargaining in Contemporary Criminal Procedure*, 87 DENV. U. L. REV. 695, 716 (2010) (discussing horizontal and vertical overcharging during the plea process).

⁶⁰ Christine M. Guidubaldi & Steve Kim, *Preliminary Proceeding: Guilty Pleas*, 86 GEO. L.J. 1510, 1511 (1998) (stating that prosecutors often agree to withdraw charges in exchange for a guilty plea). *See generally* PA. R. CRIM. P. 590 (Pleas and Plea Agreements Rule).

⁶¹ *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 863 (1995) ("The prosecutor can, and regularly does, use discretion in charging to influence greatly a defendant's decision to plead guilty in any particular case.").

⁶² *See* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 64-66 (2011) (discussing how prosecutorial overcharging threatens the criminal justice system).

⁶³ *See* Missouri v. Frye, 132 S.Ct. 1399, 1407 (2012) (citing Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes." (internal citation omitted))).

⁶⁴ *Id.* (internal citations omitted).

⁶⁵ *See* Internal C-REP Memo, *supra* note 18.

⁶⁶ *See* Karl Beimuller, *D.A. Williams Stresses New Approaches at EMAN Meeting*, GERMANTOWN CHRONICLE, June 3, 2010, at 1, 4, available at http://www.germantownnewspapers.com/Germantown_News_060310_files/GC.060310.pdf.

⁶⁷ R. SETH WILLIAMS, PHILADELPHIA DISTRICT ATTORNEY TRANSITION REPORT, PRE-ENTRY & RE-ENTRY TRANSITION SUB-COMMITTEE REPORT AND RECOMMENDATIONS 4 (2010), available at <http://www.leonaking.org/uploads/9/4/5/7/9457254/sethtransitionreportfinal2.pdf>.

overcharging in past cases.⁶⁸ In this way, the charging unit at the District Attorney's office can not only strong-arm individuals into taking pleas to lesser charges that they may not have committed in order to avoid prison time, but it can also make it difficult or impossible for individuals to remain with their families and at their jobs while their trials are pending. It can also be difficult to afford decent defense counsel. Over 80% of those charged with crimes are impoverished and unable to afford defense counsel.⁶⁹ These cycles are self-perpetuating: once an individual has been rendered unable to make bail by overcharging, he may lose his job and therefore be unable to pay for an attorney, and be left to hope that his or her court-appointed counsel has the time and energy to mount a zealous defense instead of merely making repeated requests that the individual take a plea. It is not uncommon for defendants who are incarcerated pending a disposition of their case to meet their court-appointed attorney for the first time at a substantive court appearance such as their actual trial.⁷⁰

III. THE MARK: POST ARREST

Once an individual has been arrested and charged, those charges become part of their criminal history record information.⁷¹ In Pennsylvania, the Criminal History Record Information Act (CHRIA) governs the collection and dissemination of criminal history record information by "criminal justice agencies" to non-criminal justice agencies and individuals.⁷² As of November 2011, there were approximately 2,790 criminal justice agencies in Pennsylvania.⁷³ CHRIA provides an exhaustive list of the information that may be maintained in the central repository and automated systems.⁷⁴ Under CHRIA, the Pennsylvania State Police are responsible for the "collection, compilation, maintenance and dissemination of criminal history record information" in a central repository.⁷⁵ While it costs money to request an individual's record from the state repository, criminal records are publicly available on the internet. The Administrative Office of Pennsylvania Courts (AOPC), through Pennsylvania's Unified Judicial System Web Application

⁶⁸ In Pennsylvania, bail determinations are made by considering several factors, including the nature of the offense charged and prior criminal history record information. See PA. R. CRIM. P. 523.

⁶⁹ McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 485-86 (2005).

⁷⁰ See James M. Anderson & Paul Heaton, *How Much Difference Does a Lawyer Make?: The Effect of Defense Counsel on Murder Case Outcomes* 27 (RAND, Working Paper No. WR-870-NIJ, 2011), available at http://www.rand.org/content/dam/rand/pubs/working_papers/2011/RAND_WR870.pdf (noting case where Philadelphia court-appointed attorneys made extremely low amount per case, suggesting they would only be paid \$2 per hour if they worked the average amount of hours spent by attorneys on a capital case prior to trial).

⁷¹ See 18 PA. CONS. STAT. § 9102 (2011) (defining "criminal history record information" as: "[i]nformation collected by criminal justice agencies concerning individuals, and arising from the initiation of a criminal proceeding, consisting of identifiable descriptions, dates and notations of arrests, indictments, informations or other formal charges and any dispositions arising therefrom.").

⁷² Criminal History Record Information Act, 18 PA. CONS. STAT. §§ 9101-9183 (2012).

⁷³ See LINDA L. KELLY ET AL., COMMONWEALTH OF PA., OFFICE OF ATT'Y GEN., CRIMINAL HISTORY RECORD INFORMATION ACT HANDBOOK 5 (6th ed. 2012), available at <http://www.attorneygeneral.gov/uploadedfiles/crime/chria.pdf>.

⁷⁴ See 18 PA. CONS. STAT. § 9106 (2011). CHRIA defines "automated systems" as "[a] computer or other internally programmed device capable of automatically accepting and processing data, including computer programs, data communication links, input and output data and data storage devices." *Id.* at § 9102.

⁷⁵ See 18 PA. CONS. STAT. § 9102.

Portal (UJS portal), provides free public access to criminal court docket sheets.⁷⁶ Since the inception of the UJS portal, web traffic to the site has continued to rise. In 2009, the AOPC reported that the UJS portal averaged one million hits per month⁷⁷ and in 2008, the Common Pleas Court Criminal Case Management System (CPCMS) stored more than 6.7 million cases.⁷⁸

While CHRIA imposes a duty to maintain “complete and accurate criminal history record information,”⁷⁹ AOPC’s records contain a significant number of errors.⁸⁰ One example of this is from a C-REP client’s AOPC court docket sheet, which reflected several serious criminal charges that the client was never actually charged with.⁸¹ These were added due to a clerical error.⁸² This is not an isolated incident; AOPC’s own data reflects that in 2009, the AOPC “corrected” 1,030 cases that reflected a disposition of a guilty plea when the guilty pleas had actually been withdrawn.⁸³ Moreover, in 2010, the AOPC returned 14,907 cases to the counties for correction.⁸⁴ These corrections are only the errors that were actually caught – many more likely exist without ever being found.⁸⁵ Of course, once an individual has acquired criminal history record information, even if by court error, it is now his or her legal and financial burden to correct the inaccuracies that may be keeping him or her from employment, education, and housing opportunities.⁸⁶ An individual who has been rendered practically unemployable by some error of the system, whether at the point of arrest or in the courthouse, must summon substantial financial resources in order to combat the inaccuracies of that system.

One area of data inaccuracy identified by AOPC in 2010 were cases listed as closed or

⁷⁶ See *Docket Sheets*, PENNSYLVANIA’S UNIFIED JUDICIAL SYSTEM WEB PORTAL, <http://ujportal.pacourts.us/DocketSheets.aspx> (last visited May 27, 2012).

⁷⁷ See ADMIN. OFFICE OF PA. COURTS, SUPREME COURT OF PA., ANNUAL REPORT 11 (2009), available at <http://www.pacourts.us/NR/rdonlyres/A9C3FD68-21F0-4971-AEB7-BAF5E8FF1C0F/0/09aopc09.pdf>.

⁷⁸ See *Prothonotaries’ and Clerk of Courts’ Conference 2008*, UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA, <http://www.pacourts.us/T/AOPC/ClerkofCourtsConf.2008.htm> (click on “Clerks’ CPCMS Update” hyperlink, and information is on page 1 of 6) (last visited May 27, 2012).

⁷⁹ 18 PA. CONS. STAT. § 9111 (2011).

⁸⁰ A disclaimer located at the bottom of all AOPC court summary sheets states: “Recent entries made in the court filing offices may not be immediately reflected on these docket sheets. Neither the courts of the Unified Judicial System of the Commonwealth of Pennsylvania nor the Administrative Office of Pennsylvania Courts assumes any liability for inaccurate or delayed data, errors or omissions on these docket sheets. Docket sheet information should not be used in place of a criminal history background check, which can only be provided by the Pennsylvania State Police. Employers who do not comply with the provisions of the Criminal History Record Information Act (18 Pa.C.S. Section 9101 et seq.) may be subject to civil liability as set forth in 18 Pa.C.S. Section 9183.”

⁸¹ Internal C-REP Client Case File (on file with author).

⁸² E-mail from Mike Lee, Supervising Att’y, C-REP, to author (Mar. 31, 2012) (on file with author).

⁸³ ADMIN. OFFICE OF PA. COURTS, SUPREME COURT OF PA., 2009 CASELOAD STATISTICS OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA 19 (2010) available at <http://www.pacourts.us/NR/rdonlyres/140FA368-581A-4CE0-B717-A3C4F5EE2A29/0/2009Report.pdf>.

⁸⁴ ADMIN. OFFICE OF PA. COURTS, 2010 CASELOAD STATISTICS, *supra* note 43, at 18.

⁸⁵ Review of the Administrative Office of Pennsylvania Courts Annual Reports reveal that the office has “outstanding data issues” which have yet to be addressed. See ADMIN. OFFICE OF PA. COURTS, 2009 CASELOAD STATISTICS, *supra* note 83, at 20, for an example.

⁸⁶ See 18 PA. CONS. STAT. § 9122 (2011) (noting that the individual must petition the court to get record expunged under certain circumstances).

adjudicated, but that did not have a corresponding final disposition entered.⁸⁷ Because AOPC data is often purchased in bulk and used as the basis of criminal records by commercial background screening companies,⁸⁸ AOPC data inaccuracies also find their way into commercial databases, and can in turn harm an individual's employment opportunities. This is especially true because over 92% of large employers now require a criminal background check for hiring purposes.⁸⁹ Employers increasingly rely on commercial criminal background screening companies, not state repositories such as the Pennsylvania State Police, for information concerning job applicants and employees.⁹⁰ The move to commercial criminal background screeners potentially raises the harm to those being screened because when companies fail to update their databases regularly, they will disseminate data that includes expunged and/or redacted charges.⁹¹ Additionally, data collected directly from the AOPC includes non-conviction data even though it is against the law for non-conviction data to be used in employment decisions in Pennsylvania.⁹² Given this, it is incomprehensible that commercial criminal background screening companies are permitted to compile and disseminate such data.

IV. EMPLOYMENT OUT OF REACH

*Pursuant to Article I, Section 1 of the Pennsylvania Constitution, all persons within this Commonwealth possess a protected interest in the practice of their profession.*⁹³

Community Legal Services of Philadelphia has identified forty professions in Pennsylvania where occupational licenses may be denied because of a criminal record.⁹⁴ Accordingly, an individual's criminal history record information significantly reduces their opportunities for employment.⁹⁵ This is especially true for people of color, as several recent studies have found that black job applicants without criminal history record information had roughly the same statistical chance of receiving a callback as similarly situated white applicants

⁸⁷ ADMIN. OFFICE OF PA. COURTS, 2010 CASELOAD STATISTICS, *supra* note 43, at 19.

⁸⁸ See Requests for Bulk Distribution of Electronic Case Records, 204 PA. CODE § 213.74 (2012).

⁸⁹ See SOC'Y FOR HUMAN RES. MGMT., *supra* note 11, at 3 (displaying survey results which indicate that 73% of employers conduct criminal background checks on all job candidates and 19% conduct criminal background checks on selected job candidates).

⁹⁰ See Ryan D. Watstein, Note, *Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender's Employment Prospects*, 61 FLA. L. REV. 581, 592-93 (2009).

⁹¹ See Michael H. Jagunic, Note, *The Unified "Sealed" Theory: Updating Ohio's Record-Sealing Statute for the Twenty-First Century*, 59 CLEV. ST. L. REV. 161, 171 (2011) (explaining that private databases are not adequately updated); RONALD P. HAWLEY ET AL., SEARCH, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 83 (2005), available at <http://www.search.org/files/pdf/ReportofNTFCBA.pdf> (noting that expunged records may still be reported in commercial background checks).

⁹² 476 A.2d at 1343 (finding that it is against public policy for an employer to use non-conviction data during the hiring process).

⁹³ Khan v. State Bd. of Auctioneer Exam'rs, 842 A.2d 936, 946 (Pa. 2004) (internal citations omitted).

⁹⁴ MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION PA6 (2007), available at <http://www.sentencingproject.org/doc/File/Collateral%20Consequences/Pennsylvania.pdf>.

⁹⁵ See Devah Pager, *Double Jeopardy: Race, Crime and Getting a Job*, 2005 WIS. L. REV. 617, 622 (2005).

with a felony criminal conviction.⁹⁶

Access to employment is not only crucial to fulfill basic financial needs, but as mounting social science data suggests, employment reduces recidivism and encourages successful reintegration into society.⁹⁷ Further, the longer an individual remains crime free, the less likely it is that he or she will recidivate.⁹⁸ In other words, at some point in time, criminal conviction records are no longer a sufficient indicator of future criminal behavior. A recent study in Philadelphia found that an individual who remains crime-free for six or seven years is no more likely to commit a crime than a member of the general public who has never offended at all.⁹⁹

In Pennsylvania, CHRIA governs how employers may use criminal history record information during the hiring process.¹⁰⁰ Currently, Pennsylvania law¹⁰¹ does not limit an employer's ability to gather or review an individual's non-conviction data.¹⁰² While an employer has the ability to gather and review a substantial amount of criminal history record information, only a specific subset of criminal record history information may be used in the hiring process.¹⁰³ For example, under CHRIA, "[f]elony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in

⁹⁶ See, e.g., Devah Pager et al., *Race at Work: A Field Experiment of Discrimination in a Low-Wage Labor Market*, 74 AM. SOC. REV. 777, 784-86 (2009) (finding that white applicants with a criminal background were just as likely as minority applicants without any criminal background to receive a callback or job offer); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 956-58 (2003).

⁹⁷ Shawn D. Bushway & Peter Reuter, *Labor Markets and Crime Risk Factors*, in EVIDENCE-BASED CRIME PREVENTION 202-03 (Lawrence W. Sherman et al., eds., 2002); Bruce Western & Katherine Beckett, *How Unregulated is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOC. 1030, 1044 (1999).

⁹⁸ Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 331-32 (2009).

⁹⁹ Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUBLIC POL'Y 483, 483 (2006).

¹⁰⁰ 18 PA. CONS. STAT. § 9125 (2011).

¹⁰¹ The Fair Credit Reporting Act (FCRA) is a federal law that regulates the use of consumer credit information. See 15 U.S.C. §§ 1681 *et seq.* (stating that consumer reports may not contain adverse information with regard to arrests that are more than seven years old and did not lead to a conviction).

¹⁰² Federal Courts and the Equal Employment Opportunity Commission (EEOC) have recognized that due to the racial disparity in criminal convictions, employer-hiring policies that bar individuals with a criminal conviction often have a disparate impact on people of color, and therefore may be unlawful. See *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1294 (8th Cir. 1975) (affirming that the plaintiff established a prima facie case of discrimination under a disparate impact theory by demonstrating the increased likelihood that a black individual would have a criminal conviction); EQUAL EMP'T OPPORTUNITY COMM'N, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 1 (2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. In *Field v. Orkin*, the court observed that "[i]t has long been recognized that a blanket policy of denying employment to any person having a criminal conviction" is unlawful. *Field v. Orkin Exterminating Co.*, 2001 WL 34368768, at *2 (E.D. Pa. 2001). The Pennsylvania Human Relations Commission, the Commonwealth's civil rights organization, recently drafted proposed the adoption of policy guidance titled "The Disparate Impact Discrimination Implications of a Denial of Employment Based on a Criminal Record." See 39 Pa. Bull. 6845 (Nov. 28, 2009). See generally The Pennsylvania Human Relations Act, 43 PA. CONS. STAT. §§ 951-963 (2011) (prohibiting certain practices of discrimination because of race, etc. and creating the Pennsylvania Human Relations Commission).

¹⁰³ 18 PA. CONS. STAT. §§ 9125(a)-(b).

the position”¹⁰⁴ Further, the Supreme Court of Pennsylvania has noted that CHRIA bars employers from considering arrests not leading to conviction for employment decisions.¹⁰⁵ If an employer uses criminal history record information for hiring purposes, CHRIA requires that the employer notify the unsuccessful applicant in writing.¹⁰⁶ If an employer improperly uses criminal history record information during the hiring process or fails to notify a job applicant in writing, the employer may be subject to administrative sanctions, civil penalties, damages, and attorney’s fees.¹⁰⁷

In addition to state laws like CHRIA that prevent employers from using non-conviction records as a basis for employment decisions, states¹⁰⁸ and cities¹⁰⁹ have introduced additional legislation to limit the impact of criminal history record information on employment. One popular method has been “ban the box” legislation. Generally, “ban the box” laws limit an employer’s ability to review an applicant’s criminal history record information during the application or interview process.¹¹⁰

In the spring of 2011, the Philadelphia City Council adopted the “Fair Criminal Record Screening Standards” in order to regulate how Philadelphia employers use criminal history record information for hiring purposes.¹¹¹ The Philadelphia City Council did so to “assist the successful reintegration of formerly-incarcerated people back into the community by removing barriers to gainful employment,” in turn “enhancing the health and security” of all Philadelphians.¹¹² While the law does not require employers to hire an individual with a conviction record,¹¹³ it does force an employer to review the job applicant on a case-by-case basis instead of automatically excluding from employment all individuals with a conviction. “Th[e] legislation is intended to give the individual with a criminal record the opportunity to be judged on his or her own merit during the submission of the application and at least until the completion of one interview.”¹¹⁴ While it is still too early to see the impact of the law on the employment of individuals with criminal history record information, it has successfully brought the issue of improper screening practices to light in Philadelphia.

¹⁰⁴ *Id.* at § 9125(b).

¹⁰⁵ *See* Cisco, 476 A.2d at 1343.

¹⁰⁶ 18 PA. CONS. STAT. § 9125(c).

¹⁰⁷ 18 PA. CONS. STAT. §§ 9181-9183.

¹⁰⁸ *See, e.g.*, HAW. REV. STAT. § 378-2.5 (applying a ban the box law to both private and public employers); MINN. STAT. § 364.021 (2009) (applying a ban the box law to both private and public employers); Mass. Exec. Order No. 495, January 11, 2008, *available at* <http://www.mass.gov/governor/docs/executive-orders/executive-order-495.pdf>.

¹⁰⁹ *See* THE NAT’L EMP’T LAW PROJECT, BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS 1 (2012), *available at* <http://www.nelp.org/page/-/SCLP/2011/CityandCountyHiringInitiatives.pdf?nocdn=1> (providing a list of cities and counties that have “banned the box”).

¹¹⁰ *See* Rebecca Oyama, Note, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 219-20 (2009).

¹¹¹ Fair Criminal Record Screening Standards, PHILADELPHIA CODE § 9-3500, *supra* note 41.

¹¹² *Id.* at § 9-3501(2)(a) & (b).

¹¹³ *Id.* at § 9-3501(1)(j).

¹¹⁴ *Id.* at § 9-3501(1)(k).

V. EXPUNGEMENT: A REMEDY FOR SOME

Access to employment is the main factor motivating C-REP clients to seek expungement services. Regardless of the current state of the law, client after client reports to C-REP that they have been rejected or terminated from employment because of their conviction or non-conviction data. As stated above, an overwhelming majority of individuals seeking C-REP's services are doing so in order to secure employment. Alarming, C-REP clients allege that employers rarely notify them in writing, as required by law, that they were rejected from a job because of their criminal history record information.¹¹⁵ Instead, they are notified verbally or are not notified at all.¹¹⁶ Therefore, in order to reduce an employer's access to non-conviction data, C-REP petitions the appropriate Court of Common Pleas to expunge and/or redact that data.

In Pennsylvania, criminal history record information is “[i]nformation collected by criminal justice agencies concerning individuals, and arising from the initiation of a criminal proceeding, consisting of identifiable descriptions, dates and notations of arrests, indictments, informations or other formal criminal charges and any dispositions arising therefrom.”¹¹⁷ This publicly available information includes non-conviction data such as arrests not leading to conviction, not guilty verdicts, judgments of acquittal, withdrawn charges, and nolle prosequi cases.¹¹⁸ Pursuant to CHRIA, an individual may petition the Court of Common Pleas to expunge and/or redact certain non-conviction data from their criminal record.¹¹⁹ CHRIA also allows expungement of some conviction information, including some summary offense convictions,¹²⁰ and under limited circumstances, convictions for individuals over seventy years old.¹²¹ The purpose of expungement is “to remove information so that there is no trace or indication that such information existed.”¹²² If this information is expunged and/or redacted, an employer will not be able to use the criminal history record information unlawfully during the hiring process.

CHRIA imposes the burden on the individual to seek an expungement of his or her criminal record, despite the fact that expungements are routinely granted for non-conviction data.¹²³ For example, since November 2010, 98% of C-REP's petitions for expungement have been granted.¹²⁴ The criminal history record information of many individuals contains only non-conviction data, meaning they were arrested one or more times but were never convicted. This is especially true for people of color living in areas where Philadelphia police conduct frequent stop-

¹¹⁵ E-mail from Mike Lee, *supra* note 82.

¹¹⁶ *Id.*

¹¹⁷ 18 PA. CONS. STAT. § 9102.

¹¹⁸ *See id.*

¹¹⁹ *See id.* at § 9122.

¹²⁰ *See id.* at § 9122(a).

¹²¹ *See id.* at § 9122(b) (stating that individuals may also file an expungement petition for conviction data if the individual is 70 years or older and has been free from arrest and prosecution for ten years, or has been dead for three years).

¹²² *Id.* at § 9102.

¹²³ In Pennsylvania, expungement/redaction of criminal history record information is not automatic. *See* 18 PA. CONS. STAT. § 9122.

¹²⁴ Out of the 505 petitions filed in the Philadelphia Court of Common Pleas, only nine have been denied. Internal C-REP Memo, *supra* note 18.

and-frisks.¹²⁵ Most clients that C-REP sees are young black males with multiple arrests that were dismissed without conviction.¹²⁶ Often, individuals will have ten or more arrests not leading to conviction, and relatively few minor convictions.¹²⁷ Despite the fact that so many of these individuals were not convicted after arrest, the charges will remain permanently on their record unless they petition the applicable court to order them to be removed. In 2010, there were 25,720 such non-conviction records created in Philadelphia courts alone.¹²⁸

The costs associated with filing a petition for expungement and/or redaction are often prohibitive for the poor and unemployed who would benefit most from expungement. Expungement costs between \$450 and \$2,000 in Philadelphia,¹²⁹ including \$15.00 per petition for expungement and \$12.50 per petition for redaction.¹³⁰ The fees in other counties are often much higher, sometimes reaching \$100 per petition.¹³¹ An individual must file a separate petition for each arrest and the individual must pay an additional filing fee for each petition filed.¹³² Beyond the costs associated with expungement, the process can take up to a year.¹³³ Finally, due to technological limitations and internal policies, even if the appropriate court orders an individual's record expunged and/or redacted, the AOPC may fail to process the validly issued court order if the individual owes outstanding bail, fines or costs, or if the AOPC owes the individual money.¹³⁴

VI. PROPOSED POLICY SOLUTIONS

While the use of Pennsylvania's expungement law provides many benefits for individuals with criminal records that did not lead to conviction, it is clear that due to the complexity of this issue, a holistic multi-pronged approach is needed to limit the collateral consequences of a criminal record. Solutions should include expanding access to expungements, providing better access to education, and expanding job-training opportunities. Public policies with regard to the use of criminal records should concentrate on reinforcing economic independence. Without such changes it will remain nearly impossible for individuals with criminal records to ever be fully reintegrated into our society.¹³⁵

¹²⁵ See, e.g., Consent Decree at 1, *Bailey v. City of Philadelphia*, *supra* note 56.

¹²⁶ Internal C-REP Memo, *supra* note 18.

¹²⁷ *Id.*

¹²⁸ In 2010, the Philadelphia Municipal Court and Court of Common Pleas withdrew or dismissed 25,720 cases. ADMIN. OFFICE OF PA. COURTS, 2010 CASELOAD STATISTICS, *supra* note 43, at 9, 139.

¹²⁹ E-mail from Mike Lee, *supra* note 82.

¹³⁰ See FIRST JUDICIAL DIST. OF PA., CITIZEN'S GUIDE TO COURT PROCEDURE, COURT OF COMMON PLEAS, TRIAL DIVISION CRIMINAL SECTION 2 (2008), available at http://www.courts.phila.gov/pdf/guides/Citizens_Guide-TD_Criminal.pdf.

¹³¹ For example, it costs \$36.75 to file a petition for expungement in the Lancaster County Court of Common Pleas. See JUDGE HENRY S. KENDERDINE, JR. COURT SELF HELP CTR., HOW TO FILE AN ARD EXPUNGEMENT 4 (2011), available at <http://www.co.lancaster.pa.us/prose/lib/prose/packets/expungement.pdf>.

¹³² E-mail from Mike Lee, *supra* note 82.

¹³³ *Id.*

¹³⁴ E-mail from Sharon Dietrich, Supervising Att'y, Cmty. Legal Servs. of Philadelphia, to author (Mar. 6, 2012) (on file with author).

¹³⁵ See Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 160 (1999).

Non-conviction data should be automatically removed from a criminal record upon disposition and after the exhaustion of the appeal period. In the alternative, because it is unlawful in Pennsylvania to use non-conviction data for employment purposes, non-conviction data should not be made available to non-criminal justice agencies, commercial criminal background screening companies, or the public.

The Administrative Office of Pennsylvania Courts should close the “electronic data” loophole when disseminating criminal history record information to non-criminal justice agencies and individuals. Currently, under CHRIA, prior to disseminating criminal history record information to non-criminal justice agencies and individuals, state and local police agencies must “extract from the record all notations of arrests . . . where: (i) three years have elapsed from the date of the arrest; (ii) no conviction has occurred; and (iii) no proceedings are pending seeking a conviction.”¹³⁶ In contrast, commercial criminal background screening companies are able to purchase “bulk data” directly from the AOPC.¹³⁷ The data currently provided by the AOPC includes all conviction and non-conviction data regardless of the age of the non-conviction data.¹³⁸ In other words, commercial criminal background screening companies, employers, and the public are able to access non-conviction data through the AOPC, but could not access it through the state repository and local police agencies.

Generally, conviction data should be removed from the repositories after the individual has been “crime free” for a certain period. As early as 2001, the U.S. Department of Justice recommended that “criminal history information should be sealed or expunged (purged) when the record no longer serves an important public safety or other public policy interest.”¹³⁹ Specifically, § 9122 of CHRIA¹⁴⁰ should be amended to allow the expungement and/or redaction of conviction data after the individual has been free from convictions for a certain time period: perhaps five years for misdemeanors, and ten years for felonies, similar to the law in New Jersey.¹⁴¹

The Pennsylvania Legislature should review existing statutes which limit the rights of individuals with criminal records in employment, housing, and public benefits in order to determine if they unnecessarily impose severe collateral consequences on individuals who are not jeopardizing public safety.¹⁴² If so, the statutes should be amended to remove any barriers to employment, housing, or public benefits that do exist.

¹³⁶ 18 PA. CONS. STAT. § 9121(b)(2).

¹³⁷ See Requests for Bulk Distribution of Electronic Case Records, 204 PA. CODE § 213.74.

¹³⁸ As discussed, unless an individual files for expungement/redaction pursuant to 18 PA. CONS. STAT. § 9122, the individual’s criminal history record information remains publicly available.

¹³⁹ BUREAU OF JUSTICE STAT., U.S. DEP’T OF JUSTICE, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY, AND CRIMINAL JUSTICE INFORMATION 76 (2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rntfptcj.pdf>.

¹⁴⁰ Criminal History Record Information Act, 18 PA. CONS. STAT. §§ 9101-9183 (2012).

¹⁴¹ N.J. STAT. ANN. § 2C:52-2 (West 2012).

¹⁴² See Letter from Eric H. Holder, Jr., U.S. Att’y Gen., U.S. Dep’t of Justice, to State Att’y Gens. (Apr. 18, 2011), available at http://www.nationalreentryresourcecenter.org/documents/0000/1088/Reentry_Council_AG_Letter.pdf.