Joint Statement of Commissioners Gail Heriot and Peter N. Kirsanow

This report contains some useful information about the collateral consequences of a criminal conviction—defined as the "sanctions, restrictions, or disqualifications that stem from a person's criminal history." But it also suffers from some significant flaws, which is why we are unable to support its publication in its present form.[1] We agree with parts of it, but not with others.[2]

We would classify most of these collateral consequences as falling into four broad categories: (1) those intended to punish; (2) those aimed at the fair distribution of a scarce resource; (3) those intended to protect third parties; and (4) those aimed at stifling competition. Many types of collateral consequences fall into more than one category. Each of these categories deserves a comment here. (We will confine our discussion of ex-offenders' voting rights to a brief word at the end of this Joint Statement, even though the longest portion of the report is devoted to that issue.)

But first, one overarching problem is that at times the report seems to treat a criminal conviction as something that happens almost randomly. For example, the report states, "Because of the significant stigma attached to a criminal conviction, an employer could view an applicant with a criminal record as untrustworthy or lacking in 'job readiness,' which is generally perceived as a requisite qualification for both skilled and unskilled positions."[3] The problem is that employers view applicants with criminal records this way not merely because of some artificial stigma attached to criminal conviction, but because people with criminal records really are, on average, more likely than people without such records to engage in misconduct. Obviously, this generalization is untrue in individual cases, and we would all do well to remember to treat individuals as individuals. But ignoring this group difference will lead to stunningly bad policy.

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[1] One of us (Heriot) voted no at the telephone meeting at which the report was considered. The other (Kirsanow) arranged for it to be announced at the telephone meeting that he would have voted no if he had been able to attend. In a separate statement, one of us (Kirsanow) discusses the report's recommendation urging the Dep't of Justice to issue a guidance on collateral consequences. He points out that the recommendation failed to identify the necessary legal authority for such a guidance. The Dep't of Justice is not a roving Commission to advise states on legal or policy matters; it acts when Congress, through legislation, gives it the authority to act. Commissioner Heriot agrees with this point and with all or most of the rest of the statement. Only time constraints prevented her from joining in those positions at the time the Commissioners exchanged their statements in the first round.

[2] Has the scope of the substantive criminal law—particularly federal criminal law—grown too big? Certainly many scholars and authors have made the case that it has. See, e.g., Harvey Silverglate, Three Felonies a Day: How the Feds Target the Innocent (2011); Paul Larkin, The Extent of America's Overcriminalization Problem, May 9, 2014, available at https://www.heritage.org/report/the-extent-americas-overcriminalization-problem. *See* also George Will, "When Everything is a Crime," The Washington Post, April 8, 2015, available at https://www.washingtonpost.com/opinions/when-everything-is-a-crime/2015/04/08/1929ab88-dd43-11e4-be40-566e2653afe5_story.html?utm_term=.2d9dac1344ef. This is an important question that is closely related to the central question of this report. Excessive imposition of collateral consequences is more serious if the scope of the criminal law itself is too big. But because it is distinct from this report's main question, we will not discuss it further. It also goes well beyond the charge of this Commission.

[3] Report at 29.

We won't solve the problem of re-integrating ex-offenders into the economy by being (or pretending to be) naïve. While it is certainly true that formerly incarcerated individuals sometimes struggle as a result of an unfair collateral consequence, sometimes the struggle is the result of the characteristics that drove them to commit crimes in the first place. Any serious effort to assess the benefits and costs of collateral consequences cannot ignore that.[4]

This report focuses mainly on problems with punitive collateral consequences—those done with the purpose of imposing punishment on ex-offenders beyond the term of their prison sentence. We agree that some particular punitive collateral consequences can be too harsh and hence counterproductive.

On the other hand, the zeitgeist seems to be that Americans have over-incarcerated offenders and that some de-incarceration should take place.[5] Similarly, it is frequently argued that monetary fines imposed on individuals who cannot afford to pay them are counterproductive and only result in anxiety and desperation. Indeed, the Commission's majority has elsewhere made those arguments.[6] We agree that each of these methods of punishment has its drawbacks. Incarceration is expensive and breaks up families. Some people are too poor to pay fees and fines, while others are too rich for paying a fine to feel like much of a punishment. Yet there have to be *some* negative consequences for law breaking; otherwise many people will eventually conclude that there is no point in following the law.

Punitive collateral consequences are admittedly an imperfect strategy for doing that. Dangling carrots in front of individuals for post-release good behavior—such as restoration of voting rights after a specified period—may also give some ex-offenders incentives to get their lives back on track. Something is necessary.

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[4] Another way in which the Commission seems unwilling to confront the arguments on both sides of these issues is the use of hyperbolic statements in the Commissioner Statements. They call certain collateral consequences "non-sensical," or based on "twisted logic," and argue that these consequences "make no sense," that they "communicate government disdain for [ex-offender's] worth as people," and that they "affront[] the humanity of people with criminal convictions." *See* Statement of Commissioner David Kladney at 142; Statement of Chair Catherine E. Lhamon at 139. This is not useful.

[5] Commissioner Kladney points that the United States incarcerates at much higher rates than most other countries. This is in part because at the same time prison populations were expanding, the number of psychiatric inpatients was declining—from a high of over 550,000 in 1950 to around 30,000 by the 1990s. Megan Testa and Sara G. West, *Civil Commitment in the United States*, 7 Psychiatry (Edgmont) 30, 33 (Oct. 2010). As a result, many of those who in an earlier day would have been institutionalized in psychiatric hospitals wound up in prisons instead or on the street. Estimates of exactly how many vary widely. Seth J. Prins, *The Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review*, 65 Psychiatr. Serv. 862 (2014). But today's incarceration rates are surely influenced by the near absence of psychiatric inpatients in the American systems. This makes incarceration rate comparisons with other countries where psychiatric inpatients are more common unreliable and flawed. I wish we all had a better sense of international comparisons.

[6] U.S. Commission on Civil Rights, *Targeted Fees and Fines Against Communities of Color*, 2017; "U.S. Commission on Civil Rights Urges Congress to Prioritize Civil Rights Oversight and Legislation," 2018, available at https://www.usccr.gov/press/2018/12-07-Priorities-for-116th-Congress.pdf (criticizing the use of mandatory minimum prison sentences.)

It is sometimes said that an ex-offender "has paid his debt to society" upon release from prison and that any further punishment is thus wrong. In one sense, this is simply circular logic. If the law imposes a particular prison sentence for a particular crime *and* in addition requires him to perform certain acts (such as community service or the payment of restitution) or deprives him of the possibility of particular benefits, then that is the debt that democratic processes have determined that he must pay to society and not some other.[7] It isn't over till it's over. We are mindful of the desirability of closure at some point. But given the strong desire among many Americans to de-emphasize long-term incarceration, we are disappointed that more effort hasn't gone into coming up with workable incentives and sanctions that apply *after* an offender leaves prison, thus making it possible to shorten actual prison sentences.

The report also fails to grapple with what we term distributive fairness collateral consequences. These are efforts to allocate a limited resource. Take, for example, financial aid for education. The Department of Education presumably has a limited supply of money to distribute for this purpose. It has to come up with rules for determining who gets it and who doesn't. It isn't obvious to all how that "pot" should be divided. Is it fair that ex-offenders should get a share, if that means that there will be fewer funds available for other prospective applicants who have been more law-abiding? Isn't it at least arguably true that the law-abiding applicants—including the many who are poor or have overcome other forms of disadvantage—are more deserving? On the other hand, is it fair if ex-offenders are shut out of educational opportunities that could help their rehabilitation? Add this to the considerations: Would the program be as popular if the average taxpayer thought that benefits were going to ex-offenders? Might there be efforts to scale it back generally or cancel it altogether?[8] Alas, there are no simple answers to those questions and no easy way to balance those competing considerations. They are inherently political decisions.

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[7] One possible objection to this argument: some offenders may agree to a plea bargain thinking that their "debt" will have been paid once their sentence is served, without realizing that they will face collateral consequences afterwards. Had they known more about collateral consequences, they might have held out for a lower sentence or agreed to go to trial. Commissioner Kladney points out this problem in his Statement when he states, "I am struck by the *utter lack* of requirements that criminal defendants have any notice of these consequences." [Italics supplied.] Oddly, he seems to contradict himself in the final sentence of the same paragraph when he writes, "It also behooves attorneys to counsel their clients on collateral consequences, even beyond *the bare minimum currently required*." [Italics supplied.] If there is a "bare minimum [of notice] currently required, then there can't be "an utter lack of requirements."

We are nevertheless sympathetic to the need to warn criminal defendants in some way about collateral consequences up front. Commissioner Kladney is right that attorneys should expend more effort to ensure that their clients are adequately informed. Still, a fundamental problem here is that it is impossible for defendants to understand completely the ramifications of entering into a plea deal. Criminal defendants aren't ordinarily warned, for example, about the harshness of life in prison. They don't know how a conviction will affect their relationships with family and friends. We fear some of the outrage about lack of transparency regarding collateral consequences is selective.

[8] See, *e.g.*, Emily Badger and Margot Sanger-Katz, "Who's Able-Bodied Anyway? The 400 Year History of How We Talk About the Deserving vs. the Undeserving Poor," The New York Times, February 3, 2018, available at https://www.nytimes.com/2018/02/03/upshot/medicaid-able-bodied-poor-politics.html ("Free riders threaten society—they undermine the basis of altruism," said Robert Rector, a senior research fellow at the conservative Heritage Foundation, who helped write a work requirement into welfare reform in the 1990s. That's not a liberal or

The same dilemma exists with regard to dividing up other limited resources discussed in this report, like public housing, which frequently has waiting lists.[9] Prospective applicants who have obeyed the laws have a sympathetic argument here that they deserve a greater share of these resources. Yet this dilemma is barely acknowledged in the report.[10] We wish that it had engaged these trade-offs more thoughtfully.

One thought that we can contribute to the discussion is that we prefer that decisions about how to distribute limited resources be decentralized. If a single decisionmaker like HUD or the Department of Education dominates the market for public housing or for educational financial aid, then ex-offenders will be either in a very happy or very unhappy position. But if there are multiple entities—such as state governments, local governments, and private charities—sponsoring such benefits, then it is less likely that ex-offenders will be unfairly treated.

The report does a better job addressing what we call third-party-protection collateral consequences—those that are intended to ensure the safety and security of some third party from ex-offenders' misconduct. The Findings, for example, explicitly acknowledge "Some collateral consequences, such as limitations on working with children for people convicted of particular dangerous crimes, are enacted for valid public safety reasons." Rules that restrict firearm ownership and rules that prohibit individuals convicted of financial crimes from working with

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conservative belief, he argues, but a human one. "People want to be compassionate, but they don't want to be taken advantage of.")

[9] Some of the discussion on lifetime bans on public benefits for individuals with drug convictions tries to argue that these bans disproportionately harm women. Report at 72-73. The problem is that prisoners are overwhelmingly male (the number 93% is quoted elsewhere in the report), so the report's efforts to cast these bans as having an unfair bias against women don't quite work. The various statistics cited in the report—e.g., that female offenders are somewhat more likely to have been incarcerated for drugs than male offenders and that women are more likely to qualify for certain public benefits in the absence of a drug conviction—aren't mathematically enough to overcome the fact that prisoners are overwhelmingly male.

We are a bit troubled—and perhaps a bit amused—that our staff took a topic (the collateral consequences of a criminal conviction) that overwhelmingly affects men, downplayed the significance of this disproportionality, and somehow managed to instead argue (incorrectly) that certain collateral consequences have a disparate impact on women. It's a sign of the times: *World ends tonight, women and minorities to suffer most.*

The report also states, "On average, women also earn less money than men for the same amount of work." Report at 72. But the Dep't of Labor statistic cited compares all female full-time wage and salary workers (full time defined as "those who usually work 35 hours or more per week at their sole or principal job") to all male full time wage and salary workers. It does not control for the number of hours worked above 35. Much of that gap simply reflects that female full-time workers tend to work fewer hours than male full-time workers. Women who work between 35-39 hours per week actually earn somewhat more than men who work 35-39 hours per week. *See* Diana Furchtgott-Roth, Testimony on the Gender Pay Gap, Testimony Before the Joint Economic Committee, September 28, 2010, available at https://www.jec.senate.gov/public/_cache/files/2a1f8ad4-f649-4ad3-a742-268d946962db/furchtgott-roth-testimony.pdf. Moreover, even if it were true that "[o]n average, women also earn less money for the same amount of work," there is no evidence that applies to female ex-offenders vs. male ex-offenders. On the contrary, since male offenders are more likely than female offenders to have committed a violent crime, they may find it harder to secure well-paying jobs or, indeed, any jobs at all.

[10] It is not discussed, for example, in "Barriers to Subsidized Housing for Individuals with Criminal Records" at pp. 56-63, in "The Disproportionate Impact of Lifetime Drug Bans for Public Benefits at 70-72, or "Barriers to Financial Aid for Higher Education" at 74-77.

money are generally intended to fall into that category, as are those that prevent persons convicted of child abuse or endangerment from working with children.[11]

On the other hand, the report sometimes fails to address serious third-party-protection collateral consequences arguments. The section on public housing, for example, fails to note that public housing is often home to families with young children, the elderly, people with disabilities, and that many cities have a reputation for failing to protect these and other particularly vulnerable persons living there. In Chicago, in 1981, matters had deteriorated to the point that the city's mayor, Jane Byrne, moved into the Cabrini-Green housing project on the near North Side for 20 days—a move that finally forced the city police to start taking crime there seriously.[12] Again, we are sympathetic to the argument that ex-offenders have to live somewhere. But is it fair to families who are law-abiding but poor to have to share public housing with individuals who, as a group, are more likely to threaten their safety? Alternatively, might it be good policy, at least in many cases, to create a system in which ex-offenders are encouraged to live in halfway houses or with family members who live in non-public housing rather than to attempt to qualify for public housing on their own? These questions at least deserved an airing in this report.

We are in stronger agreement with the report's discussion of anti-competition collateral consequences, such as occupational licensing laws.[13] The National Council of State Legislatures

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[11] See, *e.g.*, Statement of Margaret Love, Executive Director of the Collateral Consequences Resource Center, at 3: "Some serve an important and legitimate public safety or regulatory function, such as keeping firearms out of the hands of violent offenders, protecting children or the elderly from persons with a history of abuse, or barring people convicted of fraud from positions of public trust. Others are directly related to a specific type of crime, such as registration requirements for sex offenders, driver's license restrictions for those convicted of serious traffic offenses, or debarment of those convicted of procurement fraud."

[12] "When a Mayor Moved to the Cabrini-Green Projects," National Public Radio, August 30, 2014, available at https://www.npr.org/2014/08/30/344477127/when-the-mayor-moved-to-the-cabrini-green-projects.

[13] The fact that we have concerns about the number of licensing laws that exclude ex-offenders does not mean we approve of forcing employers to hire ex-offenders who would prefer not to by threatening them with disparate impact liability under Title VII. For an extended treatment of our views on that subject, *see* U.S. Commission on Civil Rights, Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy at 308 (Statement of Commissioner Gail Heriot), available at http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/03/EEOC_final_2013-2.pdf; Id. at 289 (Statement of Commissioner Peter Kirsanow), available at http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/04/EEOC_final_2013.pdf. We prefer the use of modest tax incentives in order to encourage the hiring of ex-offenders, which allows employers to opt in rather than being forced in.

We note that there is considerable empirical evidence that so-called ban-the-box laws and policies operate to the disadvantage of African American males who have clean records. Once employers are prohibited or strongly discouraged from checking into the criminal records of job applicants, they often end up hiring fewer African American men rather than more. See, *e.g.*, Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q. J. Econ. 191 (2018); Jennifer L. Doleac & Benjamin Hansen, *The Unintended Consequences of "Ban the Box": Statistical Discrimination and Employment Outcomes When Criminal Histories are Hidden* (August 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2812811.

In discussing studies like these, this Report states "Researchers have hypothesized that when criminal records are unavailable, 'employers use race as a proxy for criminal records.' The findings suggest that Ban the Box policies expose the pervasiveness of racial discrimination in hiring, while also possibly excluding more African-Americans from the job market." Report at 49. The truth is closer to the opposite. Ban the Box policies don't "expose the

has estimated that over the last 60 years, the percentage of jobs requiring an occupational license has risen from 1 in 20 to 1 in 4.[14] Some of these licensing requirements undoubtedly serve genuine health and safety purposes. Other licensing regulations ensure that senior professionals have an incentive to give appropriate training to apprentices in their field and that apprentices have an incentive to agree to that training.[15] But established insiders can also use licensing requirements as a way of keeping out newcomers who might become their competitors.[16] As one U.S. Court of

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pervasiveness of racial discrimination in hiring." Instead, they show that employers prefer to use indicators—like a clean criminal record—to predict which job applicants will make the most reliable employees and which will not. Only when they are prevented from using such indicators do they resort to ham-fisted statistical indicators. Ban the Box policies thus create an incentive for employers to engage in racial discrimination that wouldn't otherwise exist.
Two things may be of note here: First, (and this bears repeating over and over), Title VII was not intended to prohibit employers from adopting job qualifications simply because they have a disparate impact on some protected group. As Senators Clifford Case (R-N.J.) and Joseph Clark (D-Pa.), the bill's co-managers on the Senate floor, emphasized in their highly influential, bipartisan, interpretative memorandum: Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications." "Indeed," they wrote, "the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color."
Second, it is not true that the only explanation for the harm to African-American men that appears to result from Ban-the-Box laws and policies is that employers use race as a proxy for criminal records. Suppose for example, an employer had been happy to hire applicants who did not have a high school diploma as full-time prior to the passage of a Ban-the-Box law. After that law's passage she decides to revamp her hiring practices entirely and advertise for part-time college students at a local university (in addition to the full-time workers she had been hiring), because she believes (rightly or wrongly) that college students are less likely to have serious criminal records. Such a practice could well have a racial disparate impact, but it would not be a case of using race as a proxy for a clean record. Rather it would be a case of using college status as a proxy.

[14] Suzanne Hultin, The National Occupational Licensing Database, available at http://www.ncsl.org/research/labor-and-employment/occupational-licensing-statute-database.aspx.

[15] *See* Gail Heriot, "Apprenticeships: Useful Alternatives, Tough to Implement," Cato Institute Policy Analysis No. 805, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2877970.

[16] In *Sensational Smiles L.L.C. v. Mullen*, 793 F.3d 281 (2d Cir. 2015) cert. denied, 136 S. Ct. 1160 (2016), fifteen public choice economics scholars, including Nobel prize winner Vernon L. Smith, filed an amicus curiae brief urging the Supreme Court to grant the petition for certiorari. Although the petition was ultimately denied, the brief contained a useful and succinct description of the problem to which we refer:

> People typically assume that governmental regulations are 'unbiased and conscientious' efforts to advance the 'public interest.' *See* John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 Antitrust L.J. 1075, 1075 (2005); 1 William F. Shughart II, *Regulation and Antitrust, in The Encyclopedia of Public Choice* 263, 263-64 (Charles K. Rowley & Friedrich Schneider eds., 2004); William F. Shughart II & Diana W. Thomas, *Regulatory Rent Seeking, in Companion to the Political Economy of Rent Seeking* 169 (Roger G. Congleton & Arye L. Hillman eds., 2015). But among many economists, that assumption is largely regarded as false, as experience has demonstrated that governmental regulations often favor special interest groups to the detriment of the public. The evidence for this conclusion is supplied by 'public choice economics,' a branch of economics that applies economic theory to study the causes and effects of government actions. Public choice economics has been widely and successfully used to explain and predict the forces that lead to the enactment of anticompetitive regulations…. Public choice economics has been 'almost universally accepted' since the mid-1980s as explaining much economic regulation. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 n.6 (1986) (citing Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984)).
> Research from public choice economics has concluded that special interest groups have significant incentives to use the political and regulatory process to further their own financial interests, and

Appeals judge memorably put it, "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."[17]

West Virginia requires that would-be "waxing specialists" and "shampoo assistants" be able to demonstrate their "good moral character" to a government board in order to practice these trades.[18] Until recently, in Texas a drug conviction (no matter how old) automatically prevented one from becoming a licensed well driller or water well pump installer.[19] Are rules like these really best understood as primarily intended to keep the public safe from former criminals? We have our doubts.[20]

> that legislators and regulators often have incentives to respond to reward the special interest groups. Thus, special interest groups are expected to mobilize to convince politicians and regulators to implement regulations that benefit the interest groups' members or to block the repeal of these regulations. These problems are particularly acute when self-interested economic actors—such as the licensed dentists in this case—are given the power to influence the rules by which they are governed. In these situations, public choice theory predicts that they will behave as self-interested private actors and act to benefit their own members, rather than as stewards of the public interest. *Cf. North Carolina State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 11112 (2015).
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> A particularly insidious form of regulation favored by special interest groups is one that, in effect, operates to insulate a special interest group from competition… Abundant evidence demonstrates that, over the past several decades, interest groups have mobilized to protect themselves from competition by expanding the scope of existing occupational licensing regimes or implementing such regimes in industries where it was previously thought unnecessary. The evidence demonstrates that these exclusionary efforts have been driven overwhelmingly by the special interest groups themselves, rather than by consumer complaints or evidence of consumer harm caused by non-licensed competitors.

Brief of Public Choice Economic Scholars as Amici Curiae in Support of Petitioner at 5-6, in Sensational Smiles L.L.C. v. Mullen, No. 15-507 (filed Nov. 18, 2015), available at https://ij.org/wp-content/uploads/2011/11/ct-teeth-whitening-brief-of-public-choice-economics-scholars-as-amici-curiae-in-support-of-petitioner-11-18-2015.pdf. *See* also *Craigmiles v. Giles*, 312 F. 3d 220, 225 ("The weakness of Tennessee's proffered explanations indicates that the 1972 amendment adding the retail sale of funeral merchandise to the definition of funeral directing was nothing more than an attempt to prevent economic competition. Indeed, Tennessee's justifications for the 1972 amendment come close to striking us with 'the force of a five-week-old, unrefrigerated dead fish'"); *St. Joseph Abbey v. Castille*, 712 F. 3d 215 (5th Cir. 2013) ("The FTC determined that it could not rely on state funeral licensing boards to curb such [anti-competitive] practices because the state boards were 'dominated by funeral directors.' The funeral directors had organized themselves into industry groups, which lobbied state legislatures and made practices such as a refusal to disclose prices part of their professional 'ethics' code").

[17] *Powers v. Harris*, 379 F.2d 1208, 1221 (10th Cir. 2004)(Tacha, J. for the panel).

[18] West Virginia Code 30-27 et seq.

[19] Texas Public Policy Foundation Policy Perspective, Working with Conviction: Criminal Offenses as Barriers to Entering Licensed Occupations in Texas, "https://files.texaspolicy.com/uploads/2018/08/16092520/2007-11-PP28-licensing-ml.pdf. Because of broader efforts at licensing reform—*see* Jonathan Zalewski, "On Occupational Licensing, Texas is Once Again the Lodestar State for Legal Reforms," February 11, 2019, available at https://www.heritage.org/crime-and-justice/commentary/occupational-licensing-texas-again-the-lodestar-state-legal-reforms—now the licensing board merely considers past criminal convictions as part of its process.

[20] We do disagree with the report's complaints about lack of uniformity in licensing regulations. We agree that if a state has a particularly unusual rule that seems badly crafted to achieve any public safety purpose, it is likely that public safety is not the rule's actual purpose. The Louisiana rules requiring occupational licensing for florists, challenged by the Institute for Justice, are a typical example. See, *e.g.*, *Peters v. Odom*, Appellants' Brief, available

Lastly, we take up the issue of ex-offender's voting rights—which has become an extremely hot issue in the last few years.

Curiously enough, it is the issue to which the report devotes the largest number of pages.[21] Yet limitations on the ability to vote are hardly the greatest challenge faced by ex-offenders. A job and a place to live are far more important. One might even say that the inability to vote is their least important challenge. Unemployed ex-offenders frequently wind up back in prison; those who cannot find a place to live can wind up on the streets.

In discussing the issue, the report sometimes goes off track. For example, it complains that prison gerrymandering is a further collateral consequence of incarceration,[22] despite the lack of direct effect on individual prisoners.

The report argues that "denying this right to even a 'subset of the population' jeopardizes democracy for the entire population," and that "the right to vote is the 'essence of a democratic society, and *any* [italics added] restrictions on that right strike at the heart of representative government." While the right to vote is, of course, precious, the report's language glosses over the fact that minors and the mentally ill generally cannot vote and that democracy nonetheless appears basically unaffected. Moreover, the Constitution's 14th Amendment specifically acknowledges the ability of states to limit felons from voting.[23]

What explains this overemphasis? Disfranchised ex-offenders are widely thought to be a Democratic-leaning group.[24] The Commission has six members who were appointed by Democrats. We note that at least two other report topics approved by the current majority have recommended broadening access to the ballot, not coincidentally in ways that looked likely to

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at https://ij.org/wp-content/uploads/2003/12/Appellants-Brief-la-florists.pdf. On the other hand, we see no reason why licensing requirements must be uniform across all 50 states. In some cases, there may be good reasons for some states to be stricter than others. In other cases, we think that states can be "laboratories of democracy" and can teach each other by example what types of licensing rules work best.

[21] It devotes 35 pages to voting, but just 25 to employment issues and 16 to housing.

[22] Report at 114-115.

[23] Earlier in history, convicted felons were usually executed, so there was no need for a policy that dealt with the question of whether they should vote. But in the 19th century a number of states had to deal with the question of whether the increasing number of convicted felons who had been released from prison should be able to vote. On the eve of the Civil War, some two dozen states had either constitutional provisions or statutes that prohibited ex-felons from voting. Because most states also prohibited blacks from voting (Maine, New Hampshire, Vermont, and Wisconsin being exceptions) at that time, it is extremely unlikely that felon disfranchisement was motivated by race. *See* Christopher Uggen and Jeff Manza, Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States, 67 American Sociological Rev. 777, 781 (2002).

[24] See, *e.g.*, Christopher Uggen and Jeff Manza, Denying Felons and Ex-Felons the Vote: The Political Consequences, Past and Future, Institute for Policy Research, Northwestern University (February 2002), available at https://www.ipr.northwestern.edu/publications/docs/policybriefs/manzabrief.pdf (finding that had disenfrachised felons been allowed to vote in a few key states, the Senate might have stayed Democratic from 1986 through 2002 and that Al Gore might have won the Electoral College in 2000.)

benefit the Democratic Party.[25] It is hard to avoid the possibility that the majority is again driven by partisanship here.

[25] See, *e.g.*, U.S. Commission on Civil Rights, An Assessment of Minority Voting Rights Access in the United States (2018), available at https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf; U.S. Commission on Civil Rights, Increasing Compliance with Section 7 of the National Voting Rights Act (2016), available at https://www.usccr.gov/pubs/docs/NVRA-09-07-16.pdf.