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### Judicial Challenges to the Collateral Impact of Criminal Convictions: Is True Change in the Offing?

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# RESPONSE

## JUDICIAL CHALLENGES TO THE COLLATERAL IMPACT OF CRIMINAL CONVICTIONS: IS TRUE CHANGE IN THE OFFING?

NORA V. DEMLEITNER\*

In response to  
Jason A. Cade, *Return of the JRAD*  
90 N.Y.U. L. REV. ONLINE 36 (2015)

*Judicial opposition to disproportionate sentences and the long-term impact of criminal records is growing, at least in the Eastern District of New York. With the proliferation and harshness of collateral consequences and the hurdles in overcoming a criminal record, judges have asked for greater proportionality and improved chances for past offenders to get a fresh start. The combined impact of punitiveness and a criminal record is not only debilitating to the individual but also to their families and communities.*

*A criminal case against a noncitizen who will be subject to deportation and a decade-long ban on reentry and three different requests for expungement will demonstrate how three federal judges struggled with the long-term effects of the current sentencing and collateral consequences regime. These cases exemplify both judicial creativity and judicial impotence, as the courts have to call upon the support of other actors within the executive and legislative branches for change, in these individual cases and systemically.*

*These judicial critics of the current approach argue within an emerging normative framework that is coming to dominate the societal discourse on punishment. Increasingly some offenders are deemed “worthy” of receiving our assistance in reintegration. They are generally nonviolent first offenders, those with an unblemished record save for the offense of conviction, those who have been gainfully employed or desperately want to work, and those who have cared for their children. They present no danger to the community, and their continued punishment may negatively impact them,*

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\* Copyright © 2016 by Nora V. Demleitner, Roy L. Steinheimer Jr. Professor of Law, Washington and Lee University School of Law; Boden Visiting Professor, Marquette University School of Law. I may be reached at demleitn@wlu.edu. I commend Professor Jason Cade on the thought-provoking proposal outlined in *Return of the JRAD* and am deeply grateful to him for suggesting that I contribute to this online feature. My appreciation for outstanding research assistance goes to John Eller, Research Attorney, and to Linda Newell, Public Services Assistant, Washington and Lee University School of Law. The library at the Max Planck Institute for Foreign and International Criminal Law also facilitated my research. I thank the Frances Lewis Law Center at Washington and Lee University School of Law for its financial support and the German Academic Exchange Service for providing the foundation for this project.

their surroundings, and ultimately the country. On the other hand, those labeled violent or sex offenders or terrorists are being considered dangerous, unredeemable, and deserving of the harshness the criminal justice system has brought to bear on them. The specific categorization of offenses, the definitions of terms, and the categorization of offenders remain fluid, contingent, and subject to constant revision. Still, these judicial efforts expand on the incipient efforts at full reintegration of some of those with a criminal record. Whether their challenges will resonate with their colleagues and in other branches of government remains to be seen.

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## INTRODUCTION

Jason Cade's essay *Return of the JRAD* uses a sentencing decision issued by Judge Jack Weinstein, an icon of the federal judiciary, as its starting point.<sup>1</sup> Judge Weinstein noted in his memorandum opinion that he will consider the negative impact of likely deportation on the defendant in his sentencing decisions, as permitted under Second Circuit case law.<sup>2</sup>

<sup>1</sup> Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE 36, 36 (2015). The decision is *United States v. Aguilar*, 133 F. Supp. 3d 468 (E.D.N.Y. 2015). On Judge Weinstein, see for example, Jeffrey B. Morris, *Jack Weinstein: Judicial Strategist*, 64 DEPAUL L. REV. 279 (2015).

<sup>2</sup> See *United States v. Chong*, 13-CR-570, 2014 WL 4773978, at \*1, \*3 (E.D.N.Y. Sept. 24, 2014) (noting that the Second Circuit relatively recently overturned precedent to permit district court judges to factor deportation into sentencing decisions, while a few other circuits still prohibit such consideration). Because of the harshness of their nature, deportations are considered to be a "particularly severe penalty." See *Padilla v. Kentucky*, 559 U.S. 356, 360, 365 (2010) (observing that "deportation is a particularly severe penalty" and that, in light of substantial legislative changes, "[t]he drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes") (citations omitted) (internal quotation marks omitted); see also Angela M. Banks, *Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1291-96 (2013) (detailing negative consequences of deportation for deportees, their families, and the United States). However, there is no principled reason not to factor other collateral sanctions into the overall sentence or to impose them as separate sanctions. See, e.g., Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 755-56 (2000) (suggesting that U.S. states adopt a modified version of the German

Going forward, he will also make it his practice to issue a “non-deportation” recommendation to the immigration court “[w]here credible evidence has been proffered demonstrating that deportation is likely to unreasonably traumatize United States-born children of a deportable criminal defendant.”<sup>3</sup> That recommendation, largely legally irrelevant, moves Professor Cade to call for a “return of the JRAD,” a formerly binding judicial recommendation against deportation, which allowed the sentencing judge to mandate that no deportation occur. In the days of robust anti-discretion, anti-judicial sentiment, and fervent support for determinative and even mandatory sentencing, Congress abolished the JRAD while over time expanding grounds for criminal deportation.<sup>4</sup>

Judge Weinstein’s decision highlights the severity of the immigration scheme. Indeed, harshness underlies much of the U.S. criminal justice system and the entire collateral sanctions regime, of which deportations are just one, though perhaps the most debilitating sanction. Collateral consequences restrict the civil, political, and economic rights of those with a criminal record.<sup>5</sup> Often they befall a defendant automatically upon conviction, sometimes unbeknownst to the judge, the prosecutor, the defendant’s lawyer, and the defendant.<sup>6</sup> Many of them last well beyond the

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disenfranchisement law which makes denial of the right to vote a separate sanction to be imposed by the judge at sentencing upon commission of a small select group of offenses); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 154 (1999) [hereinafter Demleitner, *Preventing Internal Exile*] (recommending that collateral sanctions be imposed openly in court as part of a criminal justice sanction).

<sup>3</sup> *Aguilar*, 133 F. Supp. 3d at 470–71. The Judge also recommends work release “where the defendant held a full-time job prior to his arrest.” *Id.* at 471; see also *infra* Section II.C (noting the relevance of work record, work ethic, and having children).

<sup>4</sup> During that time Congress implemented the federal sentencing guidelines, expanded mandatory minimum sanctions, augmented the panoply of collateral sanctions, and increased criminal grounds for mandatory deportation. See, e.g., Demleitner, *Preventing Internal Exile*, *supra* note 2 (discussing the history of collateral sanctions and consequences); Daniel Kanstrom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C.L. REV. 771, 772 (2000) (examining the impact of expansion of criminal deportation grounds); Evan Bernick & Paul J. Larkin, Jr., *Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms*, LEGAL MEMORANDUM (Heritage Found., Washington, D.C.), Feb. 10, 2014, at 1, 2, [http://thf\\_media.s3.amazonaws.com/2014/pdf/LM114.pdf](http://thf_media.s3.amazonaws.com/2014/pdf/LM114.pdf) (discussing the modern history of mandatory minimum sentences).

<sup>5</sup> See TASK FORCE ON COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE (3d ed. 2004), [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_standards\\_collateralsanctionwithcommentary.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_standards_collateralsanctionwithcommentary.authcheckdam.pdf) [hereinafter ABA STANDARDS ON COLLATERAL SANCTIONS] (categorizing collateral sanctions and addressing them individually).

<sup>6</sup> *Project Description*, ABA NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <http://www.abacollateralconsequences.org/description/> (last visited July 23, 2016) (“[C]ollateral consequences are scattered throughout the codebooks and frequently unknown even

defendant's release from the supervision of the criminal justice system itself.<sup>7</sup> In addition to formal collateral sanctions, convictions tend to have lifelong ramifications.<sup>8</sup> These are often referred to as disqualifications or, more generally, as collateral consequences.<sup>9</sup> While collateral sanctions flow directly from a criminal conviction because of state action, collateral consequences result indirectly.<sup>10</sup> The latter may stem from discretionary governmental action or the decisions of licensing bodies or private actors, such as landlords or employers.<sup>11</sup>

Two of Judge Weinstein's fellow judges in the Eastern District of New York recently dealt with the long-term impact of criminal records on individuals. In *Doe v. United States (Doe I)*,<sup>12</sup> Judge Gleeson granted an individual's request to have her old federal fraud conviction expunged because of the negative impact it had on her ability to get and retain employment.<sup>13</sup> Even though Judge Gleeson acknowledged that employers may act rationally when letting a home health aide go after learning about

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to those responsible for their administration and enforcement.”); see also ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 5, at 21, 25–26 (adopting standards that require the legislative collection and setting out of collateral sanctions and procedural notification of defendant prior to judicial acceptance of guilty plea).

<sup>7</sup> Removal carries with it a years-long exclusion from the United States, depending on the circumstances of the removal. See, e.g., POST-DEPORTATION HUMAN RIGHTS PROJECT, CTR. FOR HUMAN RIGHTS AND INT'L JUSTICE AT BOS. COLL., RETURNING TO THE UNITED STATES AFTER DEPORTATION: A GUIDE TO ASSESS YOUR ELIGIBILITY 8 (2014) (outlining deportation grounds and attendant exclusion periods). In some states, denial of the franchise for certain criminal convictions can last a lifetime. See, e.g., THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 1 (2016), <http://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf> (summarizing state felony disenfranchisement restrictions, including two that disenfranchise permanently for certain felony offenses).

<sup>8</sup> See Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, 25 CRIM. JUST. 21, 31 (2010) (arguing for the expansion of a *Padilla*-like duty on defense counsel to “advise clients about at least some reasonably foreseeable, important legal consequences that are triggered by the fact of conviction” because of their long-term, debilitating impact). See generally JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 8 (2015) (asking whether the “lifetime forfeitures, disqualifications, and ineligibilities imposed on persons with criminal records” can be justified).

<sup>9</sup> ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 5, at 15 (distinguishing definitionally between “collateral sanctions” and “discretionary disqualifications”). Commentators frequently use the term “collateral consequences” broadly to describe all negative effects on a criminal offender. See *id.* at 7 n.2 (“The term ‘collateral consequences’ . . . includes both those consequences that occur by operation of law at the time of conviction . . . and those that occur as a result of some subsequent intervening event or discretionary decision . . .”).

<sup>10</sup> See *id.* at 7 n.2 (“In criminal justice literature, the term ‘collateral consequences’ is also sometimes used to refer to the social effects of incarceration.”).

<sup>11</sup> See *Project Description*, *supra* note 6 (describing various collateral consequences facing criminal offenders); see also JACOBS, *supra* note 8, at 4–7 (same).

<sup>12</sup> *Doe v. United States (Doe I)*, 110 F. Supp. 3d 448 (E.D.N.Y. 2015).

<sup>13</sup> *Id.* at 449.

her conviction for healthcare fraud, in light of Doe's background, he determined that the thirteen-year-old conviction should be expunged.<sup>14</sup> Ultimately he found the employment impact "excessive and counter-productive."<sup>15</sup> The Department of Justice (DOJ) appealed Judge Gleeson's decision to the Second Circuit, arguing that federal judges have no authority to expunge or seal convictions.<sup>16</sup> The Second Circuit agreed.<sup>17</sup> The Department's appeal is surprising in light of its involvement in reentry efforts for those released from prison and the Justice Reinvestment Initiative, both designed to assist offenders with reintegration.<sup>18</sup>

A few months after Judge Gleeson's decision, Judge Dearie confronted a very similar request, made by a woman who had been convicted of bank fraud twenty-two years earlier.<sup>19</sup> In contrast to Doe who had been denied and lost employment because of her criminal conviction, Stephenson, the petitioner before Judge Dearie, asked for an expungement to avoid future ramifications from her prior conviction on her chosen career path.<sup>20</sup> Judge Dearie denied the request, emphasizing the high threshold for an expungement.<sup>21</sup> Like Judge Weinstein, he directed his remarks at an outside body—the licensing board for nurses—urging them to grant Stephenson a license despite her conviction.<sup>22</sup> Judge Dearie also called on Congress to enact expungement legislation, on the President to issue pardons, on the Department of Justice to no longer oppose expungement petitions unless there is a compelling government interest, and on the

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

<sup>15</sup> *Id.* at 456.

<sup>16</sup> Brief and Appendix for the United States at 1, *Doe v. United States (Doe III)*, 833 F.3d 192 (2d Cir. 2016) (No. 15-1967-cr). For a discussion of the oral argument, which took place on April 7, 2016, see Margaret Love, *Federal Expungement Case Argued in Court of Appeals*, COLLATERAL CONSEQUENCES RESOURCE CTR. (Apr. 8, 2016), <http://ccresourcecenter.org/2016/04/08/federal-expungement-case-argued-in-court-of-appeals/#more-9308> (discussing the government's arguments on appeal).

<sup>17</sup> See *Doe III*, 833 F.3d at 199 (holding that the lower court lacked authority to expunge Doe's conviction).

<sup>18</sup> See, e.g., Press Release, Dep't of Justice, Department Announces \$110 Million for Reentry Programs; Efforts to Reduce Spending on Corrections (Oct. 8, 2010), [www.justice.gov/opa/pr/departments-announces-110-million-reentry-programs-efforts-reduce-spending-corrections](http://www.justice.gov/opa/pr/departments-announces-110-million-reentry-programs-efforts-reduce-spending-corrections); see also *Doe v. United States (Doe II)*, 168 F. Supp. 3d 427, 429 (E.D.N.Y. 2016) (describing the "Smart on Crime" initiative of the Department of Justice, one of whose goals is to assist those with a criminal record in reentering society successfully).

<sup>19</sup> *Stephenson v. United States*, 139 F. Supp. 3d 566, 567 (E.D.N.Y. 2015).

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

<sup>21</sup> *Id.* at 572. As Judge Dearie noted, Stephenson became a victim of her professional attainment; her success prevented her from demonstrating the need for an expungement. *Id.* at 571.

<sup>22</sup> *Id.* ("As the Court that sentenced Ms. Stephenson over twenty years ago, I am hopeful that a licensing board will take seriously my conclusion that Ms. Stephenson is of sound moral character and well-suited for the nursing profession.").

judiciary to revisit the standard for expungement to allow a criminal record to be expunged even in less than “exceptional” cases.<sup>23</sup>

In March of 2016, Judge Gleeson again faced a request for expungement, for a thirteen-year-old fraud conviction.<sup>24</sup> He denied the motion, finding that the petitioner’s “situation does not amount to the ‘extreme circumstances’ that merit expungement.”<sup>25</sup> In addition, he noted that “it is not clear to me that expungement would significantly help Doe, as her conviction will still appear on her nursing license and in private criminal record databases.”<sup>26</sup>

The petitioner in *Doe II* had participated in a fraudulent scheme similar to the one in *Doe I*, and Judge Gleeson sentenced her in 2003 after a jury trial.<sup>27</sup> In the intervening years, Doe frequently attempted to find employment as a nurse but was regularly rejected when the potential employer either found out about her criminal record or about the determination of professional misconduct by the New York State Office of Professional Discipline, which was based on the conviction.<sup>28</sup> Judge Gleeson found Doe rehabilitated on his review of the entire record, and proceeded to issue a “federal certificate of rehabilitation.”<sup>29</sup> He stated that this certificate symbolizes that “the same court that held Doe accountable for her criminal acts has now concluded after careful scrutiny that she is rehabilitated. In other words, the Court is recommending that she be welcomed to participate in society in the ways the rest of us do.”<sup>30</sup> Judge Gleeson’s decision is couched in his understanding of the Obama administration’s efforts to be “Smart on Crime,” which includes “help[ing] people with criminal records find and keep jobs.”<sup>31</sup>

These four cases illustrate the role judges can play in changing law and in mitigating the harshness of our current criminal justice system. The judicial opposition displayed here to disproportionate sentences and collateral consequences, however, also starkly reveals its limitations. Judicial resistance to the collateral consequences regime cannot deliver a

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<sup>23</sup> *Id.* at 572; *see also* Morris, *supra* note 1, at 296–98 (discussing Judge Weinstein’s way of addressing different constituencies in his decisions). On President Obama’s pardon record, *see* Nora V. Demleitner, *Implementing Change in Sentencing and Corrections: The Need for Broad-Based Research*, 28 FED. SENT’G REP. 303, 303–04 (2016) (noting that President Obama has the worst record on pardons of any president since 1900, save both Presidents Bush).

<sup>24</sup> *Doe II*, 168 F. Supp. 3d 427, 428 (E.D.N.Y. 2016).

<sup>25</sup> *Id.* at 429.

<sup>26</sup> *Id.* at 441.

<sup>27</sup> *Id.* at 434.

<sup>28</sup> *See id.* at 434–37 (discussing Doe’s attempts to find and maintain employment).

<sup>29</sup> *Id.* at 442.

<sup>30</sup> *Id.* at 445.

<sup>31</sup> *See id.* at 429.

real punch; judges are limited to shadowboxing. Part I of this response focuses on the increasing judicial resistance to the various ways in which the U.S. criminal justice system imposes severe sanctions that reverberate through families and communities and negatively impact the country. Part II indicates how even judicial critics of the current approach remain a part of the overall normative framework that has dominated the societal discourse on punishment over the last four decades. Even though a bipartisan consensus appears to have developed nationally that some offenders have been overpunished and that at least some of those released from a criminal justice sanction should be given the tools to reenter effectively, not all offenders seem to benefit from this changed viewpoint. This Part critically assesses some of the new hallmarks defining the “worthy” offender, as exemplified in the aforementioned decisions and in recent and proposed changes to the sentencing system. This dichotomy between the worthy and the unworthy may lead to the imposition of a new and more stringent approach toward a group of offenders—those labeled violent criminals, sex offenders, and terrorists—considered the most dangerous. Even though more discretion for judges may alleviate some of the system’s harshness, it will not negate the unforgiving, security-driven approach we, as a country, have taken toward those who have run afoul of the law.

## I

### JUDICIAL OPPOSITION TO SEVERE SANCTIONS AND COLLATERAL IMPACT

This Part details the alternative ways in which the four decisions above struggle with and against the harshness of the current sentencing and collateral consequences regime. It highlights judicial constraints as well as the creativity displayed by the judges in these cases. By focusing on the severity of the consequences that befall anyone with a criminal record even outside the formal sanction imposed, Part I displays the interplay required between the three branches of government to alleviate these consequences.

Judges are bound by legal rules—statutes and precedent—but they have the ability to construe them—even expansively—in individual cases. This is part of a judge’s traditional role, despite the headlines Judge Gleeson made in *Doe I* when he critiqued the government’s opposition to the expungement he ultimately granted.<sup>32</sup> Partly, he seemed concerned about the random or at least inconsistent approach the government has taken to such disqualifications.<sup>33</sup> In *Doe II* he revisited this critique in a

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<sup>32</sup> See *Doe I*, 110 F. Supp. 3d 448, 456–57 (E.D.N.Y. 2015).

<sup>33</sup> See *id.* at 457 (contrasting this case with one in which “the United States Attorney urged



different way, by pointing out the apparent disconnect between the Department of Justice's overall policy and the action of the U.S. Attorney's Office in this case.<sup>34</sup>

More importantly, in *Doe I* Judge Gleeson asked his fellow judges to revisit their restrictive attitude toward expungement. In fact, he characterized their "seemingly automatic refusals . . . to expunge convictions" for the purpose of assisting with employment efforts as "increasingly out of step with public opinion."<sup>35</sup> His call for greater judicial involvement in allowing offenders a path to effective reentry is not unlike the one for which Judge Weinstein and Jason Cade are asking. In contrast to non-deportation orders, judges have authority to issue expungements—though within a restrictive framework.<sup>36</sup> As one commentator has noted in a slightly different context, "[h]istory has shown that both lawyers and judges will seek to avoid the application of laws which are considered to be unduly harsh."<sup>37</sup>

All three judges share a belief in proportionality, though their analysis plays out in different contexts. While Judge Weinstein considers the proportionality between offense severity, the offender's overall background, and the impact of deportation on U.S. citizen children on the one hand, and threatened deportation in conjunction with the criminal justice sanction on the other, the other two judges confront the proportionality between the offense type and the offender's subsequent actions and background with the impact on her long-term employment—and reintegration—opportunities. The failure of proportionality and equity in these cases animates the judges' calls for legal change. Judge Weinstein implicitly, and Judges Dearie and Gleeson explicitly, called for legal changes in their decisions.<sup>38</sup> While Judge Weinstein may have held out

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[Judge Gleeson] to allow the defendant to continue to work as a tax preparer without any notice to his clients of his recent conviction for being a fraudulent tax preparer").

<sup>34</sup> See *Doe II*, 168 F. Supp. 3d at 428–33, 437–41 (discussing the DOJ's reform-minded policies regarding criminal reentry and the government's seemingly inconsistent argument that the court lacked subject matter jurisdiction to consider Doe's motion for expungement).

<sup>35</sup> *Doe I*, 110 F. Supp. 3d at 457.

<sup>36</sup> For a discussion of ancillary jurisdiction to effect an equitable expungement, see *Doe II*, 168 F. Supp. 3d at 437–41. See also Raj Mukherji, *In Search of Redemption: Expungement of Federal Criminal Records* (May 1, 2013) (unpublished comment) (on file with the Seton Hall University eRepository) [http://scholarship.shu.edu/student\\_scholarship/163](http://scholarship.shu.edu/student_scholarship/163) (discussing the different bases for federal expungements).

<sup>37</sup> Arie Freiberg, *Guerrillas in Our Midst? Judicial Responses to Governing the Dangerous*, in *DAGEROUS OFFENDERS: PUNISHMENT AND SOCIAL ORDER* 51, 66 (Mark Brown & John Pratt eds., 2000).

<sup>38</sup> See *Doe II*, F. Supp. 3d at 445–46 (urging the adoption of a federal system for issuing certificates of rehabilitation); *Stephenson v. United States*, 139 F. Supp. 3d 566, 572 (E.D.N.Y. 2015) (urging all three branches of federal government to change policies to reduce the collateral consequences of criminal sentences); *United States v. Aguilar*, 133 F. Supp. 3d 468, 470–71,

hope—however unlikely—that his decision would have some impact on a government agency, the other two judges were the final decision makers in the cases at issue, though subject to appellate review. Judge Dearie partially echoed and amplified Judge Gleeson’s call for greater judicial involvement in granting expungements and for a less restrictive DOJ policy.<sup>39</sup> He also called on Congress to change federal legislation on expungements and on the President to issue more pardons, especially to those whose sentences are already completed.<sup>40</sup> In *Doe II*, Judge Gleeson called on Congress to pass legislation creating “a robust federal certification system [that] could include an enforceable presumption of rehabilitation, as is offered in New York, and return federal rights to those with state or federal convictions on their records.”<sup>41</sup>

Questions over the application and fairness of the laws at issue in these cases are overshadowed by the larger issue of judicial power over punishments and—now increasingly—over collateral sanctions and consequences. This struggle has been playing out in different ways. When the Court declared the federal sentencing guidelines advisory,<sup>42</sup> it found an avenue to allow judges to mitigate some of the harshness and restrictiveness that many members of the federal judiciary had criticized over the years.<sup>43</sup> The extent to which judges sentence outside the guidelines’ range, and therefore take advantage of the greater discretion allocated to them, differs around the country.<sup>44</sup>

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481–82 (E.D.N.Y. 2015) (outlining Judge Weinstein’s approach and the considerations going into the final sentence).

<sup>39</sup> *Stephenson*, 139 F. Supp. 3d at 572 (citing *Doe I*, 110 F. Supp. 3d at 457) (suggesting the judiciary revisit the standard for granting expungement); *Doe I*, 110 F. Supp. 3d at 457 (calling for a fresh look at policies hindering reentry and the judicial tendency to refuse expungement when the only ground is inability to find employment).

<sup>40</sup> *Stephenson*, 139 F. Supp. 3d at 572.

<sup>41</sup> *Doe II*, 168 F. Supp. 3d at 445.

<sup>42</sup> *See United States v. Booker*, 543 U.S. 220, 245 (2005).

<sup>43</sup> *See, e.g.*, Matthew Van Meter, *One Judge Makes the Case for Judgment*, THE ATLANTIC (Feb. 25, 2016), <http://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/> (profiling Judge Coughenour, an outspoken critic of the guidelines); John Nichols, *Judge Resigns over Congressional Meddling*, THE NATION (June 25, 2003) (describing Judge John Martin’s decision to leave the bench in part because of Congressional meddling in federal sentencing decisions).

<sup>44</sup> *See* U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 75–91 (2012), <http://www.ussc.gov/research/congressional-reports/2012-report-congress-continuing-impact-united-states-v-booker-federal-sentencing> (analyzing post-*Booker* sentencing data and concluding that the influence of the guidelines varies by circuit and that rates of below-range sentences have increased). For some of Judge Weinstein’s principled opposition to aspects of guideline sentencing (and other matters in the criminal justice system), see, for example, *United States v. R.V.*, 157 F. Supp. 3d 207 (E.D.N.Y. 2016). In that case, which involved a download of child pornography, Judge Weinstein rejected a prison term under 18 U.S.C. § 3553(c)(2). *Id.* at 251–52, 255–58; *see also* Kate Stith,

While sentencing remains crucial to federal courts, with ongoing debates about the breadth and depth of judicial discretion when a panoply of mandatory minimum sentences remains on the books, some of the attention has been focused on collateral sanctions.<sup>45</sup> Among these sanctions are harsh immigration consequences, which follow automatically from certain convictions, not unlike mandatory minimum prison sentences, and impediments to reentry in the form of collateral sanctions.

While the judiciary cannot grant itself powers of which Congress has explicitly divested it, such as the power to grant JRADs, there are workarounds: In *Padilla v. Kentucky*,<sup>46</sup> for example, the Supreme Court found an alternative avenue to potentially mitigate some of the harsh consequences of a conviction for immigrants.<sup>47</sup> Requiring counsel to inform a client about potential immigration consequences before deciding on a plea offer appears to be one of many (small) judicial steps designed to trim back collateral sanctions; other steps can be seen in recent decisions restricting the reach of sex offender registration statutes.<sup>48</sup>

The four decisions out of the Eastern District can be interpreted as part of the judicial effort to mitigate the severity of the consequences of a

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*Weinstein on Sentencing*, 24 FED. SENT'G REP. 214, 214 (2012) (describing Weinstein's sentencing jurisprudence and criticisms of the guidelines).

<sup>45</sup> See, e.g., MODEL PENAL CODE: SENTENCING Art. 6X, §§ 6x.01–.06 (AM. LAW INST., Tentative Draft No. 3, 2014) (submitting draft update of Model Penal Code with proposed new provisions on collateral consequences to American Law Institute members for consideration at annual meeting).

<sup>46</sup> 559 U.S. 356 (2010).

<sup>47</sup> See *id.* at 360, 366 (holding that advice regarding deportation is not outside the scope of representation required by the Sixth Amendment); cf. Freiberg, *supra* note 37, at 58–63 (noting that Anglo-Australian judges have developed a variety of techniques to mitigate unduly harsh laws).

<sup>48</sup> For examples of other courts modifying collateral sanctions, see *Does v. Snyder*, 834 F.3d 696, 706 (6th Cir. 2016) (declaring retroactive application of amendments to Michigan's Sex Offender Registration Statute in violation of the *Ex Post Facto* Clause); *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 124 (Md. 2013) (invalidating retroactive sex offender registration requirements under the state *ex post facto* clause); *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004, 1030 (Okla. 2013) (same); *In the Interest of J.B.*, 107 A.3d 1, 2 (Pa. 2014) (holding that the Sex Offender Registration and Notification Act violates juvenile offenders' due process rights because of its use of an irrebuttable presumption). Despite some initial lower court decisions expanding *Padilla* to other collateral sanctions, so far *Padilla* has largely remained cabined. See, e.g., *State v. Trotter*, 330 P.3d 1267, 1276–77 (Utah 2014) (declaring sex offender registration statutes civil and therefore not covered by the Sixth Amendment); *State v. LeMere*, 879 N.W.2d 580, 583 (Wis. 2016) (denying expansion of the *Padilla* exception and thus holding that the Sixth Amendment does not require defense counsel to inform a client that entering a plea to a sexually violent offense can result in civil commitment). In a recent sentencing decision in the Eastern District of New York, Judge Block issued a non-incarcerative sentence, well below the applicable guideline range, in recognition of the debilitating set of collateral consequences facing the defendant. See *United States v. Nesbeth*, No. 15-CR-18, 2016 WL 3022073, at \*1 (E.D.N.Y. May 24, 2016), *appeal docketed*, No. 16-2081 (2d Cir. June 22, 2016).

criminal conviction beyond sentencing. Judge Weinstein, in many ways, fights the most uphill battle as he issues recommendations to an administrative agency that appear pointless—the recommendations have no binding legal effect—though they may bring some relief in the occasional case.<sup>49</sup> Judge Gleeson, on the other hand, issued a decision fully within his powers in *Doe I*, though he was ultimately reversed.<sup>50</sup> In *Doe II*, he created a federal certificate of rehabilitation that previously had not existed.<sup>51</sup>

While some have argued that legislative efforts to constrain judicial discretion have been indicative of the public's lack of confidence in the judiciary,<sup>52</sup> in the United States, at least, the pendulum may have swung back. As the executive and legislative branches have begun to reverse some of the harsh sentencing legislation put in place throughout the last thirty years, the judiciary may be well-positioned to reinforce and even accelerate that course. The three branches of government may be more ideologically unified on that issue, therefore permitting greater judicial discretion.

## II

### THE NEW PARADIGM OF THE DESERVING OFFENDER: NONVIOLENT, CRIME-FREE, AND WORKING

Since 2010, the magnitude of the U.S. prison system and the racialized make-up of the correctional population have focused public attention on criminal justice policy, the cost of the current regime, and the need for more effective reentry efforts.<sup>53</sup> State prison systems have become more challenging to fund in the wake of the economic recession of 2008.<sup>54</sup> Even in the federal system, the Bureau of Prisons takes up an ever-larger share of the Department of Justice budget, at the expense of law enforcement and

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<sup>49</sup> See Stith, *supra* note 44, at 215 (indicating that Judge Weinstein's decisions have received at best a mixed reception at the Second Circuit, but the government has failed to appeal many of them).

<sup>50</sup> *Doe v. United States*, 833 F.3d 192 (2d Cir. 2016), *rev'g Doe I*, 110 F. Supp. 3d 448, 456–57 (E.D.N.Y. 2015) (denying order expunging Doe's conviction).

<sup>51</sup> See *Doe II*, 168 F. Supp. 3d 427, 446 (E.D.N.Y. 2016).

<sup>52</sup> See Freiberg, *supra* note 37, at 67 (“Judges and penal authorities are now less trusted. . . . The first legislative riposte has therefore been to further remove judicial discretion . . .”).

<sup>53</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (focusing on the racialized makeup of the prison population); *THE OPPORTUNITY AGENDA, AN OVERVIEW OF PUBLIC OPINION AND DISCOURSE ON CRIMINAL JUSTICE ISSUES 1* (2014), [https://opportunityagenda.org/files/field\\_file/2014.08.23-CriminalJusticeReport-FINAL\\_0.pdf](https://opportunityagenda.org/files/field_file/2014.08.23-CriminalJusticeReport-FINAL_0.pdf) (describing the American public discourse on criminal justice issues).

<sup>54</sup> See, e.g., NAT'L ASS'N OF STATE BUDGET OFFICERS, *STATE SPENDING FOR CORRECTIONS: LONG-TERM TRENDS AND RECENT CRIMINAL JUSTICE POLICY REFORMS 4* (2013), <https://www.nasbo.org/sites/default/files/pdf/State%20Spending%20for%20Corrections.pdf> (describing the effect of the recession on corrections spending).

prosecution.<sup>55</sup> Consequently, a broad coalition from all sides of the political spectrum has begun to work on alternatives, largely with a focus on what are described as “nonviolent drug offenders.”<sup>56</sup> For this group, a treatment-based approach appears to replace the previously prevalent punishment model.<sup>57</sup>

There seems to be a growing consensus that nonviolent offenders, including nonviolent drug offenders, may not have to be imprisoned—and certainly not for the length of time they have been spending in prison.<sup>58</sup> On the other hand, despite growing awareness of the scope and breadth of collateral sanctions over the last two decades,<sup>59</sup> legislative changes have been limited. Indeed, collateral sanctions—particularly those imposed on sex offenders and some violent offenders—continue to proliferate.<sup>60</sup> The broadest movement against collateral consequences, which has achieved a substantial following in the states, the federal government, and many communities and large corporations, focuses on “Banning the Box.”<sup>61</sup> It

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<sup>55</sup> See, e.g., NANCY G. LA VIGNE & JULIE SAMUELS, THE URBAN INSTITUTE, THE GROWTH & INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 2 (2012), <http://www.urban.org/research/publication/growth-increasing-cost-federal-prison-system-drivers-and-potential-solutions> (noting that the growing Federal Bureau of Prisons budget crowds out other DOJ spending).

<sup>56</sup> Many of the proposals to change federal sentences currently pending in Congress focus solely on nonviolent drug offenders. See generally Nora V. Demleitner, *Alternative Visions for the Federal Criminal Justice and Corrections System: Is True Change Possible?*, 28 FED. SENT’G REP. 121 (2015) (discussing proposed changes to federal sentencing and other criminal justice policies designed to decrease the federal prison population).

<sup>57</sup> See, e.g., THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 4 (2014), [https://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/ndcs\\_2014.pdf](https://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/ndcs_2014.pdf) (outlining a treatment-based approach for drug offenders); *A Drug Policy for the 21st Century*, THE WHITE HOUSE, <https://www.whitehouse.gov/ondcp/drugpolicyreform> (last visited Sept. 24, 2016, 6:24 PM) (same).

<sup>58</sup> The changes in federal sentencing for crack offenders, including the release of those imprisoned, have been indicative of this change. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified in notes to scattered sections of 21, 28 U.S.C.); U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010 (2015); U.S. SENTENCING COMM’N, SENSIBLE SENTENCING REFORM: THE 2014 REDUCTION OF DRUG SENTENCES, [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/profile\\_2014\\_drug\\_amendment.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/profile_2014_drug_amendment.pdf) (last visited Sept. 24, 2016).

<sup>59</sup> See *Project Description*, *supra* note 6 (collecting, for the first time, collateral consequences of conviction in one place).

<sup>60</sup> See, e.g., Karen J. Terry, *Sex Offender Laws in the United States: Smart Policy or Disproportionate Sanctions?*, 39 INT’L J. COMP. & APPLIED CRIM. JUST. 113 (2015) (discussing enhanced sanctions against sex offenders).

<sup>61</sup> See, e.g., MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NAT’L EMP’T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT HIRING POLICIES (2016), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf> (describing the Ban the Box movement); Joshua Gaines, *Vermont Becomes the 8th State to Ban the Box in Private Employment*, COLLATERAL CONSEQUENCES RESOURCE CTR. (May 5, 2016), <http://ccresourcecenter.org/2016/05/05/vermont-becomes-8th-state-to-ban-the-box-in-private->

asks employers to dispense with questions about an applicant's criminal record on employment applications. After all, the argument for getting offenders back to work seems unassailable: It would allow them to become self-sufficient and, as studies indicate, therefore less likely to recidivate.<sup>62</sup>

According to this point of view, those with a criminal record who deserve public support are nonviolent offenders with a work history, or at least a strong desire to work. In addition, they should show little or no likelihood of recidivating, or perhaps even have proven their law-abiding nature. The judicial decisions from the Eastern District reinforce these elements, characterizing this type of person with a criminal record as worthy of a special reprieve.

The next sections analyze the characteristics of these "worthy" offenders. They highlight the historical and cultural contingency of the definition of "nonviolent" and of the characteristics that render a person with a criminal record deserving.

### A. *Defining the Nonviolent Offender*

The four offenders from the Eastern District are nonviolent, at least as characterized in the decisions. The definition of "violent" and the classification of individual offenders as such, however, have often turned out to be challenging.<sup>63</sup> Drug offenders have generally been grouped with violent offenders, a connection that is now being loosened in the discourse about the nonviolent drug offender.<sup>64</sup>

The type of car crashes at issue in both *Doe* cases may lead to physical injury and even death.<sup>65</sup> Under the residual clause struck down in *United*

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and-public-employment/#more-9789 (detailing Vermont's Ban the Box efforts).

<sup>62</sup> See, e.g., John M. Nally, Susan Lockwood, Taiping Ho & Katie Knutson, *Post-Release Recidivism and Employment Among Different Types of Released Offenders: A 5-Year Follow-up Study in the United States*, 9 INT'L J. CRIM. JUST. SCI. 16, 29 (2014) (finding that education and post-release employment significantly correlate with recidivism).

<sup>63</sup> See, e.g., *Johnson v. United States*, 135 S. Ct. 2551, 2555–57 (2015) (declaring the residual clause under § 924(e)(2)(B), which defined a crime of violence as "otherwise involv[ing] conduct that presents a serious potential risk of physical injury to another," unconstitutionally vague); Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Adopts Amendment to Definition of "Crime of Violence" in Federal Sentencing Guidelines and Proposes Additional Amendments (Jan. 8, 2016), <http://www.uscc.gov/about/news/press-releases/january-8-2016> (adopting amendment eliminating the residual clause in federal sentencing guidelines and revising the list of enumerated offenses that constitute crimes of violence).

<sup>64</sup> See, e.g., Sari Horwitz, *Justice Department Set to Free 6,000 Prisoners, Largest One-Time Release*, WASH. POST (Oct. 8, 2015), [https://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699\\_story.html](https://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699_story.html) (describing policy changes displaying lenience toward nonviolent drug offenders).

<sup>65</sup> See, e.g., Bruce Mandelbilt, *Fake Auto Accidents a Deadly Scam*, NEWSMAX (Nov. 2, 2007), <http://www.newsmax.com/US/fake-auto-accidents/2007/11/02/id/322070/> (noting that



*States v. Johnson*,<sup>66</sup> which defined a crime of violence as conduct presenting a serious potential risk of injury to another,<sup>67</sup> these crimes may have been categorized as violent.<sup>68</sup> That may explain why, in characterizing the offense in *Doe I* as nonviolent, Judge Gleeson emphasizes that it was committed almost as a measure of desperation, perhaps to improve the lives of Doe's four children.<sup>69</sup>

Similarly, some have argued that document forging, like the crime at issue in *Aguilar*, could amount to support for terrorism. After all, some terrorists have bought false documents.<sup>70</sup> Most, however, would deem frauds, theft offenses, and now drug crimes—at least those that do not include the use of violence—as nonviolent, often in stark contrast to those classified as terrorism, violent crimes, and sex crimes.<sup>71</sup>

While Professor Cade critiques the Obama Administration's approach as overly punitive toward all those with a criminal record, he specifically names those who have only been arrested, misdemeanants, and those having received a pardon, expungement, or deferred adjudication as most deserving of the exercise of discretion, perhaps because the criminal justice system labels these offenders either ultimately not culpable or the least culpable.<sup>72</sup> Cade's emphasis may be interpreted to mean that only low-level, nonviolent offenders should benefit from proportionality review and the exercise of favorable discretion.

Many legislative proposals focus solely on the nonviolent offender.<sup>73</sup> Not only does that fail to appreciate classificatory challenges, it

staged car accidents can cause injury and death).

<sup>66</sup> 135 S. Ct. at 2555–57.

<sup>67</sup> 18 U.S.C. § 924(e)(2)(B) (2012), *invalidated by Johnson v. United States*, 135 S. Ct. 2551 (2015).

<sup>68</sup> See *supra* note 63.

<sup>69</sup> See *Doe I*, 110 F. Supp. 3d 448, 449 (E.D.N.Y. 2015) (discussing Doe's financial struggles prior to committing the offense).

<sup>70</sup> See, e.g., *Identification Documents Fraud and the Implications for Homeland Security: Hearing Before the H. Select Comm. on Homeland Security*, 108th Cong. 1 (2003) (statement of John S. Pistole, Assistant Director, Counterterrorism Division, FBI) (discussing prevalence of document forgery and its connection to terrorism).

<sup>71</sup> While all three of these groups are treated substantially more harshly than nonviolent offenders, the latter two are singled out for special treatment. Sex offenders, for example, are being subjected to debilitating collateral sanctions. See, e.g., TRACY VELÁZQUEZ, VERA INST. OF JUSTICE, *THE PURSUIT OF SAFETY: SEX OFFENDER POLICY IN THE UNITED STATES 1* (2008) (discussing enhanced sanctions against sex offenders); Terry, *supra* note 60 (same).

<sup>72</sup> In his defense, Professor Cade argues that personal equities may overcome even a more substantial criminal record, though the government would also be able to make a showing of dangerousness, for example, to justify a deportation. See Cade, *supra* note 1, at 59–61.

<sup>73</sup> See *Doe I*, 110 F. Supp. 3d at 453 nn.12–13 (referencing bills in New York and in Congress that would lead to expungement of criminal records for nonviolent, first-time offenders).

misapprehends the trajectory of many offenders, and ultimately creates another new and less redeemable class of offenders—violent offenders, sex offenders, and terrorists—who are singled out as undeserving of any benefits. Just as use of a criminal record sweeps too broadly in the deportation context, distinctions between nonviolent and violent offenders may conceal as much as they reveal differences between individual cases.

### B. *Past and Future Criminal Behavior*

The second element that makes an offender redeemable is her law-abiding character, aside from the conviction at issue. All four Eastern District decisions highlight this characteristic. None of the offenders had a criminal record prior to the offense of which they had been convicted, and none have run afoul of the law since their conviction; despite both these factors, the Does have faced substantial difficulty in regaining economic self-sufficiency.<sup>74</sup> In light of the recency of Aguilar’s criminal conduct, Judge Weinstein has to rely solely on the absence of a criminal record, noting that “[t]he crime charged appears to be a deviation from an otherwise legal way of life.”<sup>75</sup> Professor Cade implies the importance of a crime-free life with his examples of pardons, expungements, and deferred adjudications, all of which are frequently based on proof—or assumptions—of individuals leading a crime-free life since (and sometimes even before) their convictions.

Recidivism has become the hallmark of release decisions and of judging the success of diversionary and treatment programs.<sup>76</sup> While U.S. recidivism studies may often use questionable measuring sticks,<sup>77</sup> there is general agreement on many of the factors that contribute to recidivism. Among those are extent of criminal history and conduct in prison, but also demographic data including age and sex.<sup>78</sup>

In the Eastern District cases, the offenders’ demographic characteristics made it less likely that they would commit offenses going

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<sup>74</sup> See, e.g., *Stephenson v. United States*, 139 F. Supp. 3d 566, 567 (E.D.N.Y. 2015) (“Importantly, Ms. Stephenson has had no runs-ins with law enforcement since her conviction.”).

<sup>75</sup> *United States v. Aguilar*, 133 F. Supp. 3d 468, 470 (E.D.N.Y. 2015).

<sup>76</sup> See Nora V. Demleitner, *How to Change the Philosophy and Practice of Probation and Supervised Release: Data Analytics, Cost Control, Focus on Reentry, and a Clear Mission*, 28 FED. SENT’G REP. 231, 232 (2016) [hereinafter Demleitner, *How to Change*] (referring to the reduction of recidivism as “the apparent goal of the efforts to improve supervisory mechanisms”).

<sup>77</sup> See, e.g., *id.* at 236–37 (2016) (discussing how recidivism studies lack a “commonly accepted yardstick” when measuring success, and criticizing current metrics).

<sup>78</sup> See, e.g., *Recidivism Report*, FLA. DEP’T OF CORRECTIONS (May 2001), <http://www.dc.state.fl.us/pub/recidivism/2001/factors.html> (analyzing factors that contribute to recidivism).



forward. Aguilar was thirty-seven at the time of sentencing,<sup>79</sup> generally an age at which the likelihood of criminal involvement is already limited and will continue to decline substantially going forward.<sup>80</sup> The Does and Stephenson are in their fifties and forties, respectively.<sup>81</sup> They are also female, the gender with the lesser likelihood of reoffending.<sup>82</sup>

The Does's and Stephenson's convictions occurred thirteen, thirteen, and twenty-two years before they sought expungement, respectively.<sup>83</sup> Depending on age and criminal history, the risk that an offender will recidivate ten years after release from confinement—a timeframe exceeded in these cases—is the same as for a person without a criminal record.<sup>84</sup> Therefore, these women were not any more likely to commit a crime than anyone else with similar demographic characteristics.

The length of time from the convictions until the requests for expungement indicates the long-term impact of a criminal conviction and its debilitating nature throughout. Even though the female offenders in these cases were not removed from the country, the collateral consequences of their convictions severely restricted them in their ability to engage fully as persons, citizens, and economic agents.

Aguilar carried a higher risk of recidivism, but even though Judge Weinstein did not discuss this issue in any detail, he implied the defendant was unlikely to commit another offense. In part, Aguilar's long and impressive work history serves as a protection against reoffending.<sup>85</sup> Judge

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<sup>79</sup> *Aguilar*, 133 F. Supp. 3d at 481.

<sup>80</sup> Age also served as a protective factor for both Does and for Stephenson. See Laura M. Baber & Mark Motivans, *Expanding Our Knowledge About Recidivism of Persons on Federal Supervision*, FED. PROBATION, Sept. 2013, at 23, 26 (pointing to increased age as a factor that decreases risk of recidivism).

<sup>81</sup> See *Doe I*, 110 F. Supp. 3d 448, 449 (E.D.N.Y. 2015) (stating that Doe was twenty-four years old in 1983); *Doe II*, 168 F. Supp. 3d 427, 433 (E.D.N.Y. 2016) (stating that Doe was fifty-seven years old); *Stephenson v. United States*, 139 F. Supp. 3d 566, 566 (E.D.N.Y. 2015) (stating that Stephenson was twenty-five years old in 1993).

<sup>82</sup> For some discussion of re-offending in the federal system, see Baber & Motivans, *supra* note 80, at 26 (noting that male gender is among several factors identified as increasing risk of committing new offenses or having supervision revoked).

<sup>83</sup> *Doe I*, 110 F. Supp. 3d at 455 (stating that Doe was sentenced thirteen years earlier); *Doe II*, 168 F. Supp. 3d at 446 (stating that Doe was sentenced thirteen years earlier); *Stephenson*, 139 F. Supp. 3d at 567 (stating that Stephenson was sentenced over twenty-two years earlier).

<sup>84</sup> See, e.g., Alfred Blumstein & Kiminori Nakamura, 'Redemption' in the Presence of Widespread Criminal Background Checks, 47 CRIMINOLOGY 10 (2009) (providing actuarial assessment of "redemption" period after which risk of rearrest mirrors that of the general population); Shawn D. Bushway, Paul Nieuwbeerta & Arjan Blokland, *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 CRIMINOLOGY 27, 28 (2011) (finding ten year redemption period for younger offenders and shorter timeframe for older offenders; those with a long criminal history, however, may never reach the same reduced risk level as those without a criminal record).

<sup>85</sup> See Baber & Motivans, *supra* note 80, at 26 (listing unemployment as a factor increasing

Weinstein also noted the defendant's strong family connection, describing the extent to which his wife and sons depended on him—a potent motivator not to recidivate.<sup>86</sup>

The presence of factors correlated with reduced recidivism does not matter, however, under the current regime. Deportation, after all, is the one collateral sanction that is assumed to make reoffending impossible by exiling the offender.<sup>87</sup> Other collateral sanctions as well as indirect effects of a criminal record, such as those discussed in *Doe I* and *II* and in *Stephenson*, may lead to further offending rather than counteracting it. Therefore, expungements long after release from a criminal conviction may generally come much too late, though obviously may still be desired by individual offenders such as the three women here.

Within the criminal justice system actuarial risk assessments to determine the likelihood of future criminal conduct have increasingly gained traction.<sup>88</sup> While Professor Cade seems to put his stock in discretionary decisionmaking, it might be helpful to consider the use of risk assessment tools in making the decisions for which he asks. In fact, those tools may be more effective in predicting recidivism—to the extent that should be an important factor in determining whether an offender should be deported—than either congressional expansiveness with respect to deportation grounds or entirely discretionary decisions of a variety of

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the risk of recidivism). None of the offenders at issue had personal factors that increased the likelihood of reoffending. Those include longer criminal histories, indications of substantial abuse problems or mental health issues. *Id.* In other studies, done for other purposes and with different populations, factors relevant to reoffending may differ. *See, e.g.*, BRIAN J. OSTROM ET AL., NAT'L CTR. FOR STATE COURTS, OFFENDER RISK ASSESSMENT IN VIRGINIA 6 (2002) (finding that only gender and factors associated with prior criminal record proved relevant with respect to reoffense risk of nonviolent offenders in Virginia).

<sup>86</sup> *See Aguilar*, 133 F. Supp. 3d at 470. Similarly, Judge Dearie notes that Stephenson is “married and is raising three daughters.” *Stephenson*, 139 F. Supp. 3d at 567.

<sup>87</sup> First, recidivism studies in the United States focus on intra-country—and, in many cases, on intra-state—reoffending. *See, e.g.*, *Recidivism Report, supra* note 78 (analyzing state-wide recidivism data). Offending within prison walls, similar to offending abroad, is not being considered. Second, a fair number of deportees will return to the United States. Reentry upon deportation is a federal offense and therefore will be counted as a new offense. 8 U.S.C. § 1326 (2012) (making illegal reentry an offense); 8 U.S.C. § 1101(a)(43) (2012) (making illegal reentry following deportation after conviction of an aggravated felony an offense); U.S. SENTENCING COMM’N, ILLEGAL REENTRY OFFENSES (Apr. 2015), [http://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015\\_Illegal-Reentry-Report.pdf](http://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf) (summarizing relevant statutory landscape of reentry offenses).

<sup>88</sup> *See, e.g.*, NATHAN JAMES, CONG. RESEARCH SERV., R44087, RISK AND NEEDS ASSESSMENT IN THE CRIMINAL JUSTICE SYSTEM 2 (2015); PAMELA M. CASEY, ROGER K. WARREN & JENNIFER K. ELEK, NAT'L CTR. FOR STATE COURTS, USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING 6 (2011), <http://www.ncsc.org/~media/Microsites/Files/CSI/RNA%20Guide%20Final.ashx> (noting that research has demonstrated that use of risk assessment tools can lead to reduction in recidivism).

individual actors. In fact, diversion, one of the potential markers against deportation, is at least in some states already supported by evidence-based decisionmaking.<sup>89</sup> While many concerns have been raised with respect to such assessments, they may function as a helpful supplemental tool—in conjunction with individual judicial and administrative discretion—in selecting those who should presumptively not be deported.

### C. *Relevance of Work Record, Work Ethic, and Having Children*

Even though the underlying offense and the offender's otherwise clean record have been important in the Eastern District cases, the judges focus explicitly on two other issues that appear to carry great weight. Both are activities that society values greatly: raising children and engaging in or seeking work. In addition, Judge Weinstein explicitly addresses the impact of the collateral consequence on the defendant's family and ultimately on society.<sup>90</sup>

For many judges, a crucial element in recommending more lenient sentences or otherwise exercising discretion in favor of an offender is the person's work history. As the "Ban the Box" movement indicates, work has become the sine qua non of reentry. Work is being hailed as a protector against recidivism, even though not all studies confirm that view.<sup>91</sup> Perhaps more importantly, this emphasis on work accords with the American belief in self-sufficiency and the rejection of public support, elements Judge Gleeson noted positively about Doe in *Doe I*.<sup>92</sup> After all, Doe seeks the Judge's help because she wants to work and does not want to be on public assistance. Her challenges also indicate that building a work history is not solely within the individual's power, but depends on wider economic, legal, and societal conditions.

As both *Doe* cases and *Stephenson* display, the work argument likely carries the most practical and ideologically persuasive import with respect

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<sup>89</sup> See OSTROM ET AL., *supra* note 85, at 1–8 (describing how Virginia's sentencing commission has developed a risk assessment that provides empirical guidance for judicial diversion decisions). The data-driven approach still allows for judicial discretion.

<sup>90</sup> See *Aguilar*, 133 F. Supp. 3d at 472–80.

<sup>91</sup> See L'ANN DURAN ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., INTEGRATED REENTRY AND EMPLOYMENT STRATEGIES 2 (2013), [https://csgjusticecenter.org/wp-content/uploads/2013/09/Final.Reentry-and-Employment.pp\\_.pdf](https://csgjusticecenter.org/wp-content/uploads/2013/09/Final.Reentry-and-Employment.pp_.pdf) (describing the "complicated relationship" between work and recidivism).

<sup>92</sup> The Probation Department's documentation indicates that Doe "wants very much to work [and] detests being on public assistance . . ." *Doe I*, 110 F. Supp. 3d 448, 450 (E.D.N.Y. 2015); see also *Stephenson v. United States*, 139 F. Supp. 3d 566, 567 (E.D.N.Y. 2015) (describing *Stephenson* as "hardworking" and pointing out that she began to work "immediately" after her sentence); *Aguilar*, 133 F. Supp. 3d at 470, 482 (detailing the defendant's long work history in the United States, including his positions and salary as well as commendations by his employers).

to the abolition, or at least the decrease, of debilitating collateral sanctions for citizens. Both *Doe* cases may carry this argument yet a step further. In each case, the prior offense seemed to relate—albeit superficially—to the type of employment sought. Judge Gleeson, however, indicated that this categorization sweeps too broadly, perhaps a cautionary argument generally against broad statutory employment restrictions.<sup>93</sup>

In the deportation context, the work argument will not persuade, especially not for those like Aguilar who worked illegally—though Judge Weinstein notes that Aguilar “was consistently employed . . . for fifteen years up until his arrest. He paid his income taxes . . . regularly.”<sup>94</sup> Judge Weinstein, therefore, turns to another argument that has been legally somewhat relevant in the immigration area but not generally in the criminal justice realm: protection of U.S.-citizen children.

Judge Weinstein indicates that going forward “this court will issue a ‘non-deportation’ recommendation to the immigration judge . . . [w]here credible evidence has been proffered demonstrating that deportation is likely to unreasonably traumatize United States-born children.”<sup>95</sup> He marshals an impressive amount of sociological and psychological research indicating the magnitude of parental deportations today and their impact on U.S.-citizen children.<sup>96</sup> The law assumes that the choice is the migrant’s whether to take the children with him to his home country or have them grow up apart in the United States.<sup>97</sup> In either case, the psychological and sociological effects are substantial, though many reject consideration of such effects on the grounds that the parent should have taken them into account before getting involved in crime.<sup>98</sup>

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<sup>93</sup> See *Doe II*, 168 F. Supp. 3d 427, 446 (E.D.N.Y. 2016) (“Though the health care fraud conviction could obviously signal to nursing employers that she committed a crime on the job, that is not the case.”).

<sup>94</sup> *Aguilar*, 133 F. Supp. 3d at 470.

<sup>95</sup> *Id.* at 470–71. Judge Weinstein does not make such recommendations in all deportation cases. See, e.g., *United States v. Chong*, 13-CR-570, 2014 WL 4773978, at \*16 (no recommendation issued in case of childless non-citizen drug offender).

<sup>96</sup> *Aguilar*, 133 F. Supp. 3d at 472–80.

<sup>97</sup> See BOS. COLL. CTR. FOR HUMAN RIGHTS AND INT’L JUSTICE, *THE PSYCHOSOCIAL IMPACT OF DETENTION AND DEPORTATION ON U.S. MIGRANT CHILDREN AND FAMILIES: A REPORT FOR THE INTER-AMERICAN HUMAN RIGHTS COURT* 3 (2013), <http://www.bc.edu/content/dam/files/centers/humanrights/doc/IACHR%20Report%20on%20Psychosocial%20Impact%20of%20Detention%20%20Deportation-FINAL%208-16-13.pdf> (“When an unauthorized parent of a U.S.-citizen child is arrested, that parent must make . . . a ‘Solomonic decision’: He/she may move the child to a . . . foreign environment . . . or he/she may leave the child in the U.S. in the care of others.” (citations omitted)).

<sup>98</sup> See Lauren Feig, *Breaking the Cycle: A Family-Focused Approach to Criminal Sentencing in Illinois*, 2015 ADVOCATES’ FORUM 13 (“It is said that offenders do not deserve special treatment just because they are parents and that they should have thought about how their actions could harm their child before committing the offense.”).

Many other countries have taken a different position by allowing consideration of family relationships and rootedness in society when deciding on deportations based on criminal offenses.<sup>99</sup> U.S. immigration law, as Cade explains, no longer does so, and allows no actor in the system to weigh the equities.<sup>100</sup> The same development characterized federal sentencing under mandatory guidelines when the offense at issue and the offender's criminal record largely determined the sentence.<sup>101</sup> In the meantime, research has been done documenting the negative impact of parental imprisonment—a close analogue to deportation. Maternal incarceration in particular negatively impacts the prisoner's children, and at least in some cases also impacts other children.<sup>102</sup>

In the end, Judge Dearie's and Judge Weinstein's decisions ask other actors that they exercise discretion in favor of the individuals in front of them as the impact of the collateral impact falls heavily on third parties—Aguilar's U.S.-citizen children and Stephenson's potential future patients who are denied a good nurse—to the detriment of U.S. society.

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<sup>99</sup> See, e.g., LSE HUMAN RIGHTS FUTURES PROJECT, DEPORTATION AND THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE UNDER ARTICLE 8 HRA 4 (2013), <http://www.lse.ac.uk/humanRights/documents/2011/KlugDeportation.pdf> (noting that family considerations are one factor the European Court of Human Rights uses to assess whether expulsion is justified under Article 8 of the Human Rights Act); see also Dimitra Blitsa et al., *Criminal Records and Immigration: Comparing the United States and the European Union*, 39 *FORDHAM INT'L L.J.* 205, 234–38 (2015) (discussing impact of criminal records on immigration decisions in the European Union); *Switzerland Rejects Proposal to Deport Foreigners for Minor Crimes*, *JOURNAL.IE* (Feb. 29, 2016), <http://www.thejournal.ie/switzerland-referendum-deporting-foreign-nationals-crime-2630551-Feb2016/> (discussing Swiss voters' rejection of referendum that would have led to automatic deportation of even minor offenders, including misdemeanants, and abolish a JRAD equivalent).

<sup>100</sup> See Cade, *supra* note 1, at 41 (“In short, under current law many noncitizens are detained, deported, and often permanently banished, without any adjudicative consideration being given to whether such extreme sanctions fit the underlying crime or comport with justice in light of the countervailing equities of the particular case.”).

<sup>101</sup> See U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM'N 2010) (noting that family ties are not typically relevant to sentencing decisions); see also Emily W. Andersen, “Not Ordinarily Relevant”: *Bringing Family Responsibilities to the Federal Sentencing Table*, 56 *B.C. L. REV.* 1501, 1504 (2015) (arguing for a guideline amendment to permit sentencing courts to consider family ties and for the creation of family impact statements as part of the presentence investigation).

<sup>102</sup> See John Hagan & Holly Foster, *Children of the American Prison Generation: Student and School Spillover Effect of Incarcerating Mothers*, 46 *L. & SOC'Y REV.* 37, 37 (2012). For some indication that not all children may be impacted negatively, see Kristin Turney & Christopher Wildeman, *Detrimental for Some? Heterogeneous Effects of Maternal Incarceration on Child Wellbeing*, 14 *CRIMINOLOGY & PUB. POL'Y* 125, 128–30 (2015). Some studies indicate that paternal incarceration may be more detrimental for children than maternal imprisonment. See Christopher Wildeman & Kristin Turney, *Positive, Negative, or Null? The Effects of Maternal Incarceration on Children's Behavioral Problems*, 51 *DEMOGRAPHY* 1041, 1042 (2014).

## CONCLUSION

The heavy focus on the nature of the underlying offense, the likelihood of recidivating, and work history may imply that the underlying approach to offenders and crime may not (yet) have changed substantially. Despite their critical rhetoric and their demand on other actors in the system to exercise discretion because of positive equities, all three judges justify their decisions within the value structure that currently governs the criminal justice discourse: nonviolent crime, a crime-free life, and employment. As they are trying to persuade relevant actors, this approach may be the most promising in light of their institutional roles and constraints. For others, however, it should be important to keep in mind legal, economic, and social constraints that make Stephenson and both Does exemplary role models rather than set the expectation for all persons with a criminal record.

As collateral consequences come under scrutiny and reentry efforts are being funded more generously, we may begin to see some, though still limited impact on the reintegration of offenders. Professor Cade and Judge Weinstein, however, have a longer struggle ahead of them. Statutory changes in the immigration system appear elusive, and most likely would not benefit those with a criminal record, and certainly not those convicted of crimes labeled violent, sexual, or terrorist, whatever their equities are.