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What's a Civil Lawyer to Do?

THE SHADOW OF
CRIMINAL RECORDS



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Sargent Shriver National Center on Poverty Law

The Intersection of Race, Poverty, and Crime

People lobbied at the Massachusetts State House to demand reform of the “criminal offender record information” law preventing those with criminal records from obtaining employment and housing.



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We should not be surprised that our criminal justice system is heavily racialized. On any given day, 30 percent of African American males 20–29 are under some form of correctional control. Of the incarcerated female population, about 50 percent are African American or Latino. Of state prisoners, 71 percent are minority parents with young children. African American and Latino children are nearly nine and three times more likely, respectively, than white children to have an incarcerated parent.¹ Contact with the criminal justice system is so pervasive in urban communities across the nation that it is a normative life experience. Because the social and economic consequences of this contact with the criminal justice system exacerbate racial inequality, civil legal aid practitioners should consider innovative strategies to alleviate them.

In this article I posit that the criminalization of poor minorities—particularly African Americans—has a long and troubling history; that it wrecks untold hardship on children, families, and communities; and that, even assuming legal aid advocates are constrained from collaborating with public defenders to attack directly the underlying discriminatory policies permeating the criminal justice system, they should employ intervention strategies, such as prudently planned disparate-impact litigation, to ameliorate the civil consequences of contact with the system.² First, using a structural racism lens, I briefly recount the long tradition of intertwining race, poverty, and crime and review longitudinal racial data on poverty and incarceration trends and

¹For demographic data on prisoners, see MARC MAUER, *RACE TO INCARCERATE 137* (2006); PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, *NCJ 215092, PRISONERS IN 2005* (2006) [hereinafter *PRISONERS IN 2005*], available at www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf; CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, *NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN* (2000), available at www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf.

²I use the term “criminalization” here to refer to public policies whose predictable result is to channel people into the criminal justice system.

contemporary policies that maintain racial inequities.³ Second, I consider three collateral punishments—broken families, deepened concentrated poverty, and diminished earning capacity—that are particularly pernicious for communities of color. And, third, I offer promising strategies to attack these punishments, including legislative approaches and cross-agency partnerships to provide holistic services.

I. Historical and Statistical Linkages Between Communities of Color and Penal Institutions

Nearly 2.2 million people, of whom 64 percent are African American, Latino, and other people of color (mostly poor), are currently incarcerated.⁴ Our prison system has had a long and disturbing history of linking race, poverty, and crime.⁵

A. Post-Civil War History: 1865–1929

The Thirteenth Amendment to the U.S. Constitution states in pertinent part that “[n]either slavery nor involuntary servitude, *except as a punishment for crime*

whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction” (emphasis added).⁶

Indeed, although the Amendment outlawed slavery, it carved an important loophole presaging the systematic construction of black crime and punishment.⁷ Before the Civil War black prison populations in the South were minuscule; slavery, not incarceration, was the preferred form of social control. In Alabama, for example, free blacks were 1 percent of the prison population.⁸ But, soon after the Thirteenth Amendment passed, Alabama, like most southern states, enacted the infamous black codes. These were later recast as seemingly race-neutral laws but criminalized the impoverished status of newly freed blacks. Alabama’s vagrancy code, for instance, punished any person without a “fixed residence” by confinement to hard “labor for six months.”⁹ The same offense in Georgia carried a prison term of one year, while a vagrant in Mississippi faced a \$50 fine or hard labor.¹⁰ Blacks, whose rights to testify, call witnesses, and serve on ju-

³The term “structural racism” refers to the ways in which public policies, institutional practices, cultural representations, and norms interact to reinforce racial inequities and identifies dimensions of history and culture that have allowed privileges associated with whiteness and disadvantages linked with color to endure and adapt over time. A thorough discussion of this concept is beyond the scope of this article. While I rely on the structural-racism framework in developing the historical underpinnings of our racialized criminal justice system, for an in-depth review of the framework, see, e.g., The Aspen Institute Roundtable on Community Change, *Structural Racism and Community Building* (2004), www.aspeninstitute.org (last visited April 2, 2007); Maya Wiley & John A. Powell, *Tearing Down Structural Racism and Rebuilding Communities*, 40 *CLEARINGHOUSE REVIEW* 68 (May–June 2006).

⁴See PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, *NCJ 213133, PRISON AND JAIL INMATES AT MIDYEAR 2005*, (2006) [hereinafter *MIDYEAR 2005*], available at www.ojp.usdoj.gov/bjs/pub/pdf/pjim05.pdf. For poverty rates among incarcerated minorities, see CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, *NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES 9* (2000), available at www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf (77 percent and 73 percent of black and Latino state inmates, respectively, were indigent).

⁵I rely principally in this section on data on African Americans (to whom I interchangeably refer as blacks) because until 1970 the Census Bureau did not track Hispanics (to whom I refer as Latinos) as a separate ethnic category, nor were significant numbers of other racial minority groups in the criminal justice system. See, e.g., MAUER, *supra* note 1, at 131.

⁶U.S. CONST. amend. XIII, § 1.

⁷See, e.g., Geiza Vargas-Vargas, *White Investment in Black Bondage*, 27 *WESTERN NEW ENGLAND LAW REVIEW* 41 (2005).

⁸Alabama Department of Corrections History, www.doc.state.al.us/history.asp (last visited April 2, 2007).

⁹See, e.g., 5 PAGE SMITH, *TRIAL BY FIRE: A PEOPLE’S HISTORY OF THE CIVIL WAR AND RECONSTRUCTION* 679 (1982).

¹⁰For Georgia’s vagrancy code, see, e.g., Alfreda Robinson, *Corporate Social Responsibility and African-American Reparations: Jubilee*, 55 *RUTGERS LAW REVIEW* 309 n.173 (2003). For Mississippi’s vagrancy law, see, e.g., Gary Steward, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 *YALE LAW JOURNAL* 2249, 2260–61 (1998). Southern states also legislated harsh punishment for the taking of livestock for subsistence. In Mississippi “theft of a pig” was grand larceny meriting a five-year prison term (see, e.g., Ronald L. F. Davis, *Creating Jim Crow: In-Depth Essay*, www.jimcrowhistory.org/history/creating2.htm (last visited April 2, 2007)), while North Carolina sentenced anyone stealing “a couple of chickens” to three to ten years in prison (see, e.g., Nancy Kurshan, *Women and Imprisonment in the U.S.: History and Current Reality*, www.prisonactivist.org/women/women_and_imprisonment.html (last visited April 2, 2007)).

ries were severely curtailed, were “duly convicted” of various petty offenses and sentenced to servitude in penal institutions.¹¹ More pointed, states leased convicted prisoners to private enterprises.¹²

Within a decade of slavery’s abolition southern prison inmates were predominantly nonwhite. Alabama’s prison population, 99 percent white in the 1840s, became 90 percent black.¹³ Paradoxically, the Thirteenth Amendment, intended to free blacks from bondage, legitimized the enduring legacy of racial disproportionality in the penal system.¹⁴

B. The New Deal and Civil Rights Eras: 1929–1979

The black prison population rose steadily during the social policy revolution of the New Deal. Pres. Franklin D. Roosevelt’s landmark legislation is widely credited with lifting millions of Americans into middle-class status.¹⁵ The watershed Social Security Act of 1935, for example,

provided safety nets for the vast majority of workers and poor people. For nearly two decades, however, the Act explicitly excluded agricultural and domestic workers—occupations that were overwhelming black and Mexican—from its coverage.¹⁶ But the highly racialized New Deal program administered by the Federal Housing Administration was the one that enabled millions of average white Americans to own a home for the first time and escape intergenerational poverty. Between 1934 and 1962 the federal government subsidized \$120 billion in home loans, 98 percent of which went to whites.¹⁷

Such economic policies decreased poverty rates and likely affected prison admission rates. By the mid-1960s the white poverty rate plummeted to 10 percent, while the proportion of white prisoners dropped to 65 percent.¹⁸ Although the black poverty rate fell to 41 percent, blacks were now 33 percent of prison-

¹¹See, e.g., James Forman Jr., *Juries and Race in the Nineteenth Century*, 113 YALE LAW JOURNAL 895, 915 (2004).

¹²For a thorough discussion of convict leasing’s legal foundations, use in perpetuating white supremacy, and pervasiveness in the post-Civil War era, see, e.g., DAVID M. OSHINSKY, “WORSE THAN SLAVERY:” PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

¹³See Alabama Department of Corrections History, *supra* note 8. Within a decade after the Civil War, blacks constituted 91 percent of Georgia’s prison population and 90 percent of Mississippi’s. See OSHINSKY, *supra* note 12, at 63, 137. For racial disparities during the 1920s, see, e.g., PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, NCJ 125618, RACE OF PRISONERS ADMITTED TO STATE AND FEDERAL INSTITUTIONS, 1926–1986 (1991) (in my files) (growth in black prison populations over a sixty-year period).

¹⁴The Thirteenth Amendment’s penal slavery exception was a linchpin for the South’s economic reconstruction following the Civil War. See, e.g., OSHINSKY, *supra* note 12, at 20–21, 57, 139, 155. For additional insight on the amendment’s loophole, see Teri A. McMurtry-Chubb, *The Codification of Racism: Blacks, Criminal Sentencing, and the Legacy of Slavery in Georgia*, 31 THURGOOD MARSHALL LAW REVIEW 139 (2005); Vargas-Vargas, *supra* note 7, at 60.

¹⁵See, e.g., MEIZHU LU ET AL., THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE (2006); Larry Adelman, *Racial Preferences for Whites: The Houses that Racism Built*, SAN FRANCISCO CHRONICLE, June 29, 2003, at D3.

¹⁶LU ET AL., *supra* note 15, at 92.

¹⁷*Id.* at 98. Excluded from homeownership, minorities were largely relegated to blighted urban metropolises. See also John a. powell, *Achieving Racial Justice: What’s Sprawl Got to Do with It?* 18 POVERTY AND RACE (Sept.–Oct. 1999).

¹⁸For the white poverty rate in 1966, see U.S. Census Bureau, Historical Poverty Tables, www.census.gov/hhes/www/poverty/histpov/hstpov2.html (last visited April 2, 2007). Deciphering the white poverty rate in 1935, when many of the New Deal programs were created, and comparing it to the 1966 rate is imperfect because before 1959 the Census Bureau did not officially define or count poverty. See Peter Edelman, *Where Race Meets Class: The 21st Century Civil Rights Agenda*, 12 GEORGETOWN JOURNAL ON POVERTY LAW AND POLICY 1, 2 (2005). However, a 1934 congressional report, which did not distinguish between white and black poverty, estimated that 42 percent of families were living in poverty. See Gordon M. Fisher, *Reasons For Measuring Poverty in the United States in the Context of Public Policy—a Historical Review, 1916–1995* (2000), <http://aspe.hhs.gov/poverty/papers/reasmeaspov.htm>. For changes in white imprisonment rates, see LANGAN, *supra* note 13, at 5. Note that the imprisonment rates cited here and in note 19 are based on national statistics, while data in I.A. focused on specific southern states.

ers.¹⁹ Ironically, while blacks were largely excluded from the economic prosperity of the New Deal, their staggering inmate population fuels the present-day prison boom in prison expansion.

C. The Modern Era: 1980 to the Present

A young black male born now has a 32 percent chance of being incarcerated during his lifetime.²⁰ In 2005 blacks were 40 percent of federal and state inmates; Latinos, 20 percent; and whites, 35 percent.²¹ One of twelve black males between the ages 25 and 29 was in the penal system, compared to one of ninety-one whites.²² Female incarceration rates across all age groups mirror similar stark disparities.²³

The Census Bureau's 2005 data revealed that, in every state, black incarceration rates were higher than those for whites. In four states—Connecticut, Iowa, New Jer-

sey, and Vermont—the rates were twelve or more times as high.²⁴ Interestingly, in southern states the disproportion was lower—a multiple of about three.²⁵

Exceedingly high black incarceration rates persist despite falling crime rates.²⁶ Experts maintain that changes in sentencing policies are the real culprits behind this trend, with the “war on drugs” being the primary contributor.²⁷ Launched anew in the Reagan administration under the auspices of the Anti-Drug Abuse Act of 1986, the war on drugs, for example, imposes the same mandatory minimum sentence—five years—for possession of 500 grams of powder cocaine as for five grams of crack cocaine.²⁸

Predictably, drug-related prison sentences skyrocketed. Minorities, particularly blacks, were arrested, prosecuted, convicted, and imprisoned at rates grossly disproportionate to their numbers in the population or their drug usage.²⁹ Black

¹⁹For the black poverty rate in 1966, see U.S. Census Bureau, *supra* note 18, at 5. For changes in black imprisonment rates, see LANGAN, *supra* note 13, at 5. The civil rights era resulted in substantial economic gains for African Americans, albeit at scales significantly less than they would have received under the government largesse of the New Deal programs. See IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN AMERICA* (2005). Nonetheless, in 1979 the black poverty rate was 30 percent, while 39 percent of prisoners were black. In the same year the white poverty rate declined to 6.4 percent, and the proportion of prisoners who were white declined to 60 percent. See U.S. Census Bureau, *supra* note 18, at 5; LANGAN, *supra* note 13, at 5. The steep black incarceration rate in 1979 is partly attributable to their higher poverty rate and the social unrest of the 1960s and 1970s. See Sarkaris Avakian, *Racial Disparity Among the Incarcerated*, LAW, SOCIAL JUSTICE AND GLOBAL DEVELOPMENT 1–2 (2002), www2.warwick.ac.uk/fac/soc/law/elj/lgd/2002_1/avakian/ (correlation between high poverty and imprisonment).

²⁰See, e.g. MAUER, *supra* note 1, at 137. The comparable data for Latinos and whites are 17 and 6 percent, respectively. *Id.*

²¹PRISONERS IN 2005, *supra* note 1.

²²*Id.* For Latino males in the same age group, the rate is one out of thirty-eight. *Id.* One out of three African American males 20–29 is under correctional supervision, including probation and parole. MAUER, *supra* note 1, at 137.

²³PRISONERS IN 2005, *supra* note 1 at 8. Black and Latino females are incarcerated at rates four and two times higher, respectively, than their white counterparts. MIDYEAR 2005, *supra* note 4, at 10.

²⁴MIDYEAR 2005, *supra* note 4, at 11.

²⁵*Id.*

²⁶See Pamela E. Oliver, *Racial Disparities in Imprisonment: Some Basic Information*, FOCUS, Spring 2001, available at www.ssc.wisc.edu/~oliver/RACIAL/Oliver%20Focus%202001.pdf; Marc Mauer, *The Sentencing Project, New Incarceration Figures: Thirty-Three Consecutive Years of Growth* (2006), available at www.sentencingproject.org/Admin/Documents/publications/inc_newfigures.pdf.

²⁷Oliver, *supra* note 26, at 29; James Austin et al., *The Use of Incarceration in the United States* (policy paper presented by the National Policy Committee to the American Society of Criminology, Feb. 2001), www.asc41.com/policypaper1.html.

²⁸21 U.S.C. § 841 (West 2006). Pres. Ronald Reagan escalated the war on drugs that Pres. Richard Nixon launched in 1968. See Margo Pierce, *Drug War Victory: The First Step Is a Permanent Cease Fire*, CITY BEAT, Nov. 9, 2005, www.citybeat.com/2005-11-09/cover.shtml. When Congress passed the Anti-Drug Abuse Act, crack cocaine users were widely known to be mainly poor urban residents, while powder cocaine users were disproportionately residents of the suburbs. Yet, like the vagrancy laws discussed in I.A., the legislation was deemed race-neutral. See CRAIG REINARMAN & HARRY G. LEVINE, *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 1–4, 20–24 (1997); the authors also discuss the demonizing of other ethnic groups by attributing drug use to them and highlight the pervasive socioeconomic problems, including poverty and racism, that underlie crack use. *Id.* at 5–7, 46.

²⁹Austin et al., *supra* note 27, at 14; Oliver, *supra* note 26, at 29.

arrest rates for possession, for example, were 1,450 per 100,000 residents, compared to 379 for whites; blacks constituted 90 percent of those convicted of mandatory drug offenses and served prison sentences 41 percent longer than those for whites.³⁰ After ten years, black incarceration rate had soared by 707 percent.³¹ Over the last four decades, minority incarceration rates have nearly doubled, while the white rate has almost been cut in half.³² This confluence of data, public policies, and historical background suggests not only a crossroads of race, poverty, and crime but also a crisis of grave proportions.

II. Collateral Punishments

Much has been written about the collateral consequences of mass incarceration.³³ Moreover, many authors of articles in this special issue of CLEARINGHOUSE REVIEW delve into these civil disabilities. Here I focus on three collateral punishments that intensify racial inequalities.

A. Broken Homes and Families

Children of color are often overlooked casualties of mass minority incarceration.³⁴ The war on drugs, which has funneled more women into the prison system, exacerbates incarceration's impact on children. Of imprisoned mothers, about 43 percent were black women whose children, when the women entered prison, were cared for by a grand- or foster parent, relative, or institution.³⁵ Many of these children suffer long-term psychological trauma related to severance of parental ties, loss of financial support, and the humiliation of having a parent in prison.³⁶ Equally disastrous, children of incarcerated parents are more likely to drop out of school, be involved with gangs, and end up in the penal system, thereby reinforcing a vicious cycle of intergenerational criminal justice involvement.³⁷

B. Deepened Concentrated Poverty

Communities of color suffer from the mass incarceration of their residents,

³⁰For the arrest rate for blacks, see Oliver, *supra* note 26, at 29; for conviction rate, see United States Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy (1997), available at www.uscc.gov/r_congress/NEWCRAK.PDF; for their longer prison sentences, see Austin et al., *supra* note 27, at 14.

³¹CHRISTOPHER J. MUMOLA & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, NCJ 164619, PRISONERS IN 1996 (1997), available at www.ojp.usdoj.gov/bjs/pub/pdf/p96.pdf.

³²Compare LANGAN, *supra* note 13, at 5, with PRISONERS IN 2005, *supra* note 1, at 8. With the exponential growth in inmate population, currently at 2.2 million, fueled disproportionately by incarceration of blacks, a booming prison industry has thrived. New prisons constructed between 1985 and 1995 came to 540, and governmental expenditures on criminal justice-related activities totaled \$185.4 billion in 2003 alone. Regarding construction of new prisons, see Terry L. Besser & Margaret M. Hanson, The Development of Last Resort: The Impact of New State Prisons on Small Town Economies, www.realcostofprisons.org/materials/TTT_paper1.pdf (last visited April 2, 2007); regarding criminal justice costs, see Hindelang Criminal Justice Research Center, University at Albany, Sourcebook of Criminal Justice Statistics Online (2003), www.albany.edu/sourcebook/pdf/t142003.pdf (last visited April 2, 2007). More chilling, and reminiscent of the post-Civil War era, the government and private enterprises are partners in keeping and controlling inmates. See, e.g. Vargas-Vargas, *supra* note 7, at 46, 65–68 (“prison-industrial complex” phenomenon; prison ownership and management channeling billions in profits to corporate interests that, as a result, have vested interests in maintaining high prison populations).

³³I adapted the concept of collateral punishments from MARC MAUER & MEDA CHESNEY-LIND, INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (2002). For more on the civil consequences of a criminal record and advocacy strategies to address them, see AMY E. HIRSCH ET AL., CENTER FOR LAW AND SOCIAL POLICY & COMMUNITY LEGAL SERVICES, EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS (2002), available at www.clasp.org/publications/every_door_closed.pdf.

³⁴Blacks are about 50 percent of parents in state prisons; Latinos, 19 percent; and whites, 29 percent. See MUMOLA, *supra* note 1.

³⁵See, e.g., Edwin C. Hostetter & Dorothea T. Jinnah, Family and Corrections Network, Research Summary: Families of Adult Prisoners (1993), www.fcnetwork.org/reading/researc.html (last visited April 2, 2007); PATRICIA E. ALLARD & LYNN D. LU, BRENNAN CENTER FOR JUSTICE, REBUILDING FAMILIES, RECLAIMING LIVES: STATE OBLIGATIONS TO CHILDREN IN FOSTER CARE AND THEIR INCARCERATED PARENTS (2006), available at www.brennancenter.org/dynamic/subpages/download_file_37203.pdf.

³⁶Hostetter & Jinnah, *supra* note 35, at 6–7.

³⁷See Jordan Bistran, Family and Corrections Network, Incarcerated Mothers and the Foster Care System in Massachusetts: A Literature Review (1997), www.fcnetwork.org/reading/bistran.html.

losing important social capital (group capacity to benefit from interdependence), informal social controls (group ability to reinforce social order and maintain community safety), potential role models, and voting power.³⁸ While the eventual return of former prisoners to their communities may ease some of these social costs, this reentry brings a different set of socioeconomic consequences.³⁹ Many neighborhoods to which formerly incarcerated people return are plagued by high under- and unemployment rates, a paucity of jobs, scarcity of affordable housing, poorly resourced schools, and weak infrastructure.⁴⁰ Minority communities that must absorb returning inmates—who are often branded as unskilled and unemployable—thus plunge into a deeper abyss of poverty.⁴¹

C. Diminished Lifetime Earning

Formerly incarcerated minorities face multiple challenges that significantly diminish their lifetime earning capacity. Prolonged incarceration results in lost work experiences, diminished skills, severed social networks, irregular employment, and depressed wages.⁴² More pointed, they—particularly blacks—continue to endure race-based discrimination.⁴³ Even more damaging, blacks *without* criminal records are stigmatized as criminals and fare worse than whites with felony convictions.⁴⁴

III. Intervention Strategies

Our criminal justice system needs a massive overhaul. A scheme for cutting the percentage of minorities in the prison population, which has nearly doubled in four decades, is essential.⁴⁵ Until such

³⁸See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African-American Communities*, 56 *STANFORD LAW REVIEW* 1271 (2004) (black communities are distrustful of the criminal justice system and are disinclined to cooperate with the system or to view involvement with it as abnormal (at 1287–88)). Roberts argues that these viewpoints are sufficiently pervasive, even if not shared by every resident, that African Americans' distrust of the system has had a profound impact on domestic violence victims, who are often reluctant to seek protection from law enforcement. *Id.* at 1287.

³⁹See Loïc Wacquant, *Deadly Symbiosis: Rethinking Race and Imprisonment in Twenty-first-Century America*, *BOSTON REVIEW*, April–May 2002, available at <http://bostonreview.net/BR27.2/wacquant.html> (minority inmates typically return to communities of color).

⁴⁰*Id.* at 2, 17 (the symbiosis between prison and marginalized minority communities reworks and reinforces racial hierarchies, as well as revives and consolidates the centuries-old association of blackness with criminality).

⁴¹See Paul Street, *Race, Prison, and Poverty: The Race to Incarcerate in the Age of Correctional Keynesianism*, *Z MAGAZINE*, May 2001, www.thirdworldtraveler.com/Prison_System/Race_Prison_Poverty.html.

⁴²See Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 *AMERICAN SOCIOLOGICAL REVIEW* 526 (2002) (the challenges described above combine to lower future earnings for minorities). In a related article, Western found a 42 percent wage differential between black and white high-school dropouts with criminal records. When compared to white dropouts without criminal records, black dropouts with criminal records had wages 76 percent lower. Black dropouts' unemployment rate was also higher at 65 percent. See Bruce Western, *Incarceration and Invisible Inequality* (2004), available at www.russellsage.org/publications/workingpapers/incarcerationinvisibleineq/document.

⁴³See, e.g., Devah Pager, *The Mark of a Criminal Record*, 108 *AMERICAN JOURNAL OF SOCIOLOGY* 937 (2003) (controlling for job experience, educational attainment, manner of speech, and criminal histories, the author sent similarly situated black and white testers to apply for entry-level jobs in Milwaukee; the results showed discrimination against blacks). A similar study in New York City reached the same result. Devah Pager & Bruce Western, *Race at Work: Realities of Race and Criminal Record in the NYC Job Market* (2005), http://nyc.gov/html/cchr/pdf/race_report_web.pdf.

⁴⁴Pager, *supra* note 43, at 958 (race remains highly consequential in determining job opportunities).

⁴⁵While the United States has been incarcerating more people in every racial group, the percentage of imprisoned whites has almost been cut in half. Compare LANGAN, *supra* note 13, at 5, with PRISONERS IN 2005, *supra* note 1, at 8. The U.S. Supreme Court's intent doctrine undercuts litigation as a strategy for reducing racial disproportionality. See, e.g., Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 *JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY* 827, 860–3 (2003), but the structural-racism framework (*supra* note 3), which challenges the intent doctrine in favor of considering multiple structures that interact to maintain racial inequities, might be worthy of exploration. Collection of race-based data at every juncture in the criminal justice continuum can be a starting point. See, e.g., Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM LAW REVIEW* 13, 54 (1998), suggesting legislatively imposed racial impact studies as an initial step toward eliminating race discrimination. Another intervention strategy might be, in collaboration with public defenders and other allies, to push for legislative amendments requiring parity between the penalties for crack and powder cocaine. See, e.g., H.R. 460, pending before the 110th Congress. Furthermore, advocates might also consider a frontal attack on the intent doctrine. See, e.g., Eva Jefferson Paterson et al., *Forging Ahead Beyond Intent*, 40 *CLEARINGHOUSE REVIEW* 358 (Sept.–Oct. 2006). In considering these strategies, some programs, particularly those funded by the Legal Services Corporation, will need to be mindful of restrictions on their advocacy capacity.

a plan is unleashed, legal aid advocates should work to ameliorate collateral punishments by promoting legislation to limit discrimination based on criminal records, wisely pursuing litigation, and partnering with public defenders and community agencies to offer holistic services. While a comprehensive coverage of these strategies is beyond the scope of this article, I offer models for each advocacy approach below.

A. Legislative Advocacy

Legal aid programs that are committed to racial equity should marshal the mounting body of research on the intergenerational and communal effects of collateral punishments and call on policymakers to end draconian treatment of minorities with criminal histories.⁴⁶ Advocates can model policy reforms using a human rights framework by, for example, promoting racial equity acts, similar to the European Union's Race Directive, which expressly bans "indirect discrimination

where [a] neutral provision, criterion, or practice would put persons of a racial or ethnic group at a particular disadvantage compared with other persons."⁴⁷ For domestic models, advocates can look to civil rights restoration bills such as that adopted in Illinois or race-neutral anti-discrimination legislation such as that in Hawaii.⁴⁸

B. Community and Cross-Agency Collaboration

The political will necessary to pass some of the ambitious, yet promising, reforms suggested above is at present lacking.⁴⁹ Nonetheless, community activism in concert with legal aid programs has built momentum for change and yielded local laws diminishing status-based discrimination against people with criminal histories.⁵⁰ And some civil legal advocates do partner with public defender programs to anticipate and ameliorate collateral punishments and collaborate with community groups to advance local initiatives.⁵¹

⁴⁶See, e.g., Margaret E. Finzen, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEORGETOWN JOURNAL ON POVERTY LAW AND POLICY 299, 322 (2005) ("call[ing] on Congress and state legislators to reexamine and repeal the vast majority of [collateral] punishments"); Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 UNIVERSITY OF TOLEDO LAW REVIEW 545, 579 (2005) (rules targeting and barring former drug offenders from public housing should be revisited and revamped).

⁴⁷See Article 2(b) Council Directive 2000/43/EC. The European Union's Race Directive covers many contexts, including employment, social advantages, and housing. *Id.*, Article 3(a), (f), (h). A human rights framework, such as that embedded in, e.g., the Convention on the Elimination of Racial Discrimination, G.A. Res. 2106 (XX), 20 U.N. GAOR, Supp. No. 14, (1966), recognizes the dignity inherent in all human beings and proposes that all appropriate means be utilized to eliminate racial discrimination. For a discussion of international instruments, including Canada's law, which affirms the right of former prisoners, particularly aboriginal people, to reenter their communities as productive participants, see, e.g., CIVIL PENALTIES, SOCIAL CONSEQUENCES (Christopher Mele & Teresa A. Miller eds., 2005).

⁴⁸740 ILL. COMP. STAT. 23/1-5 (2007), the Illinois Civil Rights Act of 2003, was enacted in the wake of *Alexander v. Sandoval*, 532 U.S. 275 (2001) (Clearinghouse No. 51,706), the U.S. Supreme Court's decision undercutting disparate-impact litigation under Title VI. For Hawaii's law, see HAW. REV. STAT. § 378-2 (2007). Recently the Supreme Court of Hawaii, in *Wright v. Home Depot U.S.A. Inc.*, 142 P.3d 265 (2006), construing this statute, reversed a lower court decision, which had found that a prior drug conviction was rationally related to a former offender's job as a lumber salesman.

⁴⁹E.g., the Second Chance Act, reintroduced in the 110th Congress as H.R. 1593, has stalled for several years. See, e.g., Chris Suellentrop, *The Right Has a Jailhouse Conversion*, N.Y. TIMES MAGAZINE, Dec. 24, 2006.

⁵⁰See, e.g., Editorial, *Cities that Lead the Way*, N.Y. TIMES, March 31, 2006 (groundbreaking policies in Boston, Chicago, and San Francisco to "de-emphasize criminal histories for qualified applicants for city jobs"). These local endeavors should be fostered, as they ultimately will propel state and national demands for comprehensive reforms.

⁵¹See, e.g., McGregor Smyth, *Cross-Sector Collaboration in Reentry: Building an Infrastructure for Change*, in this issue. Legal aid programs such as the Massachusetts Law Reform Institute work closely with grassroots groups to further effective criminal-records policies. For information on Massachusetts Law Reform's foray into ameliorating collateral punishments, see my *Race-Based Lawyering: Engaging Minority Communities in Legal Need Assessments*, 36 CLEARINGHOUSE REVIEW 213 (July–August 2002). Massachusetts Law Reform, along with its community partner, was instrumental in winning the local law in Boston highlighted in note 50.

C. Disparate-Impact Litigation

Exclusionary employment policies based on criminal records have disparate impact on minorities and are cognizable under Title VII of the Civil Rights Act of 1964.⁵² Much scholarly work covers Title VII's standard of proof.⁵³ Given recent federal retrenchments, however, I propose that disparate-impact claims also be tested under state antidiscrimination statutes.⁵⁴ While Massachusetts' act, for example, does not expressly codify disparate impact, it has been construed to reach such a claim.⁵⁵ Trying these claims in state courts may hold some promise for protecting the employment interests

of minorities overburdened by a racially charged criminal justice system.⁵⁶



That race, poverty, and crime are intricately intertwined is inescapable. Equally indisputable, racial disproportionality has been, and remains, a staple of the criminal justice system; and as a system it wrecks devastating socioeconomic consequences on low-income communities of color. Civil legal aid practitioners must take on the responsibility of pushing back against this oppressive system by mitigating the myriad civil deprivations resulting from the overuse of criminal records.

⁵²42 U.S.C. § 2000e-2 (k)(1)(A) (2006). The racial disproportionality discussed in I.A–C evinces this disparate impact.

⁵³See, e.g., Jennifer Leavitt, *Walking A Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONNECTICUT LAW REVIEW 1281, 1298–1301 (2002); Sharon Dietrich et al., *Work Reform: The Other Side of Welfare Reform*, 9 STANFORD LAW AND POLICY REVIEW 53, 56 (1998).

⁵⁴See *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232 (3d Cir. 2007), the second appellate decision to address squarely, under Title VII, the disparate impact of prior conviction policies on African Americans (in *El* the court ruled, despite its reservations about the exclusionary policy at issue, that the employer had proffered business necessity to defeat a paratransit driver's claim that his 47-year-old second-degree murder conviction should not be an employment bar); *O'Neal v. Wackenhut Services Inc.*, 2006 WL 1469348 (E.D. Tenn. 2006), denying class certification. This constriction of civil rights is not unique to minorities with criminal records. See, e.g., Eric K. Yamamoto et al., *Dismantling Civil Rights: Multiracial Resistance and Reconstruction*, 31 CUMBERLAND LAW REVIEW 523, 550–51, 565 (2001), commenting on civil rights retrenchment under Title VII and other laws and proposing counter strategies, including retooling the definition of discrimination to encompass neutral policies that have a discriminatory impact and arise from subconscious stereotyping. Nonetheless, federal courts should remain a viable venue for advancing disparate-impact claims. See, e.g., *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975) (upholding claim).

⁵⁵MASS. GEN. LAWS ch. 151B, § 4 (West 2006); *Cox v. New England Telephone and Telegraph Company*, 607 N.E.2d 1035 (Mass. 1993). In the absence of reported Massachusetts cases employing this approach, there is little scholarly guidance on how the approach might be received. However, in challenging discriminatory criminal-records policies, prudence requires that the lead plaintiff be wisely chosen; testing evidence, such as the New York City audit referred to in *supra* note 43, be replicated and incorporated; and recidivism experts be retained and proffered. See *El, supra* note 54 (failure to offer expert testimony was fatal).

⁵⁶See, e.g., Francisco Valdes, *"We Are Now of the View": Backlash Activism, Cultural Cleansing, and the Kulturkampf to Resurrect the Old Deal*, 35 SETON HALL LAW REVIEW 1407 n.46 (2005) (in spite of the evisceration of federal civil rights, state courts sometimes have been arbiters of the interests of unpopular groups).

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