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WORKING to Meet TANF Requirements and to Keep Flexibility in State Programs

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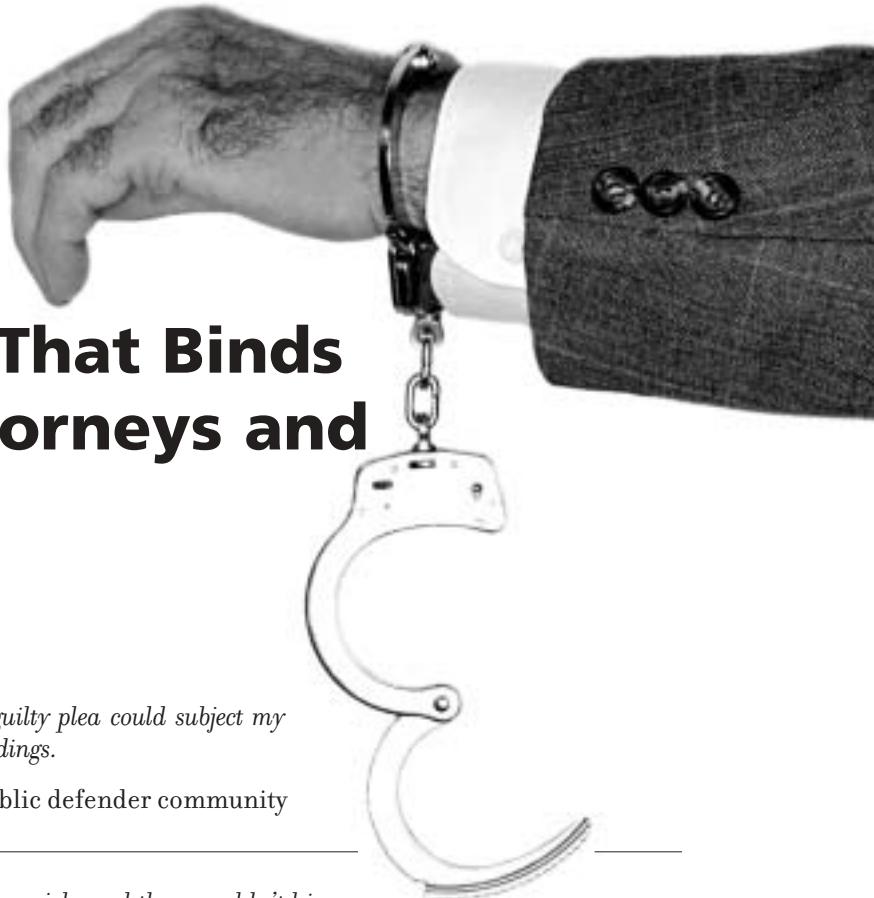
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REENTRY—the Tie That Binds Civil Legal Aid Attorneys and Public Defenders

By Cynthia Works

I didn't know entering a guilty plea could subject my client to deportation proceedings.

—Comment from the public defender community

Client: *I went to apply for a job, and they wouldn't hire me because of my criminal record. Can you help me?*

Attorney: *I'm so sorry to hear that. I can't help you with that. I practice criminal law. Your problem concerns an employment law matter, which is an area of civil law.*

Client: *Well, do you know of anyone that can help me?*

Attorney: *No, I'm sorry. I don't. (Thinking: I would really love to help my former clients with these civil problems, but my caseload is just too high to handle anything else, much less a civil matter. I can barely keep up with my criminal cases.)*

—Conversation between a public defender and a former client, recently released from prison

Reentry issues involve criminal matters. I am a civil legal aid attorney and don't know, and don't want to know, anything about the practice of criminal law.

I can't attend a conference on reentry issues. LSC [Legal Services Corporation] restrictions prevent LSC-funded programs from assisting with criminal matters and even prevent us from attending training sessions concerning reentry. Public defenders, not legal aid attorneys, should handle these types of issues. They had these clients first. It's not fair to force us to clean up their mistakes.¹

—Comments from the civil legal aid community

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¹These are just a sampling of comments from civil legal aid attorneys and public defenders about serving clients returning to their communities following incarceration. (On file with Cynthia Works.)

What does the term “reentry” mean? Whose responsibility is it to serve these clients—civil legal aid attorneys or public defenders? Moreover, why should civil legal aid attorneys and public defenders be concerned about the hundreds of thousands of ex-offenders returning to their communities each year?

While there are many unanswered questions concerning reentry, the reentry phenomenon is not going away, is not to be ignored, and will forever change the practice of law for those who represent the poor in America. We are seeing the fallout of the skyrocketing rates of incarceration in the United States in recent years; in 2000 nearly 600,000 people were released from federal and state prisons and returned to their communities.² Civil legal aid attorneys and public defenders will be called upon to help many of these ex-offenders overcome the barriers that they will face. No longer can we turn our backs on these clients. Not ready? Get ready. There is no other option.

Those who are committed to serving the poor in America must reorient their work to meet the needs of clients who, because of a criminal conviction, may face obstacles:

- Obtaining drivers’ licenses—leaving them without a positive form of identification to complete an application for employment;³

- Obtaining occupational licenses in certain fields (e.g., cosmetology, real estate, auto repair, law, medicine)—rendering them unqualified for employment in these fields;⁴
- Qualifying for federal student loans—making college attendance or even obtaining a GED (general education development) diploma extremely difficult;⁵
- Receiving federally subsidized and public housing—resulting in homelessness or separation from family members or both;⁶
- Exercising their right to vote, to serve on a jury, or to hold public office—excluding them from political, judicial, and governmental processes;⁷



² See URBAN INST., PRISONER REENTRY: WHO’S COMING HOME? (2000), available at www.urban.org/urlprint.cfm?ID=6807.

³ INVISIBLE PUNISHMENT 5 (Marc Mauer & Meda Chesney-Lind eds., 2002). A drug offender’s driver’s license may be suspended automatically.

⁴ Amy E. Hirsch et al., Cnty. Legal Servs. & Ctr. for Law & Soc. Policy, *Criminal Records and Employment: Ex-Offenders Thwarted in Attempts to Earn a Living for Their Families*, in EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 15 (2002); JEREMY TRAVIS ET AL., URBAN INST. JUSTICE POLICY CTR., FROM PRISON TO HOME 31 (2001).

⁵ See Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT, *supra* note 3, at 26; Irv Ackelsberg & Amy Hirsch, *Student Loans and Criminal Records: Parents with Past Drug Convictions Lose Access to Higher Education*, in EVERY DOOR CLOSED, *supra* note 4, at 85–86.

⁶ See, e.g., 42 U.S.C. § 13661 (2003).

⁷ Regarding voting rights, see Angela J. Davis, *Incarceration and the Imbalance of Power*, in INVISIBLE PUNISHMENT, *supra* note 3, at 302 n.3. Forty-eight states and the District of Columbia ban felons from voting while incarcerated, thirty-two bar felons on probation, and twelve bar felons permanently. All twelve permanent bar states have procedures by which a felon’s franchise may be reinstated. See also *id.* at 50. Two percent of all adults and 13 percent of African American adults are currently disenfranchised due to a current or past felony conviction. Regarding jury service, see Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 509 (1999). Regarding holding public office, see *id.* at 510–11. Seven states permanently bar elected office to persons convicted of bribery, perjury, or embezzlement. Twenty states restrict the right to hold public office until offenders complete their prison, probation, or parole terms.

- Receiving federal public benefits such as food stamps, TANF (Temporary Assistance for Needy Families), and Supplemental Security Income;⁸
- Retaining their parental rights.⁹

In this article I argue that, more than other attorneys, civil legal aid attorneys and public defenders who undertake representation of the indigent have a responsibility to be aware of the many challenges their clients face as they make the transition back into their communities. Without assistance from civil legal aid attorneys and public defenders equipped to handle the legal hurdles of reentry, many ex-offenders fall prey to recidivism, ending up on the docket of the same public defender who helped them on the very offense for which they were originally incarcerated.

The empirical evidence is undeniable. According to a 1994 study, 67.5 percent of released prisoners were rearrested within three years. Surely returning ex-offenders to the streets without mechanisms to help them cope with the collateral consequences of their criminal convictions contributes to this staggering statistic. The nearly 600,000 offenders released from prisons in 2000 represented an increase of 41 percent compared with 1990. According to the Bureau of Justice Statistics, in coming years over a half-million incarcerated individuals will be released annually from state and federal prisons and will return to their communities. In fact, at least 95 percent of all state prisoners will be released at some point.¹⁰

As the numbers illustrate, the reentry phenomenon stands to affect our country in unimaginable ways. We are just now learning how the challenges of reentry affect community members and families struggling to assist ex-offenders facing the collateral consequences of criminal convictions. Our clients, their family members, and community leaders are absorbing the burden of assisting thousands of individuals making the transition from prison life to community life. They need and deserve to have that burden lightened by the legal aid and public defender communities through informed and thorough consideration of the civil barriers to reentry.

I. Reentry

“Reentry,” an addition to the lexicon of civil legal aid attorneys and public defenders, refers to issues related to the transition of offenders from state and federal prisons to community supervision. While the impact of reentry in modern times is profound, the erection of civil barriers to impede a reentering offender’s transition to community life is not a new societal problem.

The Germanic tribes imposed the penalty of “outlawry” on offenders and thus stripped offenders of all possessions and rights and left their wives widows and children orphans. In ancient Athens, offenders were precluded from holding office, serving in the army, and attending public assemblies. In the Roman Empire, offenders were barred from certain trades.¹¹

⁸21 U.S.C. § 862a; 7 U.S.C. § 2015(c); 42 U.S.C. §§ 608(a)(9), 1382(e)(4) (2003). See text accompanying notes 25 and 26 *infra*. See also Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing: Denial of Benefits to Drug Offenders*, in *INVISIBLE PUNISHMENT*, *supra* note 3, at 41–44. In addition to a lifetime ban on TANF (Temporary Assistance for Needy Families) and food stamps for drug offenders, Supplemental Security Income is unavailable to anyone in violation even of a technical condition of probation or parole that does not involve the commission of further crimes. Other than drug offenses, only welfare fraud convictions require a ban on welfare benefits. However, unlike drug offenses, welfare fraud does not carry a lifetime ban.

⁹Peter D. Schneider, *Criminal Convictions, Incarceration, and Child Welfare: Ex-Offenders Lose Their Children*, in *EVERY DOOR CLOSED*, *supra* note 4, at 54.

¹⁰All the statistical information in this paragraph is from TIMOTHY HUGHES & DORIS JAMES WILSON, U.S. DEP’T OF JUSTICE, *REENTRY TRENDS IN THE UNITED STATES* (2002), available at <http://www.ojp.usdoj.gov/bjs/reentry/reentry.htm>.

¹¹Travis, *supra* note 5, at 17.

Who are the recently released offenders knocking on our country's legal aid and public defender doors today? According to the Bureau of Justice Statistics:

- 56 percent had been previously incarcerated one or more times;
- 85 percent were involved with drugs or alcohol at the time of the offense;
- 14 percent were mentally ill; and
- 12 percent were homeless.¹²

These offenders leave prison expecting to receive a new start. In most cases they are hit with insurmountable barriers to successful reintegration with their families and society.

II. Civil Reentry Barriers

Barriers blocking the ex-offender's reentry may be legal, social, or economic and often are all three.¹³ The barriers also build upon one another, further compounding an individual's punishment. In this section I discuss some of the collateral consequences of criminal convictions and ways that civil legal aid attorneys and public defenders can work to overcome these obstacles.

A. Privacy, Criminal Records, and Offender Registration

Leaving the prison gates, ex-offenders believe that they are free to walk the streets with their criminal records behind them. What they encounter is the stigma of a "scarlet letter C"—a criminal record blocking their path to successful reintegration.¹⁴ Today, through the

Internet and credit reports, information about their convictions is easily accessible and may be used not only to discriminate against ex-offenders but also to bar them from housing and employment opportunities and thereby leave them homeless and unemployed.

One systemic use of a criminal record is offender registration.¹⁵ Analogous to the practice of branding, registration is primarily used for sex offenders, especially violent offenders or those who prey upon children. In 1986 only eight states required ex-sex offenders to register, but by 1998 every state had such a requirement.¹⁶ These rules are intended to safeguard the communities in which the ex-offender resides, but as a practical consequence they often function as a continuation of the punishment imposed by the courts. Because registration periods vary in length from ten years to life, they mean, for many, a lifetime of public humiliation and shame.¹⁷

Criminal records are also used in the employment context. Federal or state statutes bar ex-offenders from such occupations as airport security, passenger screeners, and jobs in employee benefit plans (federal) and jobs in nursing homes, home health care, schools, and child care facilities (state). Most states enforce these barriers by denying licenses to ex-offenders.¹⁸ Six states permanently bar ex-offenders from public employment.¹⁹

Advocates who represent ex-offenders can minimize the stigma of a criminal record by filing for expungement or

¹²HUGHES & WILSON, *supra* note 10.

¹³Travis, *supra* note 5, at 18–19.

¹⁴See McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, 37 CLEARINGHOUSE REV. 58 (May–June 2003).

¹⁵Travis, *supra* note 5, at 22.

¹⁶Petersilia, *supra* note 7, at 511.

¹⁷*Id.*

¹⁸Sharon M. Dietrich, *Criminal Records and Employment: Ex-Offenders Thwarted in Attempts to Earn a Living for Their Families*, in *EVERY DOOR CLOSED*, *supra* note 4.

¹⁹Petersilia, *supra* note 7, at 510. The six states are Alabama, Delaware, Iowa, Mississippi, Rhode Island, and South Carolina.

sealing of records and in some cases requesting pardons. Because criminal records often contain inaccurate information, advocates should review their client's records and correct misinformation. Many clients also fall prey to illegal discriminatory practices. Advocates should be vigilant and, when warranted, seek redress for discriminatory actions under Title VII of the Civil Rights Act.

B. Financial Aid Programs and Military Service

Access to higher education is an important part of an ex-offender's reintegration into the community. Statutory bars unfortunately impede newly released persons' eligibility for federal financial aid programs, many of which are specifically for access to educational opportunities for self-improvement and empowerment.²⁰ Military service is also often a path to job skills training and higher education, but all felons are barred from military service.²¹

In 1998 Congress banned Pell grants and federal student loans for persons convicted of possession or sale of controlled substances.²² This amendment was intended to apply only to students convicted of drug offenses while they were enrolled in school, not to those with past convictions seeking to begin anew.²³ Notwithstanding this stated intent, nei-

ther the Bush administration nor the U.S. Department of Education has wavered from the harsh interpretation of this legislation.

Depending upon the offense and whether the client is a repeat offender, the period of ineligibility may be lifted. Advocates representing persons banned from federal financial aid programs can (1) move to have the underlying drug conviction invalidated, (2) enroll the client in a drug rehabilitation program, and (3) have the client submit to two unannounced drug tests.²⁴

C. Public Benefits

Persons with felony drug convictions for conduct occurring after August 22, 1996, are barred for life from TANF and food stamps unless they reside in a state that has passed legislation opting out of the ban.²⁵ Ex-offenders reentering their communities are often in need of public assistance to obtain basic necessities. Without even the meager allowances from TANF and food stamps, many will fall prey to the streets. This barrier extends also to so-called fleeing felons—those with outstanding felony bench warrants and those who are in violation of conditions of probation and parole until those matters are resolved.²⁶

Attorneys can advise clients of the importance of making appointments

²⁰Pub. L. No. 105-244, Title IV, 483(f) (Oct. 7, 1998), 112 Stat. 1735, 1736; 20 U.S.C. §§ 1001, 1002. See *supra* note 4.

²¹10 U.S.C. § 504 (2003). "No person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force. However, the Secretary concerned may authorize exceptions, in meritorious cases, for the enlistment of deserters and persons convicted of felonies." The U.S. Department of Defense's more restrictive set of requirements for enlistment accords with Congress' action (available at www.dtic.mil/whs/directives/corres/pdf/d130426wch1_122193/d130426p.pdf).

²²Under the 1998 reauthorization of Title IV of the Higher Education Act of 1965, drug offenses bar eligibility for federal financial aid for periods ranging from a year to a lifetime depending upon the crime and the number of crimes. Due to the change, 43,000 current students as of 2001 could lose eligibility. This number does not include potential students who choose not to apply for aid or who forgo higher education due to the restriction. See 20 U.S.C. § 1091(r) (2003).

²³144 Cong. Rec. H 2424, 2580 (Apr. 28, 1998) (remarks of Rep. Mark E. Souder, focusing on increase of drug arrests on college campuses).

²⁴20 U.S.C. § 1091(r)(2) (2003).

²⁵21 U.S.C. § 862a (2003). Only eight states and the District of Columbia opted out entirely. Twenty states narrowed the restriction to exempt people in drug treatment or who completed treatment, while twenty-two states maintain the complete bar.

²⁶See 7 U.S.C. § 2015(k) (2003) (Food Stamps); 42 U.S.C. §§ 1382(e)(4) (SSI (Supplemental Security Income) and 608(a)(9) (TANF). See also Gerald McIntyre, *Have You Seen a Fleeing Felon? Social Security Administration Targets SSI Recipients with Outstanding Warrants*, 36 CLEARINGHOUSE REV. 474 (Jan.-Feb. 2003).

with their probation and parole officers in order to avoid triggering a violation report. Moreover, once a client is in violation status, advocates can seek quick resolution of the matter to expedite restoration of benefits. Counsel can intervene and mediate between the client and caseworkers to resolve confusion and disputes about eligibility status.

D. Housing

In 1988 Congress amended the U.S. Housing Act to bar admission to and allow eviction from public housing for residents who engaged in various types of criminal activity. This prohibition extends to residents' family members and guests who engaged in prohibited activity.²⁷ Public housing authorities are now authorized to perform criminal background checks on applicants and family members and may deny admission to applicants with a history of crimes of violence against people or property or of other criminal acts that would adversely affect the health, safety, and welfare of other tenants.²⁸ The Supreme Court has upheld these policies.²⁹

Advocates may assist reentering offenders facing housing barriers by mediating with public housing authorities and encouraging them to evaluate, case by case, applicants who have a criminal history. They can also help evicted clients enroll in rehabilitation programs to lift the ban on readmission.³⁰

E. Parental Rights

Passage of the Adoption and Safe Families Act in 1997 marked a shift away from family preservation and unification in child welfare policy.³¹ In 1999 more than 1,500,000 minor children had at least one parent incarcerated.³² Of the 721,500 incarcerated parents of minor children, 2 percent reported that their children were under the care of child welfare institutions or foster families; 10 percent of incarcerated mothers had children in the child welfare system.³³ For many of these parents, child welfare laws jeopardize reunification with their children regardless of the parents' crimes. Criminal convictions may also prevent an ex-offender from becoming a foster or adoptive parent even if the crime was unrelated to parenting abilities.³⁴

The family separation that occurs when a parent is incarcerated and a child is placed in foster care works a dual injustice by obliging the parent to fight to maintain contact with the child from a prison cell and to regain custody as an ex-offender.³⁵ Since most child dependency proceedings take place on a track that is entirely separate from criminal proceedings, parents are usually unaware that the disposition of the criminal case could lead to loss of their children. The stringent time frames that the Adoption and Safe Families Act imposes on how long a parent has to

²⁷Anti-Drug Abuse Act of 1998, P.L. No. 100-690, 102 Stat. 4181, codified at 42 U.S.C. § 1437d(l)(5).

²⁸24 C.F.R. §§ 5.903, 960.203(C)(3), 982.552(C)(1) (2003).

²⁹HUD v. Rucker, 535 U.S. 125 (2002) (Clearinghouse No. 52,806).

³⁰42 U.S.C. § 13661(a) (1998).

³¹Pub. L. No. 105-89, 111 Stat. 2115 (Nov. 19, 1997).

³²TRAVIS ET AL., *supra* note 4, at 37–38 (2001). The disparate racial impact of these policies is also significant, as 2 percent of all children, and 7 percent of African American children, have a parent in prison. Child custody is a particular concern for the increasing number of female prisoners. Fully 10 percent of incarcerated mothers have had a child placed in foster care.

³³CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN (1999), available at www.ojp.usdoj.gov/bjs/abstract/iptc.htm.

³⁴42 U.S.C. § 671(a)(20)(A)(i)–(ii) (2003).

³⁵See Schneider, *supra* note 9, at 54–80.

reach goals necessary for reunification with the child mean that some incarcerated parents will simply run out of time and have their parental rights terminated while they are still in prison.³⁶ Some states view incarceration as *per se* grounds for termination of parental rights, and many states have erected some barriers (often time limits on a child's foster care placement) after which parents may lose custody.³⁷

The positive link between family ties and low recidivism suggests that keeping families together, rather than allowing them to break up while a parent is incarcerated, serves the public interest.³⁸ With obvious exceptions for particular crimes implying that an individual is *per se* an unfit parent, the confluence of more successful reentry and improved child welfare suggests that states should invest in programs to ensure the maintenance of family relationships when a parent is incarcerated.

Advocates can help their clients obtain and maintain visitation rights during their incarceration. They can also ensure that their clients have notice and an opportunity to attend all hearings concerning the care and custody of their children. Advocates must argue against incarceration for offenses that would lead to termination of parental rights.

F. Immigration

Civil barriers are particularly harsh for noncitizen ex-offenders, including those who have no meaningful connections to their country of citizenship.³⁹ Passage of the Antiterrorism and Effective Death Penalty Act, the Illegal Immigration Reform and Immigrant Responsibility Act, and the Anti-Drug Abuse Act forever changed the lives of immigrants residing in the United States.⁴⁰ Aggravated felonies and crimes of moral turpitude became deportable offenses.⁴¹ The list of crimes that qualify as aggravated felonies grew to include crimes of violence and white-collar crimes.⁴² Correspondingly the number of deportations due to commission of crimes rose 12 percent between 1996 and 1998.⁴³

Advocates should be aware of every client's immigration status. This is particularly useful information to have in advance of plea negotiations and trial in criminal matters where counsel who are cognizant of the triggering offenses can fashion plea bargains that avoid deportable offenses. They may be able to persuade the prosecution not to proceed with the case, given the immigration consequences. Advocates can also file appeals to overturn deportable convictions, proceed with efforts to purge or expunge records, and advocate policy change.

³⁶The Act requires a permanency hearing within twelve months of a child's entry into foster care. 42 U.S.C. § 675(5)(C) (2003).

³⁷See Schneider, *supra* note 9, at 64–72, for a more detailed analysis of the particular federal and state statutory schemes that govern child custody when a parent is incarcerated.

³⁸See TRAVIS ET AL., *supra* note 4, at 39. Studies suggest a correlation among ex-offenders between supportive families and a decreased likelihood to commit further crimes.

³⁹See Nguyen v. INS, 533 U.S. 53, (2001) (Clearinghouse No. 53,346) (child of American father convicted of sex crime and deported to Vietnam notwithstanding that father was American citizen; because father had not officially registered himself as child's father for citizenship purposes within the statutory time limit, 22-year-old Nguyen was deported to Vietnam, a country he left when he was 6 years old). See also INS v. St. Cyr, 533 U.S. 289 (2001) (Clearinghouse No. 53,885) (holding unconstitutional the retroactive application of deportation to defendant who had pleaded guilty before his crime was a deportable offense).

⁴⁰Pub. L. No. 104-132, 110 Stat. 1214 (2001) (Antiterrorism and Effective Death Penalty Act); Pub. L. No. 104-208, 110 Stat. 3009 (2001) (Illegal Immigration Reform and Immigrant Responsibility Act); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 7342, 101 Stat. 4181, 4469.

⁴¹*Id.*

⁴²Immigration Act of 1990, Pub. L. No. 101-649 § 501(b), 104 Stat. 4978; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416 § 222(b), 108 Stat. 4305, 5048.

⁴³Office of Pub. Affairs, INS (Immigration and Naturalization Service), INS Sets New Removals Record: Fiscal Year 1999 Removals Reach 176,990 (Nov. 12 1999).

G. Voting Rights

As ex-offenders reenter society, they not only face the barriers described above but also are barred from the democratic process. An estimated four million Americans, or one in fifty adults, have temporarily or permanently lost the right to vote as a result of a felony conviction. Forty-eight states and the District of Columbia prohibit voting by persons incarcerated for a felony offense. Thirty-two states deprive offenders of the right to vote while on parole, and twenty-nine prohibit probationers from voting. Thirteen states disenfranchise ex-offenders for life. Florida is an especially notable example; there over 200,000 people were permanently disenfranchised and unable to cast votes in the 2000 election.⁴⁴

The statistics are especially shocking for African American men, 13 percent of whom are disenfranchised. Assuming that current rates of incarceration continue, this number could climb to 40 percent.⁴⁵

Advocates can continue to challenge the constitutionality of the voting laws under the equal protection clause as well as the 1965 Voting Rights Act. They can also advocate the restoration of voting rights by seeking pardons, expungements and certifications of rehabilitation, and joining the legislative movement to restore rights to offenders.

III. Lack of Involvement

Why, given ex-offenders' obvious need for assistance from civil legal aid attorneys and public defenders, is this assistance lacking? Misinformation, lack of resources, high caseloads, and other

professional priorities appear to be some of the reasons.⁴⁶ Nonetheless the commitment in both communities to solve the problem and come to the aid of this rising population is clear.

In 2002 at the National Legal Aid and Defender Association's annual conference a historic first occurred—a joint civil legal aid and public defender training program track was dedicated to addressing reentry. The goal was to educate and expose the civil legal aid and public defense communities to the problems of reentry by exploring legal strategies and forming partnerships to address reentry barriers. In a keynote address, New York University Law School Professor and Clinician Anthony Thompson offered a general overview of the issue.⁴⁷

Some civil legal aid providers who attended the conference were under the misimpression that LSC regulations barred them from attending the training sessions on reentry and that attendance would jeopardize their LSC funding. Some understood the restrictions to preclude them from even listening to Professor Thompson's keynote luncheon address and therefore did not attend the event.

To clarify these issues, an opinion from the Center for Law and Social Policy analyzed the LSC regulations with regard to (1) attending and participating in training programs concerning reentry, (2) representing individuals with criminal records, and (3) the range of advocacy permitted under the LSC regulations.⁴⁸ A review of 45 C.F.R. §§ 1613, 1615, 1637, and 1612 forms the basis for these conclusions.

⁴⁴See www.sentencingproject.org. Felony Disenfranchisement Laws in the United States.

⁴⁵*Id.*

⁴⁶In researching reentry and the legal aid and public defense communities, I have not uncovered a systematic study that focused on this issue, but I propose that one be undertaken to evaluate this dilemma empirically as a part of addressing reentry obstacles.

⁴⁷The reentry clinic that Prof. Anthony Thomson directs at New York University Law School is the only such clinic at a U.S. law school.

⁴⁸See Alan W. Houseman & Linda E. Perle, *Representing Individuals with Criminal Records Under the LSC Act and Regulations*, following this article.

LSC restrictions prohibit representing clients in criminal proceedings and in habeas corpus petitions. The restrictions also prohibit representation of those who are incarcerated. Helping an ex-offender expunge a record, apply for public benefits, or retain custody of a child does not require involvement in any criminal proceeding, nor is it representation in “adversary judicial processes prosecuted by a public officer.” LSC-funded programs may engage in very limited forms of policy advocacy, such as administrative and legislative advocacy and grassroots lobbying—thus the importance for advocates to be armed with accurate information in order to assist clients facing reentry barriers.⁴⁹

IV. Collaboration Between Civil Legal Aid and Public Defenders

Collaboration is essential to tackling reentry barriers. No longer can we languish in a “my clients versus their clients” or civil versus criminal mindset. Instead we must begin to view reentry clients as joint responsibilities, merely represented in different sectors of the law.

A. Training and Conferences

To assist attorneys representing those facing reentry obstacles, many state, regional, and national organizations present training programs and conferences full of opportunities to learn from other attorneys’ experiences, share information, and explore collaboration and partnerships. Smaller and more specialized roundtable discussions, working groups, and referral arrangements have also sprung from these conferences.

B. Innovative Offices

Many offices across the country are developing new ways to combat the

problems of reentry. For over thirty years, the Public Defender Service for the District of Columbia has provided exemplary client-centered representation. In 1999 it opened a Civil Legal Services unit that has evolved from assisting children in the delinquency system to handling cases involving the collateral consequences of a criminal arrest. Attorneys in both the civil and defender units educate each other about the issues they confront and how the intersection of these issues affects their joint representation of clients.⁵⁰ The staff attorneys also work with a team of program developers—social workers in the Offender Rehabilitation Division; their mission is to support defender division attorneys who represent clients plagued by mental illness, homelessness, unemployment, illiteracy, and substance abuse.⁵¹

Attorneys from the Legal Action Center in New York City have been extremely effective in battling employment barriers facing ex-offenders. The organization is developing a National Center to Promote the Employment of Ex-offenders and is publishing a fifty-state survey detailing state employment laws affecting people with criminal records.⁵²

Community Legal Services of Philadelphia, Pennsylvania, is a model for other civil legal aid offices. It serves clients who face reentry obstacles in such ways as offering handouts and booklets on expunging records and using employment laws. The program’s attorneys have contributed to scholarship in this area and have participated in national training conferences and listservs. They also have a Web site for those in the employment arena.⁵³

The Bronx Defenders, through their Civil Action Project, offer comprehen-

⁴⁹See *id.* on LSC-funded programs being allowed to engage in very limited forms of policy advocacy.

⁵⁰See www.pdsdc.org.

⁵¹*Id.*

⁵²See www.lac.org.

⁵³See www.clsphila.org.

sive legal services to clients by fully integrating civil representation with a criminal defense practice. The office assists clients who have legal problems such as eviction, loss of public assistance or Medicaid, and unlawful forfeiture that prevent them from integrating into their communities. Bronx Defenders also identify and challenge systemic, unfair, or discriminatory practices arising from involvement with the criminal justice system.⁵⁴

The Georgia Justice Project is another innovative program that works to break down reentry barriers. Founded in 1986, it provides free criminal defense representation to indigent persons who sign a contract accepting social services such as Alcoholics Anonymous, anger management, counseling, drug counseling, GED assistance, and job skills. Some participants are employed by the program's landscaping business. Although they come to the program while their criminal case is pending, they are required to continue the rehabilitative programming following the case's completion. The Georgia Justice Project has assisted thousands of persons with great success, touting an 18 percent recidivism rate compared to the national 60 percent.⁵⁵

C. American Bar Association Initiatives

Although the barriers to reentry are numerous, efforts are being mounted to eradicate them through national reforms. To advocate system change, the American Bar Association issued standards that limit the noncriminal collateral consequences of criminal convictions and is researching the extent of collateral sanctions around the states. These efforts have support at the state, regional, and national levels.

D. Reentry Courts

A new vision of reentry management is the reentry court. This model, fashioned after drug courts, requires the offender, at the time of sentencing, to enter into a contract the terms of which lay out the plans for the offender's reintegration into society. The sentencing judge serves as the contract enforcer and may impose sanctions for failure to meet the terms of the agreement. While many public defenders understandably do not favor reentry courts, this model of reentry management does not appear to be on the decline.⁵⁶

E. Law Schools

Law schools are joining the battle against civil barriers to reentry. In addition to raising general awareness about the problems facing reentering ex-offenders, law schools can inform public interest lawyers about reentry barriers that could affect their clients. While there are encouraging signs that steps are being taken toward both of these goals, much more must be done to ensure that public interest lawyers are able to attack the collateral consequences of their clients' criminal convictions. Otherwise public interest advocates will continue to feel the crippling toll that reentry barriers take on the released offender and will have to deal with the increased workload and disheartening impact of the higher rate of recidivism.

The *Fordham Urban Law Journal* held a symposium, "Beyond the Sentence: Post-Incarceration Legal, Social, and Economic Consequences of Criminal Convictions," to explore the legal, social, and practical ramifications of civil consequences of criminal convictions.⁵⁷ Students enrolled in New York University School of Law's Offender

⁵⁴See www.bronxdefenders.org.

⁵⁵See Georgia Justice Project, Executive Summary, www.gjp.org.

⁵⁶Jeremy Travis, *But they all Come Back: Rethinking Prisoner Reentry*, in *SENTENCING AND CORRECTIONS: ISSUES FOR THE 21ST CENTURY: PAPERS FROM THE EXECUTIVE SESSIONS ON SENTENCING AND CORRECTIONS* No. 78 (U.S. Dep't of Justice ed., 2000).

⁵⁷*Twelfth Annual Symposium on Contemporary Urban Challenges: Beyond the Sentence: Post-Incarceration Legal, Social, and Economic Consequences of Criminal Convictions*, 30 FORDHAM URB. L.J. (forthcoming 2003).

Reentry Clinic receive classroom instruction and spend a minimum of twelve hours per week in fieldwork placements at the Legal Action Center, where the students represent clients who face reentry-related legal problems.

The legal profession has been well served by both civil and defender clinical models. We must continue to improve not only our method of instruction but also the content of the curriculum. Exposing students interested in public interest work to the impact of reentry barriers before they embark upon their legal careers will produce advocates who are better equipped with the tools to tackle these issues. This training in turn may help newer attorneys develop skills to motivate them to remain public interest advocates.⁵⁸

V. Conclusion

Professor Thompson labeled the work ahead for legal aid attorneys and public defenders assisting their clients with reintegration into society as the “new justice frontier.”⁵⁹ One particularly insidious aspect of the civil barriers to successful reentry into society is that they tend to funnel former prisoners back into the same structural conditions that spawned their original transgressions. Limited opportunities, easy access to illegal drugs, and even associational stimuli of the felon’s “old haunts” decrease the chances that reentering prisoners will transform their lives.⁶⁰ While these may indeed be new and uncharted waters, civil legal aid and public defense professionals owe it to their clients to equip themselves with

the knowledge necessary to tackle the new enemy—civil barriers to reentry—and to protect their clients from continued victimization by the collateral consequences of their criminal convictions.

How can we achieve this goal? Forging partnerships, attending training sessions and conferences, and becoming more aware of the issues will yield a greater understanding of the impact of reentry barriers. Working together to develop direct service and policy advocacy strategies to put in place in their communities, states, regions and nationally can help break down the barriers facing ex-offenders’ full participation in society. Simply picking up the telephone to call the local defender or legal aid office across town to answer a question regarding a collateral consequence could make all the difference in a client’s successful reentry in their community at the end of their sentence.

If the goal of the civil legal aid and defender communities is truly to ensure equal justice in America, then we must respond to the challenges of reentry that our clients face and offer them a fair opportunity to reintegrate into society. Our role as counselors no longer ends with the completion of a closed case memorandum or by the closing of jail-cell door. “Our clients should not have to fight this battle alone. Together, we cannot, we will not be stopped.”⁶¹

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⁵⁸See generally Charles J. Ogletree Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. LAW REV. 1239, 1290–91, 1294 (1993). Suggesting that law schools teach empathy and heroism in clinical legal education in order to foster student motivations to work as public defenders, Professor Ogletree further opined, “[T]he morality and legitimacy of our system of criminal justice depends on our ability to motivate people to defend the indigent.”

⁵⁹Anthony Thompson, Reentry The New Justice Frontier, Address at the National Legal Aid and Defender Association Annual Conference (Nov. 14, 2002).

⁶⁰See Travis, *supra* note 5, at 26; TRAVIS ET AL., *supra* note 4, at 27.

⁶¹*Id.*

Representing Individuals with Criminal Records Under the LSC Act and Regulations

Under what conditions may legal aid programs funded by the Legal Services Corporation (LSC) represent ex-offenders? LSC-funded programs may represent individuals who have criminal records and who are no longer in prison in civil matters that directly relate to their prior criminal records. Such civil representation is subject to neither the prohibitions on criminal representation nor the restrictions on actions collaterally attacking criminal convictions. LSC-funded programs also may advocate change in policies on the treatment of individuals with criminal records as long as the programs comply with the requirements of 45 C.F.R. § 1612.

These conclusions are based on a review of the key LSC regulations governing representation in criminal proceedings (Part 1613), actions in the nature of habeas corpus seeking a collateral attack on a criminal conviction (Part 1615), representation of prisoners (Part 1637), and training and policy advocacy (Part 1612).

Representation in Criminal Proceedings

The initial inquiry is whether an LSC program may represent an individual with a criminal record in order to help the individual obtain employment, public benefits, housing, student loans, or other benefits, or represent the individual in child welfare, immigration, or other proceedings where the criminal conviction is or could be an issue. The primary examples involve bringing actions to seal or expunge a criminal record, seek a pardon of the criminal conviction, seek certifications of rehabilitation where they are allowed (as in New York), or clean up errors in criminal records—all are permitted, and none violates the restrictions on criminal representation in 45 C.F.R. § 1613.

Part 1613 prohibits criminal defense representation that is in a “criminal proceeding.” In Part 1613.2, LSC narrowly defines “criminal proceeding” as “[t]he adversary judicial process prosecuted by a public officer and initiated by a formal complaint, information or indictment charging a person with an offense denominated ‘criminal’ by applicable law and punishable by death, imprisonment, or a jail sentence.”

The LSC Office of General Counsel (OGC, now the Office of Legal Affairs) further interpreted this defini-

tion “to mean a proceeding which is intended to determine the client’s guilt or innocence of the offense charged in the complaint, information or indictment.” See OGC Opinion, June 2, 1981, and OGC Opinion, May 17, 1993. If the program is not involved in the adversarial proceeding to determine the client’s guilt or innocence of an alleged offense, the representation does not violate Part 1613.

Actions that are brought to seal or expunge a criminal record, to seek a pardon, to seek a certification of rehabilitation, to clean up errors in a criminal record or other similar actions are civil in nature and are not part of the adversarial proceeding to determine the guilt or innocence of the client and do not violate Part 1613. Representation in a civil matter is permissible even if the action is formally brought under the caption of the original criminal case.

Note that the restrictions in Part 1613 apply only to a recipient’s LSC and private funds. These restrictions are not part of the 1996 appropriation restrictions and do not apply to a recipient’s non-LSC public funds, such as IOLTA (Interest on Lawyers’ Trust Account) funds, state filing-fee funds, or state general revenue funds.

Habeas Corpus Actions Collaterally Attacking a Criminal Conviction

Part 1615 of the LSC regulations prohibits an LSC recipient from providing legal assistance supported with LSC or private funds “in an action in the nature of habeas corpus collaterally attacking a criminal conviction if the action … (b) Alleges that the conviction is invalid because of any alleged acts or failures to act by an officer of a court or a law enforcement official.” See 45 C.F.R. § 1615.2.

Actions to seal or expunge a criminal record, to seek a pardon, to seek a certification of rehabilitation, to clean up errors in a criminal record or other similar actions are not in the nature of habeas corpus collaterally attacking a criminal conviction. They do not challenge the underlying conviction; rather, they seek to ameliorate the effects of such a conviction on an individual and are permitted under LSC regulations.

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Representing Individuals with Criminal Records

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Representing Prisoners

The LSC prohibition on representation of prisoners does not apply to a person who is no longer incarcerated in a federal, state, or local prison (or to a person who is still serving a sentence but is no longer in prison). According to the LSC regulation on representation of prisoners, 45 C.F.R. §1637.2: “‘Incarcerated’ means the involuntary physical restraint of a person who has been arrested for or convicted of a crime”; “Federal, State or local prison means any penal facility maintained under government authority”; and “Persons who are ex-prisoners may be represented in actions to seal or expunge criminal records, to seek a pardon, to seek a certification of rehabilitation, to clean up errors in a criminal record, or similar actions.”

Policy Advocacy

Certain changes in policies or practices of private and public entities may be necessary to help ex-offenders become or remain employed; participate in welfare to work programs; obtain public benefits and safe, decent, and affordable housing; prevent loss of their children through the child welfare system; obtain student loans; or remain in the United States. Current policies and practices may restrict what can be done for persons with criminal records. In order to represent a client effectively when the client has a criminal record, advocacy to change those policies and practices may be necessary. LSC-funded programs may engage in some policy advocacy under the restrictions set out in 45 C.F.R. § 1612. A summary follows.

Changing Agency Practices. LSC program staff members may advocate with administrative officials and represent clients in efforts to change the practices of institutions and agencies so that they are more responsive to low-income persons with criminal records, as long as such advocacy is not a part of a formal agency rule making.

Administrative Policy Advocacy. Except as noted below, LSC programs may not represent clients or client interests before administrative agencies engaged in rule making and may not use LSC funds to respond to requests of administrative officials with regard to rules directly affecting clients. However, an LSC program may use non-LSC funds to (1) comment orally or in writing in a public rule-making proceeding or (2) respond to a written request for information or testimony from a government agency so long as the program is respond-

ing only to the requesting party and the program does not solicit the request.

Legislative Advocacy. Except as noted below, LSC programs may not engage in advocacy and representation before legislative bodies on pending or proposed legislation. However, an LSC program may use non-LSC funds to respond to a written request for information or testimony from a legislative body or committee, or a member of such body or committee, with the same proviso as in item 2 in the preceding paragraph.

Grassroots Lobbying. LSC programs may not participate in any grassroots lobbying. Prohibited activities include oral or written communications, letter writing, and telephone or e-mail campaigns calling for specific action to influence members of the public to contact legislators or public officials to support or oppose pending or proposed legislation, regulations, executive orders, or ballot measures.

Participation in Workshops on Prisoner Reentry

Under 45 C.F.R. § 1612.8, LSC programs may not support or conduct training programs to advocate particular public policies or political activities or to train people to engage in restricted activities. However, LSC program staff may participate in training programs that inform about substantive poverty law developments and discuss statutes, regulations, or administrative or judicial decisions affecting the legal rights of ex-offenders. LSC program staff may also participate in training programs that discuss potential legal remedies for ex-offender clients adversely affected by existing or new policies and practices of public or private agencies and organizations.

—Alan W. Houseman and Linda E. Perle

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