**Boston College Law Review**

Volume 45
Issue 2 *Number 2*

Article 1

3-1-2004

# Navigating The Hidden Obstacles to Ex-Offender Reentry

Anthony C. Thompson

# NAVIGATING THE HIDDEN OBSTACLES TO EX-OFFENDER REENTRY

ANTHONY C. THOMPSON*

**Abstract:** As federal and state correctional institutions steadily release record numbers of ex-offenders each year, the communities into which prisoners are released are unprepared to sustain the economic and social burden of the massive reentry movement. As a result, reentering ex-offenders lack the support needed to reintegrate themselves into society and to lead productive, law-abiding lives. This Article first explores political trends that account for the increase in incarceration rates over the last two decades and the resulting social, legal, and economic challenges of reentry both ex-offenders and their communities face. Only recently has the government begun to respond to these problems by establishing reentry courts that specialize in ex-offender transition, support, and supervision. After questioning the efficiency and institutional competence of reentry courts, the Article suggests two alternative ways in which the legal community might help to manage ex-offender reentry. First, public defender offices could evolve into a less specialized and more integrated role through which they could represent ex-offenders in a variety of matters related to reentry. Second, law schools could provide students with clinical opportunities through which to explore creative, non-traditional solutions to representation of ex-offenders. Ultimately, collaboration between lawyers and communities will be necessary to provide ex-offenders with the resources they need for successful reintegration.

## INTRODUCTION

The distance between a prison and an ex-offender's home community generally can be traversed by bus. But this conventional form of transportation masks the real distance the ex-offender must travel from incarceration to a successful reintegration into her community. Indeed, in many ways, the space that she must cross is more akin to what one

* Professor of Law, New York University School of Law. J.D., Harvard Law School; B.A., Northwestern University. I am grateful to Professor Randy Hertz and especially Professor Kim Taylor-Thompson. I also would like to thank Anna Roberts and Liyah Brown for their research assistance and Dulcie Ingleton for her administrative support. I gratefully acknowledge financial support from the Filomen D'Agostino and Max Greenberg Research Fund at the New York University School of Law.

imagines takes place in time travel. The ex-offender, of course, remains the one constant throughout the trip across time. She possesses the personal strengths and weaknesses that she has always had. But because time has effectively stood still for her, she has no real frame of reference for the changes she will encounter. Armed with little more than her own instincts and innate abilities, she is thrust instantaneously into a world that is at once foreign and intimidating in its differences and complexities. Her home community barely resembles that which she left behind. Yet, more than physical changes await her. The community that she enters has undergone significant economic, technological, and social changes that perhaps its insider now takes for granted, but that will be all too apparent to our time traveler—the outsider. The insider will be familiar with the norms of conduct, the formal and informal structures that exist in this environment, and the relationships that govern how residents interact and thrive. The outsider will not know the rules. And yet, we will expect the ex-offender—the quintessential stranger in a strange land—to enter this dramatically different environment and simply fit in without information, without significant support, and without meaningful preparation. If she does not manage to succeed on her own, she must then face the ultimate consequence—a return to her own time, a return to prison.

The problem posed by inmates being released from prison and struggling to make successful transitions is not science fiction. Nor is it new. What is new, though, is the scale of the current problem. The United States has commenced the largest multi-year discharge of prisoners from state and federal custody in history. This release is a direct consequence of the explosion in incarceration that this country endorsed and experienced over the last two decades. In the twenty-five-year period between 1972 and 1997, the number of state and federal prisoners soared from 196,000 to a record 1,159,000.[1] In the year 2000 alone, corrections officials discharged approximately 600,000 individuals, with most returning to core communities from which they came.[2] The repercussions of this massive release effort are only now beginning to be felt. Staggering numbers of ex-offenders have been returning to the communities from which they originally came, hav-

[1] Marc Mauer, The Sentencing Project, Race to Incarcerate 114 (1999).

[2] James P. Lynch & William J. Sabol, *Prisoner Reentry in Perspective*, Crime Pol'y Rep. (Urban Inst. Justice Policy Ctr., Washington, D.C.), Sept. 2001, at 4, 15, http://www.urban.org/UploadedPDF/410213_reentry.pdf.

ing completed their sentences.[3] Research suggests that a large share of reentering offenders come from a relatively small number of neighborhoods.[4] Typically, these communities are located within central cities in a core group of states already straining under the load of their existing social and economic problems.[5] Without in-depth planning, these neighborhoods will remain ill prepared to take on the additional demands of the burgeoning reentering ex-offender population.

Prison officials, criminal justice experts, elected officials, and other interested community activists are rapidly coming to this realization. To head off the huge upheavals that this record number of releases could spark, many actors in the criminal justice system are beginning to engage in some form of planning to prepare both returning individuals and their communities for this change.[6] Unfortunately, the efforts are belated. Worse still, they may be inadequate to the task. One of the principal complications for which communities must prepare is that significant numbers of ex-offenders will rejoin their communities without the safety net of minimal supervision or support mechanisms to aid in this reintegration. Of the more than 600,000 prisoners returning home annually, about 130,000 individuals will be released simply without any form of oversight after having completed their sentences fully.[7] These individuals will not be on parole; they will not be subject to any release conditions; they will have no duty to report to—or work with—a parole officer.[8] Instead, record numbers of ex-offenders will be left on their own to navigate their release and reintegration into the very communities in which they first found themselves enmeshed in the criminal justice system.

Of course, the lack of supervision is not an entirely new phenomenon. Even when the criminal justice system expected the vast majority of ex-offenders to report to parole officers, the interaction too often degenerated into little more than a superficial reporting relationship. Individuals on parole would be required to meet with their parole officers according to a set schedule and to report their activities.[9] Fail-

---

[3] *See* JEREMY TRAVIS ET AL., URBAN INST. JUSTICE POLICY CTR., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 1 (2001), http://www.urban.org/UploadedPDF/from_prison_to_home.pdf.

[4] Lynch & Sabol, *supra* note 2, at 16.

[5] *Id.*

[6] *See* TRAVIS ET AL., *supra* note 3, at 43.

[7] *See* Lynch & Sabol, *supra* note 2, at 13.

[8] TRAVIS ET AL., *supra* note 3, at 15–16.

[9] *Id.* at 21–22; *see* Joan Petersilia & Susan Turner, *Intensive Probation and Parole*, 17 CRIME & JUST. 281, 282 (1993) (discussing the elements of a generic intensive supervision

ure to appear for a parole meeting or to comply with parole conditions could lead to sanctions or revocation of parole.[10] But the sort of guidance or help that one might imagine a parole officer could supply too often was rendered impossible due to case overload and a lack of both will and resources to engage in any meaningful intervention in the lives of individuals released on parole.[11] Thus, even under a traditional model, society has relied on ex-offenders largely to manage their own reintegration.[12]

This reliance has been greatly misplaced. It ignores the reality that an overwhelming number of ex-offenders entered prison with disabilities that continue to plague them upon reentry into their communities. A prison record, in addition to minimal education and a lack of job skills, limits ex-offenders' employability in many cases.[13] In addition, society has created a vast network of collateral consequences that severely inhibit an ex-offender's ability to reconnect to the social and economic structures that would lead to full participation in society.[14] These structural disabilities often include bars to obtaining government benefits, voting disenfranchisement, disqualification from educational grants, exclusion from certain business and professional licenses, and exclusion from public housing.[15] Without structural support or intervention, these individuals face a wide range of obstacles making it virtually impossible for them to pursue legitimate means of survival.

---

program to include "some combination of multiple weekly contacts with a supervising officer, unscheduled drug testing, strict enforcement of probation or parole conditions, and requirements to attend treatment, to work, and to perform community service").

[10] TRAVIS ET AL., *supra* note 3, at 22; *see* Petersilia & Turner, *supra* note 9, at 282 (describing "intermediate sanctions").

[11] *See* TRAVIS ET AL., *supra* note 3, at 21.

[12] *See* Jeremy Travis, *But They All Come Back: Rethinking Prisoner Reentry*, SENTENCING & CORRECTIONS (U.S. Dep't of Justice, Washington, D.C.), May 2000, *at* http://www.ncjrs.org/txtfiles1/nij/181413.txt (comparing parole supervision to more collaborative programs such as drug treatment and pretrial services).

[13] *See* TRAVIS ET AL., *supra* note 3, at 31–32; Lynch & Sabol, *supra* note 2, at 18.

[14] *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699–700 (2002).

[15] Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, FED. PROBATION, Sept. 1987, at 52, 52 (identifying legally mandated collateral consequences of the loss of voting rights, the holding of public office and offices of private trust, service as a juror, employment opportunities, professional licenses, and domestic rights); Chin & Holmes, *supra* note 14, at 705–06; *see* 20 U.S.C. § 1091(r) (2000) (suspending eligibility for federal loans and grants for drug convictions); Anti-Drug Abuse Act of 1988 § 5101, 42 U.S.C. § 1437d(*l*) (2000) (permitting eviction from public housing for "criminal activity" by tenants or their guests); *Developments in the Law—One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1939–40 (2002) [hereinafter *One Person, No Vote*].

Economic obstacles are complicated by the profound physical and mental health problems that often haunt ex-offenders. To the extent that mental health problems have manifested prior to incarceration, they more often than not remain untreated in prison.[16] Eighty percent of the state prison population reports a history of drug or alcohol use.[17] These individuals often face serious, sometimes life-threatening, health problems. Mental disorders are also prevalent among the inmate population. Rates of mental illness are, by some estimates, as high as four times the rate in the general population.[18] Providing more accessible treatment for mental and physical illnesses could help stabilize these conditions and enable individuals to maintain housing and employment. Instead, little help is available.[19] Equally troubling is the pressure placed on limited public health resources in low-income communities due to the lack of foresight regarding the escalating numbers of reentering individuals with health problems.

This laissez-faire attitude about reentry has had a predictable effect on crime. The ex-offender population has tended to recidivate due in part to an unavailability of economic and social supports. The majority of ex-offenders released from prison reoffend.[20] The largest study of recidivism conducted by the Bureau of Justice Statistics showed that eleven states accounted for 57% of all state prison releases in 1983.[21] Of those prisoners released in 1983, 63% were rearrested at least once for a felony or serious misdemeanor.[22] Concern about stopping the cycle of crime would seem to mandate that we as a society address issues of reentry and devise plans for the successful reintegration of ex-offenders into society. Large numbers of community groups, youth workers, law

---

[16] Mark J. Heyrman, *Mental Illness in Prisons and Jails*, 7 U. CHI. L. SCH. ROUNDTABLE 113, 118 (2000).

[17] TRAVIS ET AL., *supra* note 3, at 25.

[18] *Id.* at 29; *see* Heyrman, *supra* note 16, at 118; James R.P. Ogloff et al., *Mental Health Services in Jails and Prisons: Legal, Clinical, and Policy Issues*, 18 L. & PSYCHOL. REV. 109, 112–15 (1994) (describing a study involving 3684 offenders incarcerated in New York prisons, which found that eight percent were suffering from severe psychiatric or functional disabilities of the severity ordinarily found among patients in a psychiatric hospital); T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. J. CRIM. L. 283, 287–90 (1997).

[19] Heyrman, *supra* note 16, at 118.

[20] *See* TRAVIS ET AL., *supra* note 3, at 1.

[21] ALLEN J. BECK & BERNARD E. SHIPLEY, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1983, at 1 (1989), http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr83.pdf. The eleven states are California, Florida, Illinois, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Oregon, and Texas. *Id.*

[22] *Id.*

enforcement representatives, and faith institutions have begun to take this problem seriously. Their motives may vary, but each of these groups has realized the benefits of planning for returning prisoners due, in part, to the impact on both services and safety.[23] Jerry Brown, Mayor of Oakland, California, for example, attributes the city's gradual increase in homicide and general crime rates, in part, to "parolees hitting the streets."[24] As a result, the city has openly acknowledged the need to initiate programs with inmates in the state prison system prior to their release back into the neighborhoods from which they came.[25]

The federal government has taken some initial steps to tackle this problem as well. In 2000, then Attorney General Janet Reno called prisoner reentry "one of the most pressing problems we face as a nation."[26] In the 2000–2001 federal budget, then President Bill Clinton included $60 million for "Project Reentry," a federal program designed to encourage parental responsibility among offenders, job training for parolees, and the establishment of reentry courts.[27] Under the federal design, reentry courts would operate as a substitute for parole supervision, conferring on judges the responsibility to monitor the progress and problems of released ex-offenders.[28]

Although these efforts represent an important component in any effort to address the problem of reentry, little attention has been paid to the role that the legal community should play. Legal institutions have begun to weigh in on the issue of collateral consequences and reentry. Recently, the American Bar Association has promulgated a resolution calling for the reevaluation and, where appropriate, the abolition of collateral sanctions that states automatically impose on individuals convicted of certain offenses.[29] But more remains to be done. Effectively tackling the problems posed by reentry may require a shift in the ways that lawyers currently conceive of—and provide—representation to this population. The shift proposed in this Article ac-

---

[23] TRAVIS ET AL., *supra* note 3, at 43.

[24] Evelyn Nieves, *Homicides Rise Again, Threatening Oakland's Renaissance*, N.Y. TIMES, Aug. 11, 2002, at A18.

[25] *Id.*

[26] *See* Attorney General Janet Reno, Remarks at John Jay College of Criminal Justice on the Reentry Court Initiative (Feb. 10, 2000), http://www.usdoj.gov/archive/ag/speeches/2000/doc2.htm.

[27] *Id.*

[28] *See* Travis, *supra* note 12.

[29] *See* STANDARDS RELATING TO COLLATERAL SANCTIONS & DISQUALIFICATION OF CONVICTED PERS. § 19-1.2 (2003), http://www.abanet.org/crimjust/standards/collateralblk.html#1.2.

tually may require that lawyers revive and reinvigorate a paradigm of the past: the lawyer as general practitioner. The funding streams of governmental poverty practice coupled with the efficiencies of modern-day compartmentalization and specialization have caused perhaps unintentional schisms in the public interest sector. In much the same way that lawyers in private practice have come to specialize, public interest lawyers have developed areas of expertise that both deepen their knowledge of the matters that fall within their practices and narrow the range of matters that they will tackle.[30] The political and economic forces that drove lawyers to specialization may have caused them to lose sight of what fell out of the picture as they moved away from the traditional model of general practice.

Given the need to reorient the thinking of lawyers and their sense of their mission, law schools may have an important role to play. In particular, law clinics may provide the precise vehicle to try this new role on for size. Law school clinics ideally operate as laboratories for exposing young lawyers about to enter the profession to the realities and potential of practice. In the reentry context, law clinics might serve as a location for developing new advocacy strategies that cut across disciplines and practice lines. On a more practical level, law students may also begin to provide ex-offenders a resource of support and services in the process of reintegration.

Recognizing that any proposals for change must take account of the current situation and the factors that led to it, this Article attempts to explore the root causes of the reentry problem the nation now faces and the new challenges that reentry poses for both individual ex-offenders and for their communities. Part I of this Article briefly explores the fallout of two decades of tough-on-crime initiatives that paved the way for this massive release of ex-offenders.[31] Many of the problems that communities and ex-offenders now face could have been predicted and averted. Part II examines the typical challenges that ex-offenders encounter upon their return to communities.[32] A careful understanding of the extent and range of problems that they face is a necessary prerequisite to the development of any meaningful strategies or policy initiatives to ease the transition of this population. Part III looks at the role of lawyers in helping to manage reentry and offers

---

[30] *See* Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 232 (1976) (emphasizing the degree of specialization in public interest law firms).

[31] *See infra* notes 34–137 and accompanying text.

[32] *See infra* notes 138–241 and accompanying text.

modest proposals for involving law students in the challenge of reintegration of these ex-offenders into society.[33]

## I. The Repercussions from Tough-on-Crime Initiatives

### A. *Continuing Casualties from the War on Drugs*

Punishment in the criminal justice system in the last two decades has narrowed its focus to the achievement of two principal goals: retribution and deterrence.[34] Political leaders no longer even operate under the pretense that the nation's system of punishment might seek to rehabilitate the offender. Rising crime rates at various points in the last twenty years coupled with increased media attention to violent crimes have made symbolic responses all the more attractive.[35]

Mainstream politicians in the mid-1980s bet their careers on tough-on-crime agendas.[36] Crime control policies in the mid-1980s were no longer the sole territory of conservative political leaders. Otherwise left-of-center politicians pinned their political hopes to policies that sounded as tough as their more conservative opponents.[37] But regardless of their position on the political spectrum, elected officials seemed content to laud and promote measures that would appear tough even though the impact of such policies was never openly discussed or studied.[38]

The media interpreted successful "get tough" electoral messages that extended through the mid-1990s as the new political direction for the country.[39] Across the country, mayoral races were won or lost on platforms that promised drastic crime measures. For example, in New York City, the incumbent mayor, David Dinkins, lost his seat to a tough-talking opponent, Rudy Giuliani, despite decreases in crime.[40] Other states tackled the crime problem with increasingly severe sanc-

---

[33] *See infra* notes 242–278 and accompanying text.

[34] Kansas v. Hendricks, 521 U.S. 346, 361–62 (1997).

[35] Tali Mendelberg, The Race Card: Campaign Strategy, Implicit Messages, and the Norm of Equality 136–65 (2001); Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. Rev. 1227, 1247–53 (2000); *see* Nancy E. Marion, *Symbolic Policies in Clinton's Crime Control Agenda*, 1 Buff. Crim. L. Rev. 67, 67 (1997).

[36] Mauer, *supra* note 1, at 59–60.

[37] Eda Katherine Tinto, *The Role of Gender and Relationship in Reforming the Rockefeller Drug Laws*, 76 N.Y.U. L. Rev. 906, 910 (2001); Katherine N. Lewis, Note, *Fit to Be Tied? Fourth Amendment Analysis of the Hog-Tie Restraint Procedure*, 33 Ga. L. Rev. 281, 281 (1998).

[38] Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. Rev. L. & Soc. Change 153, 154 (2004).

[39] Mauer, *supra* note 1, at 71–72.

[40] *Id.* at 72.

tions. For example, California passed the Nation's first "three strikes" legislation, requiring double time for second felonies and twenty-five years to life for third-time felons (even for nonviolent felonies, such as petty theft).[41] The nation was witnessing a dramatic sea change in criminal justice policy and a new focus on incarceration as the principal method of crime control.[42] The media only helped to fuel public hysteria about crime and violence by focusing on a few high-profile incidents including the abduction and murder of Polly Klaas in California, the random shooting by a gunman on the Long Island Railroad commuter train, and similar violent incidents leading the public to see these cases less as the exception and more as the norm.[43]

The rush to embrace crime control as a model occurred as the public clamored for answers to the recurring crime problem and as the perception grew that nothing could be done to change the behavior of offenders. The collapse of faith in the rehabilitative capacities of the key institutions of crime control led to the failure model, a pervasive sense of skepticism about individualized treatment as a means of curbing criminal behavior.[44] The failure model evolved out of a number of unsuccessful attempts at institutional treatment in prison-based programs.[45] Although first used in relation to prison-based treatment, it was later used to characterize probation, parole, and other aspects of the criminal justice system.[46] The prevailing view was that criminal justice interventions were largely ineffective in the fight against crime. Fueling public perception that the crime problem was spiraling dangerously out of control was the constant barrage by the media of stories detailing violent crimes.[47] A study conducted by the Center for Media and Public Affairs found that television coverage of crime more than doubled from 1992 to 1993, despite the fact that crime rates remained essentially the same.[48] Politicians responded to both the media deluge and the accompanying call from the public for harsher measures. The result was a deliberate move toward custody as the answer to the problem of crime.[49]

---

[41] *Id.*

[42] *Id.* at 71–72.

[43] *Id.* at 72.

[44] DAVID GARLAND, THE CULTURE OF CONTROL 61–63 (2001).

[45] *Id.*

[46] *Id.*

[47] MAUER, *supra* note 1, at 72.

[48] *Id.*

[49] *See* GARLAND, *supra* note 44, at 168; Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, *in* PRISONS 17, 56 (Michael Tonry & Joan Petersilia eds., 1999).

In the directional shift toward custody lie the seeds for the current crisis in reentry. The 1980s marked not only the declaration of the war on drugs, but also saw its intensification.[50] Although the nation experienced increases in many serious crimes, between 1985 and 1995 the number of drug offenders sent to prison increased 478% compared to a rise of 119% for other crimes.[51] Overall, incarceration became the single-minded focus of the drug war. Although much of the war on drugs was fought at the local level, the pattern of large numbers of prosecutions followed by extensive incarceration was evident in the federal system as well.[52] From 1982 to 1988, federal drug prosecutions increased by 99%, whereas prosecutions for other crimes rose only 4%.[53] Increasingly, sanctions focused on prison as the primary punishment for drug offenses.[54]

1. Shifts in Composition and Complexion of Prison Population

The shift toward crime control had an adverse impact on specific populations. This very public enforcement effort primarily targeted the central city communities.[55] The war on crime increasingly degenerated into a war on those who inhabited the inner city.[56] When the crime control model coincided with the introduction of crack cocaine—a stronger, more addictive form of cocaine—the movement gained momentum.[57] The nation began to embrace dramatic alterations in sentencing schemes as necessary evils to combat the greater evil of crack cocaine. Because crack offered buyers a less expensive form of cocaine, it tended to find a market in economically subordinated communities.[58] Critics of the new crime control model decried the new sentenc-

---

[50] THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 115 (Stephen R. Donziger ed., 1996) [hereinafter REAL WAR ON CRIME]; *see* Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 340 (2002); Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC MONTHLY, Dec. 1998, at 51, 56–57 (describing the increase in tough-on-crime legislation and prison construction preceding, during, and after the 1980s crack epidemic).

[51] MAUER, *supra* note 1, at 152.

[52] REAL WAR ON CRIME, *supra* note 50, at 118.

[53] MAUER, *supra* note 1, at 61.

[54] *See id.* at 56–68 (noting impact on incarceration rates of war on drugs' policies).

[55] *See* Joseph L. Galloway et al., *A Bleak Indictment of the Inner City*, U.S. NEWS & WORLD REP., Mar. 12, 1990, at 14 (noting that the war on drugs focuses mainly on inner cities, which are populated primarily by minorities).

[56] *See id.*

[57] *See* Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1956–59 (1993).

[58] *See id.*

ing schemes due to their disparate impact on low-income communities of color.[59]

The net result of enforcement strategies and harsher sentencing schemes for crack cocaine could be seen in the changes in the racial composition of the prison population. Across the country, the rate of incarceration for African Americans skyrocketed.[60] The primary factor contributing to these imprisonment rates was the war on drugs' focus on black drug users. Although blacks comprise only 12% of the illegal drug users in the country, they accounted for 44% of all drug arrests.[61] In 1990, drug traffickers and possessors accounted for 33% of all convicted felons, with blacks representing 56% of that group.[62] Examples of the racial implications of the war on drugs' enforcement strategy abounded across the nation. In Michigan, drug arrests doubled between 1985 and 1990, yet drug-related arrests of blacks tripled.[63] Furthermore, with respect to drug and firearms offenses in 1990, the average sentence for black offenders was 49% longer than the average sentence for white offenders.[64]

As one might have expected, drug offenses attracted the attention of those policymakers interested in promulgating mandatory minimum sentences.[65] State and federal mandatory sentencing guide-

---

[59] *See* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 203–07 (1991); Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121, 122–23 (1994); Dennis Cauchon, *Balanced Justice? Sentences for Crack Called Racist*, USA TODAY, May 26, 1993, at A1.

[60] MAUER, *supra* note 1, at 143.

[61] Lowney, *supra* note 59, at 123; *see* Ron Harris, *Blacks Take Brunt of War on Drugs*, L.A. TIMES, Apr. 22, 1990, at A1; *U.S. Has Highest Rate of Imprisonment in World*, N.Y. TIMES, Jan. 7, 1991, at A14 (noting that from 1984 to 1988, the percentage of all drug arrestees who were black rose from 30% to 38%).

[62] PATRICK A. LANGAN & JOHN M. DAWSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: FELONY SENTENCES IN STATE COURTS, 1990, at 1, 5 (1993). The Bureau of Justice Statistics issues this report approximately every two years.

[63] *Report: U.S. Has Top Jailing Rate*, CHI. TRIB., Jan. 6, 1991, at 5.

[64] Ruth Marcus, *Racial Bias Widely Seen in Criminal Justice System: Research Often Supports Black Perceptions*, WASH. POST, May 12, 1992, at A4 (citing a 1989 *USA Today* study). "Between 1980 and 1988, the combined federal and state prison populations increased by ninety percent." MARC MAUER, THE SENTENCING PROJECT, AMERICA BEHIND BARS: ONE YEAR LATER 7 (1992). The U.S. prison population has tripled since 1970 and doubled since 1980. Fox Butterfield, *U.S. Expands Its Lead in the Rate of Imprisonment*, N.Y. TIMES, Feb. 11, 1992, at A16.

[65] *See* Hon. Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 457 (1999) (describing legislation passed during the war on drugs that created mandatory minimum sentences and a general increase in the penalties for drug offenses).

lines, generally, and for drug offenders, specifically, have caused not only a surge in the prison population, but have also been responsible for dramatic increases in the length of sentences imposed and served. In the federal system alone, drug offenders released *from* prison in 1990 had served an average of thirty months, whereas those sentenced *to* prison in 1990 served an average of sixty-six months.[66]

The movement to lengthen sentences coincided with efforts to attack and eliminate parole.[67] Parole in the United States has undergone dramatic changes since the mid-1970s, when most inmates served open-ended indeterminate prison terms.[68] The indeterminate sentencing scheme vested decision-making authority in parole boards to determine whether and when an inmate could be released.[69] In theory, offenders would be placed on parole only once they could demonstrate that they had established significant community ties.[70] If inmates violated parole, they could be returned to prison to serve the balance of their term. This scheme operated as a powerful incentive not to commit crimes.[71]

Questions arose about the extent to which discretion in the imposition of sentences created disparities in the system.[72] Studies showed that wide differences in the length of sentence could be traced to a judge's personal views of the characteristics of the crime and the offender.[73] Sentences appeared unduly influenced by the offender's race, socioeconomic characteristics, and the place of conviction.[74] The move to eliminate discretion resulted from an unusual alliance between left-leaning individuals interested in curbing racist sentencing patterns and those on the right who saw determinate sentencing as a way to make the system more predictable.[75] The net result was that all sentences were increased. As of 1999, fourteen states have replaced indeterminate sentencing and discretionary release with determinate sentencing and

---

[66] MAUER, *supra* note 1, at 151–52.

[67] *See id.* at 47.

[68] *Id.* at 45.

[69] *Id.* at 46.

[70] *Id.*; *see* TRAVIS ET AL., *supra* note 3, at 14.

[71] MAUER, *supra* note 1, at 45–46.

[72] *See* Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 46–47 (1994).

[73] *See* Leonard Cargan & Mary A. Coates, *The Indeterminate Sentence and Judicial Bias*, 20 CRIME & DELINQ. 144, 147–56 (1974); Nugent, *supra* note 72, at 47 ("Studies consistently report that racial minorities receive harsher and longer prison sentences.").

[74] Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, SENTENCING & CORRECTIONS (U.S. Dep't of Justice, Washington, D.C.), Nov. 2000, at 1, 1, http://www.ncjrs.org/pdffiles1/nij/184253.pdf.

[75] *See* MAUER, *supra* note 1, at 44–47.

automatic release, thereby reducing the need for, and reliance on, parole authorities.[76]

California's history with sentencing offers an all too common example of the long-term impact of short-sighted criminal justice policy making. In the late 1970s, California switched from an indeterminate criminal sentencing scheme to determinate sentencing.[77] Authorities now release more than 125,000 prisoners each year in the state, yet no parole board investigates the inmate's preparedness for release.[78] Offenders receive fixed terms at their initial sentencing and are released automatically at the end of their prison term, usually with credits for good time.[79] Most offenders in California complete their sentences and are then subject to a one-year term of parole supervision.[80] Individuals placed on parole generally must be released to the county where they resided before incarceration.[81] Thus, offenders overwhelmingly return to poor, geographically isolated, inner-city neighborhoods.

In keeping with the new trend, California has reduced its dependence on parole as a means of structuring the ex-offenders' entry back into society. Although California has not completely abandoned parole during this penological reconstruction, it has substantially eliminated discretionary parole, and the role of the parole agent has undergone change.[82] By the 1980s, parole supervision had devolved into little more than a gateway back to prison, given extremely high recidivism rates, decreased flexibility in case management, and growing caseloads.[83]

In recent years, parole has come under even more pointed attack. Parole supervision practices were at the core of a much-publicized criminal justice debate in California's 1994 gubernatorial race, threatening the very existence of parole as a viable arm of the correctional enterprise.[84] Some questioned whether parole served any useful pur-

---

[76] *See* Michael Tonry, *Reconsidering Indeterminate and Structured Sentencing*, SENTENCING & CORRECTIONS (U.S. Dep't of Justice, Washington, D.C.), Sept. 1999, at 1, 3, http://www.ncjrs.org/pdffiles1/nij/175722.pdf; *see also* TRAVIS ET AL., *supra* note 3, at 14.

[77] *See* Mona Lynch, *Waste Managers? The New Penology, Crime Fighting, and Parole Agent Identity*, 32 LAW & SOC'Y REV. 839, 842–43 (1998); Andrew von Hirsch & Julia M. Mueller, *California's Determinate Sentencing Law: An Analysis of Its Structure*, 10 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 253, 254 (1984).

[78] *See* Petersilia, *supra* note 74, at 2.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *See id.*

[83] *See* Petersilia, *supra* note 74, at 3.

[84] Lynch, *supra* note 77, at 843.

pose.[85] Attacks on parole came from inside and outside of corrections, leading to an "accountability" crisis for parole.[86] One principal way in which these criticisms of parole played out is that the system ultimately circumscribed parole officers' duties and thereby limited their ability to perform their job effectively.[87] Parole in California no longer operated as a means of exercising control over the release decision in advance of sentence expiration; it also no longer served as a means for achieving equity in sentencing. Parole supervision simply fell out of favor and no longer functioned as an integral part of the criminal justice or rehabilitative processes.

2. Ignoring the Needs of the Prison Population While Incarcerated

Coinciding with the effort to impose harsher sentences nationwide came the movement to restore harshness to the sentence itself.[88] Politicians not only focused on increasing incarceration as the primary tool in crime control, but they also directed their retributive impulses toward prison conditions.[89] Using popular narratives of "country-club like" prison conditions, elected officials set as an ambition creating conditions of incarceration so unbearable that prisoners would not want to return to prison.[90] Although the goal of making prisoners reluctant to return to prison is obviously laudable, the manner in which officials sought to realize this objective raised many eyebrows and questions. For example, in a number of states, jails and prisons reinstituted chain gangs, a practice that once had been synonymous with inhumane treatment.[91]

The political zeal to limit prisoners' access to privileges also led to the removal of anything that bore the appearance of a benefit, including many academic and vocational programs. The timing of these

---

[85] *See* Edward Epstein, *Brown Tries to Grab Crime Issue*, SAN FRANCISCO CHRON., June 14, 1994, at A3 (describing 1994 gubernatorial candidate Kathleen Brown's attack on the efficacy of the state's parole regulations).

[86] Lynch, *supra* note 77, at 843; *see* JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990, at 133 (1993).

[87] *See* SIMON, *supra* note 86, at 135–37.

[88] *See* Mark Curriden, *Hard Time*, A.B.A. J., July 1995, at 72, 74.

[89] *See* Richard Lacayo, *The Real Hard Cell: Lawmakers are Stripping Inmates of Their Perks*, TIME, Sept. 4, 1995, at 31, 31; *see also* Rhonda Cook, *Around the South Back to Hard Labor*, ATLANTA J.-CONST., Aug. 20, 1995, at D4.

[90] Iris Kelso, *Tough-on-Crime Rhetoric Scary*, NEW ORLEANS TIMES, Sept. 17, 1995, at B7.

[91] Andy Miller, *Like It or Not: James Has Alabama in Spotlight*, ATLANTA J.-CONST., Sept. 7, 1995, at C5 (remarking that one opponent termed the reintroduction of chain gangs by politicians as "Alabama's current genius of bumpkin publicity").

changes was, at best, unfortunate. The needs of the inmate population had changed dramatically since the inception of the war on drugs. With law enforcement efforts focused on low-income communities, the targets of arrests tended to be people of color in those neighborhoods.[92] The people of color most likely to be caught up in the criminal justice net were those who lacked sufficient formal education, a traditional protection against a criminal career. One study suggests that through the mid-1990s among those entering state prisons, over 70% had not completed high school and 16.4% had no high school education at all.[93] Those individuals who entered prison tended to lack marketable job skills or job experience that could sustain them in an economy with an increasingly reduced availability of unskilled jobs.[94] The recent recession has only made matters worse. A growing number of unskilled labor positions have shifted off shore and, as a result, the types of jobs ex-offenders once acquired after release have all but disappeared. The combination of cheap labor beyond U.S. borders and downsizing by manufacturers has diminished employment opportunities for those with and without criminal records.[95]

Although the educational and vocational deficits of the incarcerated population increased, Congress chose to ignore those needs. Indeed, Congress took specific aim at the large number of individuals convicted and incarcerated for drug offenses in choosing to withdraw services. For example, in 1994 Congress enacted the Violent Crime Control and Law Enforcement Act, which eliminated Pell Education Grants for state and federal prisoners.[96] Prior to 1994, Pell Grants served as the primary method for funding inmates' education.[97] The withdrawal of these grants has reduced or eliminated job-training programs and educational programs that might have given offenders an

---

[92] Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 52–55.

[93] *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 567 (Kathleen Maguire & Ann L. Pastore eds., 1995).

[94] For other reasons that limit the employability of ex-offenders, including lack of skills, race, relocation of jobs, changes in the job market, economic downturns, and competition from welfare leavers, see TRAVIS ET AL., *supra* note 3, at 31–33 and Lynch & Sabol, *supra* note 2, at 18.

[95] *See* Peter T. Kilborn, *Flood of Ex-Convicts Finds Job Market Tight*, N.Y. TIMES, Mar. 15, 2001, at A16.

[96] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20411, 108 Stat. 1796, 1828 (codified at 20 U.S.C. § 1070a(b)(8) (2000)).

[97] *See* Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 73–74 (2002).

opportunity to improve their condition upon release from prison.[98] Similarly, in 1998, Congress denied federal grants, federally subsidized loans, and work-study funds to college students who had convictions for any drug offense, regardless of whether it was a felony or a misdemeanor.[99] The legislation stripped this resource from certain students and restricts federal funds to those students Congress deemed to be more deserving. Interestingly, the legislation does not extend the prohibition to individuals who may have been convicted of serious felonies such as rape, robbery, or murder.[100] Instead, the legislation prevents those individuals without financial resources, who happen to have been convicted of any type of drug offense, from acquiring the tools necessary to reintegrate fully as working, productive members of society.[101]

Complicating this picture, the population that was entering prison in the 1990s experienced greater health problems.[102] In 1997, between 20% and 26% of the nation's individuals living with HIV or AIDS, 29% to 32% of people with hepatitis C, and 38% of those with tuberculosis were released from a correctional facility.[103] In addition to higher rates of HIV infection, the overall rate of confirmed AIDS cases in 1997 among inmates was five times the rate found in the general population.[104] Tuberculosis also made a resurgence in a number of correctional facilities.[105] In addition to the physical health needs of the inmate population, the instance of admissions of inmates with mental disorders has been on the rise.[106] At a time when the offender popula-

---

[98] *See id.* at 79–83 (stating that prison education programs have reduced recidivism rates by a factor of four); *see also* Robert B. Greifinger, *Commentary: Is It Politic to Limit Our Compassion?*, 27 J. L. MED. & ETHICS 234, 234 (1999).

[99] Blumenson & Nilsen, *supra* note 97, at 68–69; *see* Higher Education Reauthorization Act of 1998, Pub. L. No. 105-244, § 483(f), 112 Stat. 1581, 1736–37 (codified at 20 U.S.C. § 1091(r)).

[100] *See* 20 U.S.C. § 1091(r); *see also* Blumenson & Nilsen, *supra* note 97, at 70.

[101] See Blumenson & Nilsen, *supra* note 97, at 68–71 for an excellent discussion of this point.

[102] *See* TRAVIS ET AL., *supra* note 3, at 28; Charles Blanchard, *Drugs, Crime, Prison and Treatment*, SPECTRUM, Winter 1999, at 26, 26 (describing high instance of drug and alcohol addiction among inmates); Elisabeth Rosenthal, *Doctors Behind Bars Balance Safety and Care*, N.Y. TIMES, Jan. 1, 1994, at A1.

[103] TRAVIS ET AL., *supra* note 3, at 28.

[104] *Id.*

[105] Faith Colangelo & Mariana Hogan, *Jails and Prisons—Reservoirs of TB Disease: Should Defendants with HIV Infection (Who Cannot Swim) Be Thrown into the Reservoir?*, 20 FORDHAM URB. L.J. 467, 467 (1993); Kollin K. Min, *The White Plague Returns: Law and the New Tuberculosis*, 69 WASH. L. REV. 1121, 1128 (1994).

[106] *See* Henry J. Steadman & Stephen A. Ribner, *Changing Perceptions of the Mental Health Needs of Inmates in Local Jails*, 137 AM. J. PSYCHIATRY 1115, 1115 (1980) (discussing perception of correctional administrators that prisons are becoming inundated with mentally ill

tion was experiencing greater need for assistance and intervention to enable individuals to return to society in better posture than when they were removed, prison officials drastically reduced the assistance provided to inmates.[107]

Worse still, increasing numbers of offenders required substance abuse treatment while in custody.[108] One author suggests that 65% of inmates nationally tested positive for drug use in 1997.[109] Eighty-three percent of state prison inmates exhibited evidence of involvement in illicit substances: they had violated drug or alcohol laws, were under the influence at the time of their offense, committed the offense to obtain money for drugs, or demonstrated a history of drug or alcohol dependence.[110] Despite these overwhelming statistics, very few inmates actually receive drug treatment.[111]

The reasons for this are complicated and varied. In the mid-1970s, for example, the prevailing literature on treatment in prison suggested that few interventions worked, leading to the conclusion that nothing could be done to change behavior.[112] Although recent studies suggest that prison-based treatment can be effective, substance abuse services have not expanded.[113] Studies suggest that 31% of federal inmates require some level of substance abuse treatment, and a staggering 74% to 85% of state inmates are in need of treatment.[114]

---

inmates); Open Soc'y Inst., Research Brief, Mental Illness in U.S. Jails: Diverting the Nonviolent, Low-Level Offender (Nov. 1996) (on file with author).

[107] *See* Violent Crime Control and Law Enforcement Act of 1994 § 20411, 20 U.S.C. § 1070a(b)(8) (2000) (denying Pell Grants to prisoners); *see also* Fox Butterfield, *Tight Budgets Force States to Reconsider Crime and Penalties*, N.Y. TIMES, Jan. 21, 2002, at A1 (describing State of Illinois funding cuts for education in prison beyond high school equivalency level).

[108] *See* Steven Belenko, *The Challenges of Integrating Drug Treatment into the Criminal Justice Process*, 63 ALB. L. REV. 833, 835 (2000).

[109] *Id.* at 835 & n.15, 836–37.

[110] *Id.* at 836.

[111] *Id.* at 834–38; Christopher P. Krebs et al., *Jail-Based Substance User Treatment: An Analysis of Retention*, 38 SUBSTANCE USE & MISUSE 1227, 1227 (2003); Amanda Kay, Comment, *The Agony of Ecstasy: Reconsidering the Punitive Approach to United States Drug Policy*, 29 FORDHAM URB. L.J. 2133, 2175 (2002).

[112] *See* Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 48–49 (1974); *see also* DOUGLAS LIPTON ET AL., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 515–32, 542–46 (1975) (outlining various findings from previous evaluations of correctional treatment programs).

[113] *See* D.A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369, 369, 384–85 (1990) (explaining that imprisonment without rehabilitation will have no effect on recidivism); Paul Gendreau & Robert R. Ross, *Revivification of Rehabilitation: Evidence from the 1980s*, 4 JUST. Q. 349, 350–51 (1987); Stone, *supra* note 18, at 298.

[114] Belenko, *supra* note 108, at 855–56.

Notwithstanding the documented need for treatment services, correctional departments offer their own set of explanations for the failure to provide treatment. They cite budgetary constraints, lack of available counselors, lack of space, too few volunteers, and limited inmate interest as the principal reasons that they do not—and cannot—offer and provide such treatment.[115] Correctional departments also blame the failures of prison-based treatment on the frequent transfer of inmates to other prison facilities.[116] These transfers, they claim, interfere with the continuity of treatment that meaningful drug intervention would seem to require.[117] Whatever the reason, prisons and jails are simply not furnishing offenders with the type of pre-release substance abuse treatment that might facilitate their transition back into their communities.

Without access to education, job training, or substance abuse treatment, ex-prisoners attempting reentry must rely upon parole agents and other service providers in the community to help them address these critical issues. Because of the demands on the parole system due to declining funding and dangerously high caseloads, parole agents simply are unable to meet this task.[118] Furthermore, the communities to which ex-offenders return typically do not have a wealth of programs that might serve this population.[119] As a result, ex-offenders often are unable to locate programs that can address their problems. Or, to the extent that they can find a program to meet their needs, they often must juggle the effort to address their sometimes-overwhelming problems with the need to support themselves. Because of these competing demands, most parolees simply find themselves unable to lead law-abiding lives. So, predictably, they face re-arrest.[120]

### B. *Lack of Awareness of Collateral Consequences*

In addition to leaving prison with little preparation for employment and little or no treatment for continuing substance abuse problems, many ex-offenders return to their communities only to find new and unexpected hurdles in their path to reintegration. Collateral consequences, as they have been termed, include the range of social and

---

[115] *Id.* at 861.

[116] *Id.*

[117] *Id.*

[118] *See* Petersilia, *supra* note 74, at 3.

[119] *See* Lynch & Sabol, *supra* note 2, at 16, 18 (describing socioeconomic problems within core communities).

[120] *See* Petersilia, *supra* note 74, at 3.

civil restrictions that flow, sometimes without prior warning, from a criminal conviction.[121] Among the collateral consequences that affect social integration are a suspension or loss of voting rights, the loss of the right to run for or hold office, rejection from jury duty, and the prohibition against obtaining certain professional licenses.[122] These consequences of conviction prevent ex-offenders from enjoying the full benefits of citizenship even after they, ostensibly, have served their debt to society. These social exclusions not only further complicate ex-offenders' participation in the life of their communities, but they also quite effectively relegate ex-offenders to the margins of legitimate society, stigmatizing them and further highlighting their separation from law-abiding members of society.

Not only offenders, but many participants in the criminal justice system remain wholly unaware of these consequences. Because these effects cover a range of disciplines, many practitioners, and even judges, do not fully appreciate the entire impact of a conviction.[123] The diverse areas in which these sanctions surface make them difficult to know completely and to resolve in any single forum. Currently, court rules do not require that either a trial judge or defense attorney explain the collateral consequences of a guilty plea to the defendant.[124]

Although not required by law or court rule, some prosecutors have begun to take some preliminary action to address collateral consequences. Their efforts have come about as some prosecutors have begun to question the appropriateness of making charging, plea bargaining, and sentencing decisions without taking into account the potential collateral consequences on the defendant.[125] Robert Johnson, the past president of the National District Attorneys Association has suggested that

> [a]t times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without dis-proportionate collateral

---

[121] *See* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 153–54 (1999).

[122] Chin & Holmes, *supra* note 14, at 705–06; *see* U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY apps. A, B (1996) (providing listings of several types of disabilities afforded ex-offenders).

[123] *See* Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. & CRIMINOLOGY 347, 347 (1968).

[124] *See* Chin & Holmes, *supra* note 14, at 700.

[125] *See* Robert M.A. Johnson, *Message from the President: Collateral Consequences*, PROSECUTOR, May–June 2001, at 5, 5.

> consequences. There must be some reasonable relief mechanism. It is not so much the existence of the consequence, but the lack of the ability of prosecutors and judges to control the whole range of restrictions and punishment imposed on an offender that is the problem. As a prosecutor, you must comprehend this full range of consequences that flow from a crucial conviction. If not, we will suffer the disrespect and lose the confidence of the very society we seek to protect.[126]

Although prosecutors may not have an express professional obligation to consider the real impact of a conviction, practical concerns about fairness, as well as the societal concern about creating obstacles to the reentry of ex-offenders who have paid their debt to society, may impose such a duty.[127]

Public defenders, too, have come to recognize that their counseling role may need to broaden to include discussions of reentry concerns. Based on their experience with immigration, defenders have already found value in informing clients about some collateral consequences.[128] In the immigration context, defenders have come to understand the necessity of explaining the potential immigration impact of a conviction to their clients. For example, a plea bargain that would otherwise seem attractive in the criminal justice system could adversely affect immigration status.[129] Thus, a guilty plea that permits an offender to avoid a jail term could still subject the offender to deportation. In the same way that defenders have recognized that their clients need to be apprised of potential immigration consequences, they are now beginning to explore the range of reentry consequences that may flow from a conviction so that they can help their clients make judgments that are more informed. Reentry consequences could affect an even larger segment of the defense bar's clients.[130]

Typically, though, these collateral consequences do not surface in counseling sessions between lawyer and client or in the course of a guilty plea colloquy in court. Lawyers and judges are often unaware of

---

[126] *Id.*

[127] *See id.*

[128] *See* NAT'L LEGAL AID & DEFENDER ASS'N, JUSTICE IN ACTION CONFERENCE PROGRAM 1, 24 (2002), *at* http://www.nlada.org/Training/Train_Annual/Annual_2002 [hereinafter NLADA].

[129] Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 99, 120 (1998).

[130] *See* NLADA, *supra* note 128, at 8. Reentry was a central theme of the NLADA 2002 annual conference. *See id.*

the full range of consequences involved.[131] Courts have also declined to hold that defendants should be advised of collateral consequences.[132] Without the court's official sanction, some defense lawyers may not see this form of advice as part of their central role. Even if lawyers perceive this as within their duties, they may not have the resources to help the client address these problems even though they recognize the effects. Finally, the vast majority of those affected by collateral sanctions are indigent.[133] Because indigent legal services tend to be provided by areas of specialty (housing or government benefits, family law, or criminal defense), it is unlikely that a single defender would have complete knowledge of the wide range of consequences.

Although judges typically do not address collateral consequences in individual cases, they have begun to appreciate the larger problem. Judges have started to explore the negative ramifications of often unforeseen effects of convictions through the use of reentry courts. In January 2002, the United States Departments of Justice, Health and Human Services, Labor, Education, and Housing and Urban Development jointly issued a national reentry solicitation, "Going Home: The Serious and Violent Offender Reentry Initiative."[134] The grant program hoped to award approximately $100 million toward this effort.[135] At least one community in each state would receive funding under the initiative by developing broad strategies that prepare prisoners for successful reentry and reintegration.[136] The solicitation also called for the establishment of reentry courts because the federal government considered reentry courts a promising approach, and hoped to encourage their development throughout the nation.[137]

Still, the attempts to address reentry remain fragmented. The criminal justice and civil justice actors and service providers have yet to develop a coordinated approach to providing both front-end recogni-

---

[131] *See* Damaska, *supra* note 123, at 347.

[132] A consequence is "direct" where it is "definite, immediate and largely automatic." United States v. Kikuyama, 109 F.2d 536, 537 (9th Cir. 1997). A consequence is "collateral" where it is "beyond the control of the sentencing court." Chin & Holmes, *supra* note 14, at 704.

[133] *See* Laurie Robinson & Jeremy Travis, *Managing Prisoner Reentry for Public Safety*, 12 FED. SENT. REP., 258, 258 (2000); Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1281 (2002).

[134] *Reentry Courts*, CRIM. JUST., Spring 2002, at 15, 15. For more information about federal reentry solicitation, see OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, LEARN ABOUT REENTRY, at http://www.ojp.usdoj.gov/reentry/learn.html (last visited Apr. 6, 2004).

[135] *Reentry Courts*, *supra* note 134, at 15.

[136] *Id.*

[137] *See* U.S. DEP'T OF JUSTICE, *supra* note 134; *see also Reentry Courts*, *supra* note 134, at 15.

tion of the range of consequences as well as delivery of services for individuals reentering society. The system as a whole must determine how to prepare the individual for the likely consequences of a conviction. At a minimum, one player needs to take responsibility for alerting the individual about these consequences, giving the prisoner the assistance to secure help and services while incarcerated, and providing that individual with some help and support upon release. Right now, these services fall within the cracks because no one owns this responsibility.

## II. The Challenges of Reentry for Ex-Offenders and Their Communities

Much of what ex-offenders encounter upon release to their communities can be anticipated and addressed. The problem is that for too long the standard approach has been to allow ex-offenders to fend for themselves with little or no support or guidance. A critical first step in unraveling the tangle of issues that ex-offenders face is open acknowledgment that there are common difficulties. Mapping a path for ex-offenders to follow given those difficulties would seem a logical second step. Issues of gender and geography also bear consideration in developing any strategy to address the morass of reentry problems facing the returning offender.

As a first step toward coordination, one might begin by examining the various points of contact for the offender on the continuum from prison to home. Such an examination would likely suggest a role for corrections officials prior to the offender's release. Meaningful coordination of programs for the offender means assessing the offender's needs while in prison and providing information about programs that he or she might tap upon release. At a minimum, for example, corrections officials might ensure that upon release an offender will receive adequate state-issued identifications. Healthcare services, drug treatment placements and employment services should all be connected from facilities to communities, so the ex-offender has a map of sorts to follow that might prevent interruption of services and might provide a transitional support as he or she begins reintegration.

Still, the most pressing problems that the ex-offender encounters are the obstacles that interfere with the ability to make a smooth transition to being a productive member of the community. Collaborative efforts will need to take into consideration that the communities receiving the largest number of ex-offenders are also the communities

most often at risk.[138] Overwhelmingly, commentators and statistics demonstrate that the primary recipients of prison sentences during the height of the war on drugs and the war on crime have been African Americans.[139] This high rate of incarceration has placed added stresses on low-income communities of color. The loss of young men who are potential wage earners and supports for families has a detrimental effect on the social organization of poor communities while the offender is in prison. After the offender is released, the problems of lack of employment and lack of meaningful connection with the community can persist.[140]

So the question remains that if conditions continue to worsen, what can and should communities do to provide resources for returning ex-offenders? At a minimum, a coordinated effort to develop public education programs geared to individuals and communities about the impact of reentry and the need to provide services would seem appropriate. These programs should identify common issues facing all ex-offenders in the particular community. For those groups of ex-offenders that may experience unique difficulties—women with children, or those ex-offenders with particular mental or physical health problems—communities should enlist broad support and input into methods to serve this population.

### A. *Barriers to Reentry*

One of the principal but largely hidden barriers to successful reentry is the complex network of legal and administrative regulations barring access to many services.[141] Where specific legal barriers are not in place, powerful incentives drive local authorities to exercise

---

[138] Lynch & Sabol, *supra* note 2, at 15–16.

[139] JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 80–82 (1996); Alfred Blumstein, *Incarceration Trends*, 7 U. CHI. L. SCH. ROUNDTABLE 95, 103 (2000) (stating that the incarceration rate of African Americans is 8.2 times that of whites); *Punishment and Prejudice: Racial Disparities in the War on Drugs*, HUM. RTS. WATCH, May 1, 2000, http://www.hrw.org/reports/2000/usa/Rcedrg00.htm#P54_1086.

[140] John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, *in* 26 PRISONS: CRIME AND JUSTICE 121, 121–22 (Michael Tonry & Joan Petersilia eds., 1999).

[141] *See* Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1716–19 (2003).

their discretion in a manner that limits access to services for ex-offenders in the interest of the larger community.[142]

### 1. Housing

For example, the federal government rewards public housing agencies points in the Public Housing Assessment System for documenting that they have adopted policies and procedures to evict individuals who engage in activity considered detrimental to the public housing community.[143] On its face, such a system makes sense. It is designed to ensure safety of public housing tenants by empowering officials to remove a current threat.[144] Public housing officials, however, have interpreted this mandate to cover individuals who may pose no current danger, but who happen to have criminal histories.[145]

Housing has always presented a problem for individuals returning to their communities following a period of incarceration. Private property owners often inquire into the individual's background and tend to deny housing to anyone with a criminal record.[146] But, in the past, when private housing options seemed foreclosed, public housing remained an option. Ex-offenders were placed on a list like other public housing applicants and were considered based on a number of factors including their age, marital status, and parental status.[147] In 1988, however, Congress removed that safety net through an amendment to the public housing statute adopting a one-strike eviction policy from federal public housing.[148] The intent of the amendment was to prohibit admission to applicants and to evict or terminate leases of residents who engaged in certain types of criminal activity.[149] More than just adversely affecting the individual, the one-strike provision has had a profound impact on families. It has fractured family structures and increased pressure on already at-risk communities by limiting housing options for those who have convictions or are returning from incar-

---

[142] 42 U.S.C. § 1437d(q) (2000) (permitting public housing agencies to access criminal records); 24 C.F.R. § 5.903 (2003).

[143] 24 C.F.R. § 966.4(*l*)(5)(vii).

[144] *Id.*

[145] *See id.* § 902.43(a)(5); Michael Barbosa, *Lawyering at the Margins*, 11 AM. U. J. GENDER SOC. POL'Y & L. 135, 139 (2003).

[146] Heidi Lee Cain, Comment, *Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 149–50 (2003).

[147] *Id.*

[148] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300 (codified at 42 U.S.C. § 1437d(*l*) (2000)).

[149] *Id.*

ceration.[150] Families who reside in public housing often have had to sign agreements that ex-offender family members not only could not live with them but also would not visit the public housing unit.[151]

2. Employment

Although it is tempting to think in isolation about each of the problems reentering ex-offenders face, they tend to be linked. For example, the difficulty in finding housing also affects the ability of ex-offenders to secure and maintain employment.[152] The relationship between stable housing and seeking and maintaining employment has been described as interconnected.[153] Ex-offenders applying for work need to have an address and telephone number where they can be reached. Once employment is obtained, the newly employed need the stability that comes from some level of permanence to be able to handle the day-to-day stresses associated with work.

If families cannot or do not provide housing options for those returning from incarceration, then options are few. The temporary housing stock in most central cities—the primary communities in which large numbers of offenders are located—consists primarily of homeless shelters. Homeless shelters are more often than not unsafe.[154] Moreover, these facilities tend to be crowded and lack any sense of privacy, making it difficult for occupants to regard the shelter as anything other than temporary lodging.[155] This situation adds to the feeling of instability in the lives of ex-offenders when stability is precisely what they need.[156]

---

[150] *See* Fox Butterfield, *Invisible Penalties Stalking Ex-Convicts, Sanctions Target Jobs, Housing, Welfare, Voting*, PITTSBURGH POST-GAZETTE, Dec. 29, 2002, at A9.

[151] *See id.*

[152] *See id.*

[153] *See* Brian Maney & Sheila Crowley, *Scarcity and Success: Perspectives on Assisted Housing*, 9 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 319, 328 (2000).

[154] Christina Victoria Tusan, *Homeless Families from 1980–1996: Casualties of Declining Support for the War on Poverty*, 70 S. CAL. L. REV. 1141, 1190–93 (1997); Suzanne Daley, *Robert Hayes: Anatomy of a Crusader*, N.Y. TIMES, Oct. 2, 1987, at B1 (describing view of homeless that shelters are dangerous places).

[155] *See* Tusan, *supra* note 154, at 1190–92; K. Scott Mathews, Note, *Rights of the Homeless in the 1990s: What Role Will the Courts Play?*, 60 UMKC L. REV. 343, 344 (1991); *see also* Daley, *supra* note 154, at B1.

[156] *See* Paul Ades, *The Constitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595, 620 n.183 (1989) ("[E]ven if shelter beds are accessible, it can be argued that homeless people are offered no real choice if, as is likely, the shelter is dangerous, drug-infested, crime-ridden, or especially unsanitary. . . . Giving one the option of sleeping in a space where one's

In addition to limitations on access to public housing, felony convictions lead to a number of employment barriers. Throughout the 1980s, a number of states restricted the employment opportunities for ex-offenders to show their tough-on-crime stance.[157] Rather than focusing on employment that might be related to an offense, these prohibitions generally assume the form of blanket restrictions based on the individual's status as an ex-offender as opposed to some specific relationship to conduct.[158] A number of states permanently bar ex-offenders from public employment.[159] California, for example, prohibits parolees from working in real estate, nursing, or physical therapy.[160]

On one hand, some might argue that the nature of certain offenses might warrant exclusion from specific occupations, such as barring a convicted sex offender from working with children. The logic of this sort of exclusion lies in its direct relationship to the nature of the offense of which the ex-offender was convicted. On the other hand, some still might argue against these specific exclusions because the exclusions fail to acknowledge the effect of therapy and the potential for changes in the offender's conduct and character. Regardless of how one might resolve this debate, it is hard to construct a justification for blanket restrictions that makes sense. Applicants for employment should be reviewed individually rather than having to face the additional punishment of being barred from a position regardless of the offense. By precluding every ex-offender from specific occupations, states may be preventing too broad an array of potential workers from becoming productive members of the community.[161]

Complicating the bars to employment are occupational licensing restrictions that apply to ex-felons nationwide.[162] Professional licensing is the primary method for maintaining some measure of regulatory control over professional qualifications and over the quality of service provided by individuals within that business. Ex-offenders are routinely excluded from many employment opportunities that require profes-

---

health and possessions are seriously endangered provides no more choice than does the option of arrest and prosecution.").

[157] Nora V. Demleitner, *Collateral Damage: No Re-entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1038 (2002).

[158] *Id.* at 1038–39.

[159] *Id.* at 1038.

[160] *Id.*

[161] *See id.*

[162] Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 193 (1995).

sional licenses.[163] Many federal, state, and municipal laws exclude ex-felons from "regulated occupations" by requiring that the applicant show "good moral character" or by barring entry into the profession by anyone who has been convicted of a crime.[164]

Good moral character statutes pose a significant barrier to the ex-felon obtaining an occupational license.[165] These statutes rarely define "good moral character" with any specificity making statutory interpretations of this term ambiguous at best.[166] Without a reasonably clear legislative or judicial understanding of what "good moral character" means, licensing boards and agencies have tremendous latitude in defining the term.[167] Therefore, someone with a criminal conviction applying for a license that contains the good moral character requirement is barred, for all intents and purposes, from obtaining a license.[168] Further, without adequate guidelines, different licensing agencies can apply varying interpretations of good moral character, which can lead to inconsistent application of the same licensing statutes.

The provision that any criminal conviction will bar an individual from obtaining a license can be similarly overbroad.[169] Licensing requirements apply to a wide spectrum of professions—from lawyer to bartender, nurse to barber, and plumber to beautician.[170] Professional disqualifications do not depend on the existence of a nexus between the prior offense and the employment.[171] Therefore, an individual might face exclusion from the plumbing profession, for example, because of an assault conviction that occurred in a unique situation wholly divorced from an employment context. Still, professional disqualifications have been hailed as necessary "to foster high professional standards."[172] As these restrictions indicate, felony convictions "impose[] . . . a status upon a person which not only makes him vulnerable to future sanctions . . . but which also seriously affects his reputation and economic opportunities."[173] The end result of these

---

[163] *See id.* at 193–94.

[164] *See id.*

[165] *Id.* at 197.

[166] *Id.*; *see* Bayside Enters., Inc. v. Carson, 450 F. Supp. 696, 707 (M.D. Fla. 1978) (stating that the character requirement is "so imprecise as to be virtually unreviewable"); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 571 (1985).

[167] *See* May, *supra* note 162, at 197.

[168] *See id.*

[169] *See id.* at 195–96.

[170] *See id.* at 193–94 & n.52 (listing licensed occupations that exclude former offenders).

[171] *Id.* at 206–07.

[172] Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 406 (1967).

[173] Parker v. Ellis, 362 U.S. 574, 593–94 (1960) (Warren, C.J., dissenting).

wide-ranging restrictions on ex-offenders' ability to obtain employment is to further restrict their ability to reintegrate into society.

One unforeseen complication has been that prisons have continued to provide vocational training to inmates in certain occupations from which they will be barred upon release. Consider the case of Marc LaCloche.[174] Mr. LaCloche served a term in the Clinton Correctional Facility in New York after being convicted of first-degree robbery.[175] He spent 1200 hours in prison learning a barber's trade so that upon release he would have a means of building a new life.[176] Shortly before LaCloche was due to be paroled, he applied for a license as a barber's apprentice, but the state refused his application on the ground that the "applicant's criminal history indicates lack of good moral character."[177] At least one judge in New York appreciated the irony of this situation, noting, "if the state offers this vocational-training program to persons who are incarcerated, it must offer them a reasonable opportunity to use the skills learned thereby after they are released from prison."[178] Yet the disconnect continues.

### 3. Voting

Perhaps the most public bar to reentry is the inability for ex-offenders to participate in the electoral process. Felon disenfranchisement arguably has altered the outcome of elections.[179] States address the participation of ex-felons in the voting franchise in a variety of ways. A number of states disenfranchise felons permanently but allow some limited opportunities for formal restoration of rights.[180] Others either permanently disenfranchise after a second felony conviction or allow ex-felons to vote only after they finish probation or parole.[181] The loss of voting power has ramifications not only for the

---

[174] Dareh Gregorian & Pia Akerman, *Ex-Con Barber in Hair Tangle*, N.Y. Post, Feb. 21, 2003, at 3.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *See One Person, No Vote*, *supra* note 15, at 1941.

[180] *See* Jamie Fellner & Marc Mauer, Human Rights Watch & The Sentencing Project, Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States 4 (1998); The Sentencing Project, Legislative Changes on Felony Disenfranchisement 1996–2003, at 3 (2003), http://www.sentencingproject.org/pdfs/legchanges-report.pdf (providing updates from several states).

[181] Fellner & Mauer, *supra* note 180, at 4; *see* Patricia Allard & Marc Mauer, Regaining the Vote: An Assessment of Activity Relating to Felon Disenfranchisement

individual ex-offender, but also for the communities to which ex-offenders return, which will then include growing numbers of residents without a recognized political voice.

### B. *Reentry Is Complicated by Gender*

To the extent that policymakers consider the plight of the returning ex-offender, they treat reentry problems generically more often than not. That tendency has almost hidden from view the unique but quite compelling difficulties that female ex-offenders face upon release.[182] Women who are incarcerated have unique health needs and often experience different mental health issues that may have contributed to or arisen out of their confinement.[183] Yet, perhaps the most significant factor that distinguishes women from their male counterparts relates to their real and perceived responsibility for their children.[184] It is the impact of the parental role that often weighs most heavily on the woman ex-offender and guides her choices upon release—a factor too often ignored in examinations of the problems posed upon reentry.

The majority of mothers currently incarcerated had been the sole caretakers for their children prior to incarceration.[185] Generally, when a father goes to prison, the mother keeps the family intact.[186] When a mother enters prison, however, the father too often does not remain involved in the caretaking of the children.[187] Therefore, families are more likely to be broken as a result of mothers being incarcerated than fathers.[188] Although some children live with a relative during their mother's incarceration, many enter the foster care system because no

---

LAWS 3–4 (2000), http://www.sentencingproject.org/pdfs/9085.pdf (for an overview of current laws and initiatives relating to felon disenfranchisement).

[182] *See* Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 133, 140 (1999).

[183] Ellen M. Barry, *Bad Medicine: Health Care Inadequacies in Women's Prisons*, CRIM. JUST., Spring 2001, at 39, 39–42.

[184] *See* Acoca & Raeder, *supra* note 182, at 135–36.

[185] *Id.*; Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 949 (1993).

[186] *See* Raeder, *supra* note 185, at 952 (revealing that ninety percent of male inmates reported that their children's mother was caring for their children).

[187] *See* Acoca & Raeder, *supra* note 182, at 135–36 (reporting that only twenty-six percent of female inmates indicated their children's father was caring for their children).

[188] *See* MARILYN C. MOSES, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, KEEPING INCARCERATED MOTHERS AND THEIR DAUGHTERS TOGETHER 4 (1995), http://www.ncjrs.org/pdffiles/girlsct.pdf.

family member is available to care for them.[189] Thus, an overriding concern for many women upon release is regaining custody of their children.

The lack of planning for reentry for the female population has a disproportionate impact on children and families. Approximately 2.1% of all children under the age of eighteen have a parent in state or federal prison.[190] This means that 1.5 million children in the United States are affected by the lack of any coherent reentry policy.[191] In addition, between 1985 and 1997 the number of women in jails and prisons nearly tripled.[192] Upon release, this growing number of women faces the burden of trying to find housing and employment often at the same time that they are fighting to be reunited with their children.[193]

Additionally, the fight for custody can be overwhelming. Federal welfare and adoption legislation create significant obstacles for women ex-offenders.[194] Welfare laws reduce their access to benefits that might provide transitional support as they seek employment.[195] Adoption laws add pressure to returning mothers by reducing the amount of time that parents have to reunite with their children before permanently losing custody.[196] At the same time, increased rates of incarceration of men and women of color have meant an increase in fragmented families in those communities.[197] Although measuring emotional harm is difficult, some judgments about the ways in which

---

[189] *See id.*

[190] Amy E. Hirsch, *Introduction* to EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 7, 7 (Ctr. for Law & Soc. Policy & Cmty. Legal Servs., Inc. ed., 2002).

[191] *Id.*

[192] *See* Acoca & Raeder, *supra* note 182, at 134.

[193] *See* Stephanie R. Bush-Baskette, *The War on Drugs as a War Against Black Women*, *in* CRIME CONTROL AND WOMEN: FEMINIST IMPLICATIONS OF CRIMINAL JUSTICE POLICY 113, 113–15 (Susan L. Miller ed., 1998) (crediting the increase in black women's incarceration rates to the war on drugs and indicating that black women are a greater percentage of the female prison population than black men are of the male prison population).

[194] Acoca & Raeder, *supra* note 182, at 140–41.

[195] 42 U.S.C. § 608(a)(9) (2000); Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 115, *id.* § 862a; Acoca & Raeder, *supra* note 182, at 140–41; Recent Legislation, *Welfare Reform—Punishment of Drug Offenders—Congress Denies Cash Assistance and Food Stamps to Drug Felons*, 110 HARV. L. REV. 983, 985 (1997).

[196] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

[197] Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 206 (1998).

high imprisonment affects families, the life chances of children, and the economic circumstances of at-risk communities are possible.[198]

A brief examination of the problems that women encounter on reentry may lead to a decision to have gender-specific approaches to reentry. For example, in communities of color, women offenders tend to be stigmatized by their community.[199] Although men who commit crimes are not necessarily seen as good members of the community, they are rarely ostracized.[200] Women who engage in crime are often seen as defying gender roles, which is perceived by communities as deviance of a higher order.[201] In addition, women's transition back into their communities becomes more difficult because they often have trouble maintaining connections during their period of incarceration. The few women's prisons that exist tend to be located far from the women's homes.[202] This distance means fewer visits and limited contact with family members.[203] This distance has consequences such as loss of physical or legal custody of children.[204] Once released, women face multiple tasks simultaneously—getting children back, getting a job, getting housing, getting treatment—which only exacerbates the already difficult process of reentry.

### C. *Challenges to Communities with Reentering Residents*

As a general rule, communities are quite adept at considering and anticipating the potential safety issues posed by the release of offenders. Still, they tend to ignore the drain on political influence and financial support when large numbers of ex-offenders return.

---

[198] The family disorganization that results from the imprisonment of an adult member not only increases the likelihood that juveniles will become enmeshed in the justice system but also decreases the likelihood that they will be able to disentangle from it. For example, one study reporting that institutionalization had an adverse effect on the likelihood that juvenile offenders would commit future parole violations also found that the most potent predictor of parole outcomes was the level of "family problems" they confronted once released. Michael Fendrich, *Institutionalization and Parole Behavior: Assessing the Influence of Individual and Family Characteristics*, 19 J. COMMUNITY PSYCHOL. 109, 119 (1991); *see* Meares, *supra* note 197, at 206.

[199] *See* Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1791–92 (1992).

[200] *Id.*

[201] *Id.*

[202] REPORT OF THE SPECIAL COMMITTEE ON GENDER TO THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE, AND ETHNIC BIAS (1995), *excerpted in* 84 GEO. L.J. 1657, 1796 (1996).

[203] *Id.*

[204] Raeder, *supra* note 185, at 951–54. For approximately twenty-eight percent of women state prisoners nationally, imprisonment means permanent loss of legal custody of their children. *Id.* at 954.

A principal financial impact has occurred as a result of the mechanics of the most recent national census. At the end of the millennium, the Census Bureau engaged in a comprehensive effort to count every living body in the country.[205] The Bureau counted bodies where they were located, which had an often-devastating impact on low-income communities, because prisons are often located somewhere else.[206] The twin circumstances of high incarceration rates of individuals from low-income urban communities and the Census Bureau's decision to count prisoners as residents of the communities in which prisons were located meant that low-income communities lost numbers for purposes of the Census.[207] Financial resources in the form of state and federal aid are tied, in part, to census figures. States such as Arizona, Illinois, and Wyoming use census figures to distribute state tax revenue and other funds.[208] One hundred and eighty-five billion dollars a year in federal aid are distributed on the basis of census figures.[209] Federal programs based at least partially on census data include job training programs, school funding, national school lunch programs, Medicaid, and community development programs.[210] The loss of population numbers can diminish the financial health of communities that rely on such programs. Indeed, as urban communities lost out, some rural communities stood to gain. Towns located close to prisons were able to include prisoners' low incomes in their per capita income figures.[211] Thus, the towns appeared poorer and became eligible for more poverty-related grants.[212]

What rural communities stood to gain from the inclusion of prison populations in their census figures, poorer urban communities lost. Funding follows prisoners who are transferred out of their home communities. In the 1990s, for example, Lorton prison, filled with District of Columbia residents, was placed in Virginia at a cost to the city of $60 million.[213] Such transfers of people and funds reduce the

---

[205] PETER WAGNER, PRISON POLICY INITIATIVE, IMPORTING CONSTITUENTS: PRISONERS AND POLITICAL CLOUT IN NEW YORK 1, 4 (2002), http://www.prisonpolicy.org/importing/importing.shtml; Fred Alvarez, *Census Bureau Counts on Huge Campaign to Get Numbers Right*, L.A. TIMES, Nov. 28, 1999, at B1.

[206] WAGNER, *supra* note 205, at 4.

[207] *Id.* at 4–6.

[208] Peter Wagner, Prison Policy Initiative, Detaining for Dollars: Federal Aid Follows Inner-City Prisoners to Rural Town Coffers 1 (2002) (on file with author).

[209] *Id.*

[210] *See id.*

[211] *Id.*

[212] *Id.*

[213] Wagner, *supra* note 208, at 1.

money available for resources that have been proven to reduce crime, such as schools and poverty programs.[214]

The census count simultaneously reduced the political power of low-income urban communities.[215] Even though inmates are prohibited from voting in forty-eight states, including New York, they are counted for the purpose of legislative apportionment and redistricting.[216] The fact that they are recorded by the census as residing in their prisons results in a decrease in the number of politicians representing urban interests.[217] In New York, for example, where 65.5% of state prisoners are from New York City, the census count costs the city 43,740 residents.[218] The loss of political power is particularly severe for minority communities in New York, because 80% of New York's prisoners are black or Latino, but New York's prisons are predominantly in white rural areas.[219] All prisons built in New York since 1982 have been built upstate, and although only 24% of New York prisoners are from the upstate region, over 91% of its prisoners are incarcerated there.[220]

In a number of states, the decrease in political power in mostly inner-city neighborhoods of color is matched by an increase of political power in the predominantly white rural areas in which prisons are located.[221] The votes of rural residents are said to be weighted more heavily than those of urban residents, because, with so many of their constituents incarcerated, rural politicians are able to devote more of their attention to their "real constituents."[222] With a considerable

---

[214] *See id.*

[215] *See* PRISON POLICY INITIATIVE, DILUTING DEMOCRACY: CENSUS QUIRK FUELS PRISON EXPANSION 1 (2003), *at* http://www.prisonpolicy.org/articles/dilutingdemocracy.pdf.

[216] *Id.*; WAGNER, *supra* note 205, at 4.

[217] Peter Wagner, *Locked Up, Then Counted Out: Prisoners and the Census*, FORTUNE NEWS, Winter 2002–2003, at 22, 22, http://www.fortunesociety.org/deathpenalty.pdf.

[218] *Id.*

[219] Press Release, Prison Policy Initiative, Study Says Prison Populations Skew New York Districts; City Loses, Rural Legislators Gain, from New Districts (Apr. 22, 2002), *at* http://www.prisonpolicy.org/importing/pr.shtml. New York is a majority white state (54%), but the overwhelming majority of prison growth (87.6%) since 1970 has been of minorities. WAGNER, *supra* note 205, at 12. During that period of growth, the New York prison population became 5.6 times larger. *Id.* Of the two million Americans now behind bars in local, state, and federal facilities across the nation, nearly half are black and 16% are Hispanic. Jonathan Tilove, *Minority Prison Inmates Skew Local Populations As States Redistrict*, NEWHOUSE NEWS SERVICE, Mar. 12, 2002, at A1, http://www.newhousenews.com/archive/story1a031202.html.

[220] Peter Wagner, *Census Quirk Sustains New York's Love Affair with Prisons*, ALB. CENTER L. & JUST. NEWSL., Aug. 2002, http://www.prisonpolicy.org/articles/clj0802.shtml; Wagner, *supra* note 217, at 22.

[221] Tilove, *supra* note 219, at A1.

[222] *See* PRISON POLICY INITIATIVE, *supra* note 215, at 1.

proportion of those included within their constituencies unable to react by means of the vote, politicians become better able to maintain the supply of local prison-related jobs through policies involving lengthy sentences and prison expansion.[223] In New York, for example, the leading defenders of the Rockefeller Drug Laws, which impose long mandatory drug sentences, and which precipitated the prison boom, are state senators who represent upstate areas.[224] The combination of the weakening of the political representation available to the urban communities most affected by these policies with the strengthening of those who stand to gain from them results in a cycle of prison expansion that appears to lack a democratic check.[225]

### D. *Government's Limited Response*

The federal government only in recent years has recognized the enormity of the reentry crisis. In the late 1990s, Jeremy Travis, then Director of the National Institute of Justice (the "NIJ"), began to trumpet the call for increased attention to the problem.[226] Members of the Justice Department and the NIJ initiated a national discussion of an idea: the development of reentry courts to provide at least one response to the challenges posed by reentry.[227] First proposed by Travis and Attorney General Reno in 1999, reentry courts were expected to provide a central location for the coordination of services, support, and supervision for the returning offender.[228] The govern-

---

[223] *See id.*

[224] *Id.*

[225] *See id.* ("On a political level, it is the urban minority communities ravaged by the war on drugs that have the greatest desire to see drug law reform."). Jonathan Tilove describes a case study conducted by Peter Wagner in New York:

> Almost half the state's prisons are in the state Senate districts of four upstate Republicans who, if they could not count inmates, would have to stretch their district lines to encompass more people, setting in motion a ripple effect that eventually would reduce the Republican electorate in competitive districts closer to New York City.
>
> And if those same prison inmates were instead counted in the communities whence they came, the population of urban districts would swell, setting in motion reciprocal ripples that would increase the Democratic electorate in those same competitive districts. Wagner estimates the net effect of changing how prisoners are counted could gain urban Democrats two seats in both the New York House and Senate.

Tilove, *supra* note 219, at A1.

[226] *See* Travis, *supra* note 12.

[227] *Id.*

[228] *Reentry Courts*, *supra* note 134, at 15.

ment provided considerable funds for the development of these prototype courts to give the states and local jurisdictions the incentive to undertake such projects.[229]

In theory, these courts would provide just the sort of organization that was missing upon reentry. Building on the success of drug courts in the 1990s, the reentry courts were to become the latest incarnation of problem-solving courts. This time the mission would be to "institutionalize redempt[ion]" while at the same time to provide treatment and other services to the returning ex-offender.[230] Typically, these courts include four core components: a reentry transition plan, a range of supportive services, regular appearances for oversight of the plan, and accountability to victims or communities.[231] The reentry transition plan was designed to be a specialized program for ex-prisoners that focused on each individual's specific employment, treatment, housing, family, and supervision issues.[232] Like their predecessor, the drug courts, reentry courts mandate regular meetings where the judge monitors the progress of an individual's transition.[233] In this way, judges have assumed the traditional role of parole officers as the primary overseers in an ex-offender's reentry.[234]

In practice, the experiment with reentry courts does respond to the one critical concern with regard to coordination: the courts can serve as a single entity that focuses on an individual's reentry. But reentry courts simultaneously raise a host of questions. Should judges engage in hands-on methods in this type of setting? Similar questions have been raised about the role of judges in drug courts.[235] The safeguard that judicial detachment is designed to provide, namely "reduc[ing] the likelihood of decision making based on favor or bias," is

---

[229] *See* U.S. DEP'T OF JUSTICE, REENTRY COURTS: MANAGING THE TRANSITION FROM PRISON TO COMMUNITY: A CALL FOR CONCEPT PAPERS 12–19 (1999) (developed by NIJ Director Jeremy Travis); *see also* Petersilia, *supra* note 74, at 5.

[230] William Schma, *Kalamazoo County Circuit Court*, 29 FORDHAM URB. L.J. 2016, 2019 (2002).

[231] *Reentry Courts*, *supra* note 134, at 15.

[232] *See id.*

[233] *Id.*

[234] *See id.* For a description of the judge-centered model, see Robinson & Travis, *supra* note 133, at 260. By contrast, "[u]sually a court's responsibility ends when a defendant is found or pleads guilty and is sentenced by the judge. . . . [T]he trial judge's responsibility ends when the trial ends." U.S. DEP'T OF JUSTICE, *supra* note 229, at 5.

[235] *See* Morris Hoffman, *Commentary: The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1533 (2000).

absent from a "hands-on" court.[236] Questions arise about the amount of judicial discretion available in reentry courts and other types of "problem-solving courts."[237] The judge who offers support to the person appearing before her will later be the one who decides whether and how to punish that person.[238] Will that judge "become personally invested in the success" of the efforts of that person, and perhaps react to failure "personally" and "inappropriately"?[239]

Thus, the federal government's response to reentry seems to raise more questions than answers. Do reentry courts require judges not only to stray too far beyond their traditional function, but also beyond their realm of expertise?[240] Judges have only limited training in the areas of responsibility required by these courts and, consequently, may not perform this role well.[241] And finally, are judges in a better position to oversee reentry than parole agents? By limiting the caseload of parole agents and providing them with the same range of service referrals, perhaps the system could achieve the same goals without the establishment of an entirely new court system.

## III. The Role of Lawyers in Managing Reentry

At a minimum, comprehensive reentry programming would require identifying an individual or entity with ultimate responsibility for assisting ex-offenders with the management of their reintegration into society. Some communities have begun to take steps to provide programs to support returning prisoners and their families.[242] Some local

---

[236] Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 Wash. U. J.L. & Pol'y 63, 78 (2002).

[237] *See* John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 Alb. L. Rev. 923, 953 (2000) (raising the question: "What guides the drug court's use of incarceration during the informal, non-adversarial proceedings, which emphasize judicial discretion, and even, some might say, raise it to new heights?").

[238] *See id.* at 950 n.146 ("The judge in drug court can be encouraging and supportive, even engaging the defendant in direct conversation. . . . However, if the defendant is not participating effectively in treatment, . . . the judge may order confinement.").

[239] Thompson, *supra* note 236, at 79.

[240] *See* Goldkamp, *supra* note 237, at 927 (describing a "hands-off critique" of drug courts and other types of "problem-solving courts" that view "intervention into the problems of the individuals involved in criminal cases as inappropriate and compromising to the 'neutral' judicial adjudication function").

[241] *See* Thompson, *supra* note 236, at 79 (noting that drug court judges "typically do not have the sort of professional or specialized training that one would expect from someone vested with the responsibility to choose and design treatment programs"); *id.* at 93 (raising the question: "Are we expecting too much of judges if we charge them with resolving complex social problems through the criminal justice system?").

[242] *See* Travis et al., *supra* note 3, at 43; *Reentry Courts*, *supra* note 134, at 12, 13.

defender offices have begun to focus staff and other resources on developing reentry programs.[243] Meanwhile, some civil legal services providers have chosen to address problems facing ex-offenders to the extent that their problems fall within the office's areas of expertise.[244] Through probation services and other agencies, local governments also are attempting to coordinate services, but for the most part, these services happen on an ad hoc basis and remain largely uncoordinated.[245]

One group that could potentially intervene to coordinate services to this ever-increasing client population is lawyers. Lawyers are beginning sporadically to think about the challenge of representing ex-prisoners. As defense lawyers begin to embrace the concept of "whole-client" representation, they are recognizing that a client's social circumstances may have bearing on the client's involvement with the legal system.[246] Perhaps this broader conception of representation might lead them to recognize that those circumstances may continue to be at issue even once a client has completed a sentence. Civil legal services lawyers also are encountering a growing demand by ex-offenders for their assistance.[247] Rather than categorically rejecting such clients as having matters that flow from a criminal involvement, these lawyers may need to broaden their mandate to help fill the gap in service to these clients.

Right now, the types of issues confronting ex-offenders cross substantive legal categories. Matters related to housing and employment fall in the civil arena. Legal issues regarding the custody and care of children are also deemed civil. Ex-offenders may continue to interact with the criminal justice system if their release contains specific conditions that must be met to avoid revocation of release status. Although a single client may encounter all of these issues simultaneously, the traditional legal offices that handle such matters are often separate

---

[243] *See* THE BRONX DEFENDERS, THE CIVIL ACTION PROJECT, *at* http://www.bronxdefenders.org/comm/index.cfm?code=006 (2003).

[244] The Legal Aid Society of New York has run two programs, one out of its Brooklyn office, administered by Ann Cammett, and the other, entitled "Second Chance," out of its Harlem office, administered by Mike Barbosa. The Second Chance program is now defunct, but represents the type of program that can be focused on services for ex-offenders.

[245] *See* Petersilia, *supra* note 74, at 5–6.

[246] *See* Cynthia Works & Cait Clarke, *Preparing for the Tidal Wave of Prisoner Reentry: Equipping Civil Legal Aid and Defense Lawyers to Represent the Whole Client*, CORNERSTONE (Nat'l Legal Aid & Defender Ass'n, Washington, D.C.), Fall 2002, at 3, 3, http://www.nlada.org/DMS/Documents/1044986725.85/Fall%202002%20Cornerstone%20final.pdf.

[247] Anthony Thompson, Address to the National Legal Aid and Defender Association ("NLADA") Annual Conference (Nov. 14, 2002), http://www.nlada.org/DMS/Documents/1038340494.03/Anthony%20Thompson%20Re-entry20%speech.doc.

entities that will only address those issues that fall within their range of expertise. This leads the ex-offender from one office to another in search of assistance with reentry.

One possible way to reduce the chaos in legal representation that an ex-offender must negotiate would be to have one legal entity serve as the entry point for the offender. That office could then help map a strategy for the offender that might involve working with separate legal and social entities. The offender would thus have a point person from whom he or she could obtain some guidance in the process.

### A. *Adapting Traditional Advocacy Approaches to Facilitate Reentry*

Practice areas have developed largely in response to the types of issues that both the civil and criminal justice systems yield. With ever-increasing complexity of legal cases, civil and criminal defense lawyers have come to appreciate the need to organize around specialty areas. This design strategy has permitted lawyers to focus their attention on specific substantive areas, learning the law that develops, and shaping practices to benefit their clients. For example, public defender offices generally organize into various divisions that focus on separate aspects of their clients' legal matters.[248] The office assigns lawyers to misdemeanor units or appellate divisions, enabling those lawyers to develop a level of expertise in that arena. To the extent that a defender office has broadened its mission to include a client's extra-legal needs, the office typically accomplishes this mission by assigning social workers to a support division.[249] In all offices, the volume of cases that they must handle makes compartmentalizing the defense function all the more necessary.

Similar practice pressures occur in the civil legal services arena. Civil cases have taken on a level of complexity that demands specialized skill sets of practitioners. As importantly, the restrictions that the federal government has placed on funding for legal services lawyers has dictated, and often limited, the services that legal service providers can offer.[250] Indeed, out of fear that funding might be jeopardized, civil legal service practitioners have begun to exercise extreme

---

[248] *See, e.g.*, THE PUB. DEFENDER SERV. FOR THE DIST. OF COLUMBIA, ABOUT US, *at* http://www.pdsdc.org/AboutUs/index.asp (last visited Apr. 6, 2004).

[249] THE BRONX DEFENDERS, WHO WE ARE, *at* http://www.bronxdefenders.org/whow/index.cfm (2003).

[250] Deborah Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1786 (2001); *see* Raymond H. Brescia et al., *Who's in Charge, Anyway? A Proposal for Community-Based Legal Services*, 25 FORDHAM URB. L.J. 831, 840 (1998) (describing funding cuts to legal services programs that limited their ability to assist the community).

caution in accepting cases or engaging in any activities that might appear to cross a regulated line.[251]

Still, when the client's problems cross the civil and criminal divide during the pendency of a legal matter, standard practice involves a general referral to another legal entity. Far from uniform, this referral process takes a variety of forms. Lawyers will rely on sometimes outdated lists or telephone numbers in their effort to direct the client to help. Clients then must juggle appointments, names, and addresses of various providers to get that help. But what might occur if lawyers developed more robust systems of referral or engaged in partnerships across substantive legal divides?

1. Creating More Robust Referral Processes

If legal organizations find it necessary for whatever reason to maintain substantive divisions, they still can provide their clients with improved assistance by taking the referral process more seriously. Even a moment's consideration of what would be required to facilitate a client's access to and use of referral services would reveal some steps that any organization could take to make this process operate more effectively. Developing and maintaining a strong referral process means identifying the range of services that clients need. In addition, identifying particularly strong and very weak organizations is very important and should involve at the very least a canvassing of staff (legal and support) and tracking and documenting clients' impressions of the services providers when possible.

More ambitious efforts might entail assigning an intern under the supervision of a lawyer or social worker to go to the most frequently used offices. That intern could then obtain information directly from the provider. This more ambitious effort could help the office begin to think more methodically about community relations. In doing so, legal organizations could reach out to churches and community organizations and offer know-your-rights workshops in the community. Ultimately, through formal and informal connections, defenders would become more aware of the providers in their clients' communities. The primary goal of this effort would be to create a vi-

[251] This author was the keynote speaker at the 2002 NLADA Annual Convention. The topic was the need for more focus and collaboration on offender reentry. Concerned that attending such a speech might violate some federal mandates, civil legal service providers would only attend after an opinion was sought and circulated approving attendance at the keynote luncheon.

able system of referrals that both staff and clients could access to find help in addressing reentry concerns.

Even more ambitious plans might involve implementing a strategy where public defenders and civil legal service providers would engage in partnerships to weave a network of services for returning ex-offenders. For both defender offices and civil legal services providers, this would necessitate redefining their notions of what constitutes a case. Rather than limiting representation to clients who have pending cases or cases that fall within a specific substantive area, these offices would need to stretch their concept of representation. The new definition would include addressing a client's needs even once the initial legal matter had resolved. What follows is a proposal for embarking on such a new approach.

2. Identifying One Entry Point for Reentry Services

A critical failing of most efforts to address reentry is the lack of a single entity or point of contact for the coordination of services that ex-offenders would feel comfortable using. In theory, the parole officer concept in part was designed to serve this purpose: the parole agent represented a single point of entry for the ex-offender.[252] Despite its goals, however, the interaction between parole officer and ex-offender devolved into a monitoring/policing function. This Article proposes a return to the theoretical underpinnings that led to the development of the parole agent, but vesting the coordination authority in a different entity: the public defender office. By providing a single stop for referral, support, and guidance, the defender would breathe life into the coordinating function that parole officers were once expected to fulfill. Defenders in this context would help to assess ex-offenders' needs, link them to services, and provide them with information about barriers, so that the ex-offenders would not have to learn these for themselves in a frustrating dance of trial and error.

Obviously, a number of legal, civic, or community-based organizations could fill this role. But the public defender office seems most logically suited to assume this function. Although defender offices are more often than not struggling to stretch resources to handle a growing caseload, these offices tend to have the institutional resources and

---

[252] Vincent D. Basile, *A Model for Developing a Reentry Program*, FED. PROBATION, Dec. 2002, at 55, 58.

structures that might allow them to coordinate a reentry effort.[253] They tend to employ staff and support personnel who could offer some stability to such an initiative. They may already have a relationship with the offenders, because it is likely that someone in the office represented them and may have continued to work with them during their incarceration.[254] That is not meant to suggest that undertaking such a role would be easy. Defenders would be electing to undertake a role that extends beyond their central mandate as contemplated by law and by funding authorities.[255] They would also need to stretch their concept of representation to cover a new substantive area. Still, the defender office seems at least a logical place to begin such coordination.

Some defender offices have already taken steps to work across substantive boundaries on behalf of their clients.[256] Neighborhood or community defenders represent all of their clients' legal needs based upon a geographical "catchment area."[257] These innovative offices can

---

[253] *See* THE BRONX DEFENDERS, RESOURCES AND OPPORTUNITIES, *at* http://www.bronxdefenders.org/reso/index.cfm (2003); THE PUB. DEFENDER SERV. FOR THE DIST. OF COLUMBIA, THE COMMUNITY DEFENDER PROGRAM, *at* http://www.pdsdc.org/CommunityDefender/index.asp (last visited Apr. 6, 2004).

[254] The Public Defender Service for the District of Columbia, for example, has a division that works with inmates on civil matters while in prison. *See* THE PUB. DEFENDER SERV. FOR THE DIST. OF COLUMBIA, THE CIVIL DIVISION, *at* http://www.pdsdc.org/Civil/index.asp (last visited Apr. 6, 2004).

[255] *Gideon v. Wainwright*, *Argersinger v. Hamlin*, and progeny contemplate representation flowing from a criminal charge. *See Argersinger*, 407 U.S. 25, 25 (1972); *Gideon*, 372 U.S. 335, 335 (1963).

[256] *See* Susan Finlay, *Center for Problem Solving Courts*, 29 FORDHAM URB. L.J. 1982, 1997 (2002).

[257] See *id.* for a description of the neighborhood defender model. Judge Susan Finlay, Director of Education of the Center for Problem Solving Courts, commented:

> This [client] has multidimensional legal problems. They have a housing case and they have a criminal case. Wouldn't it be interesting if we actually provided some form of civil representation for them? And then that model is expanded even more by the Vera Institute of Justice in what is called the neighborhood defender model. There is one up in Harlem which explores the idea that people who come to the defender service are of a certain character within a certain area. In other words, they are going to have a certain set of demographic characteristics which are going to cause them to have a whole host of problems that lead them to the criminal justice system; in other words that sense that we all had in law school that a person's legal issue is a very narrow set of problems the person has, and if we just solve that person's case, it is not really going to solve that crisis that they are in at that moment.

*Id.*; *see also* Terry Brooks & Shubhangi Deoras, *New Frontiers in Public Defense*, CRIM. JUST., Spring 2002, at 51, 51.

provide a wide range of services.[258] The structure of these offices often includes community members on their boards of directors, which also assists in recognizing the needs of clients.[259] These offices, although small in number nationally, represent a new and different way to provide comprehensive services (civil and criminal) for those experiencing difficulty with reentry.[260]

This approach to providing indigent legal services raises some questions of design. In thinking about providing direct representation to criminal defendants, the design of neighborhood or community defenders offices attempts to address clients' problems in a context broader than that of formal pending criminal charges. Employing teams rather than a single lawyer, the project represents clients in any forum in cases related to their difficulties with the criminal justice system. The design and structure of these offices provide some departure from the traditional means by which defenders normally deliver services. These offices do, however, provide an example of innovative or non-traditional ways to think about providing reentry services.

In many ways, what this Article proposes may seem consistent with a view of lawyering that prevailed in the past: the general practitioner. Under that model, the lawyer attempted to help the client with the full range of issues that the client might bring to the lawyer. In reconceiving that concept and applying it to this context, some important distinctions bear mention. First, the defender office would not lose sight of its principal function—to provide zealous representation to indigent clients charged with crimes and facing the loss of their liberty or their lives. This would simply be a service that would be added to the complement of services that defender offices already provide. Second, the defender office would not have to become everything to every client. Instead, by conceiving of this role as a facilitative one, the defender simply could perform the function of referring the ex-offender to those with more specialized training in certain relevant practice areas. So, what is contemplated under this model is that the defender would work with civil legal services lawyers to address the clients' needs. The defender similarly would look to tap a larger social network of services that might meet the clients' treatment needs. Es-

---

[258] *See* Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 401–05 (2001).

[259] *See* Kim Taylor-Thompson, *Institutional Actor v. Individual Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2469–70 (1996).

[260] *Id.*

sentially, the defender office would play a coordinating role, guiding clients to the assistance they might require.

Of course, an inherent concern arising out of the general practitioner role is that the lawyer would give less-than-adequate advice to the client who might need a level of expertise. This would make the development of collaborative networks all the more important for both the defender and the ex-offender. One way to think of the role might be to borrow from the concept of in-house counsel in a corporation. In-house counsel must learn the nature of the business and understand and anticipate legal issues facing the business.[261] Yet, in handling many of the legal matters that develop, in-house counsel will enlist the services of outside counsel to assume primary responsibility for the matter.[262] In much the same way, the defender would perform such a coordinating role rather than a principal representational role. Understanding the client's needs, the defender would try to help the ex-offender identify the resource that might best address those needs. Thus, if defender offices were indeed willing to assume such a role, they might offer ex-offenders the single point of entry they now lack.

### B. *Preparing Lawyers for a Role in Reentry*

Although lawyers could play a pivotal role in guiding ex-offenders through the maze of reentry, lawyers typically are not prepared to assume this responsibility. As indicated above, conventional legal practice has carved out separate substantive practice areas, leaving reentry in a limbo space that is neither purely civil nor purely criminal. Yet, practitioners do not bear entire responsibility for neglecting reentry as an area of focus. Law schools have done little to prepare new lawyers to deal with the myriad of legal, social, and administrative problems offenders reentering communities face.[263] Law schools have tended to perpetuate the notion that their mission is to prepare students to engage in conventional notions of legal advocacy.[264] So the

---

[261] *See* JEFFREY R. PARSONS, LITIGATION MANAGEMENT: IN-HOUSE AND OUTSIDE COUNSEL—WHO'S IN CHARGE? 219, 221–33 (Practising Law Inst., Corporate Law and Practice Course Handbook Series, PLI Order No. B4-6918, 1990), WL 684 PLI/Corp 219.

[262] MARYELLEN B. CATTANI, MANAGING OUTSIDE COUNSEL 75, 79 (Practising Law Inst., Corporate Law and Practice Course Handbook Series, PLI Order No. B4-6986, 1991), WL 760 PLI/Corp. 75.

[263] Prior to the New York University Law School Offender Reentry Clinic, no law school in the United States offered a clinical course on issues ex-offenders face.

[264] Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1930 (2002).

following question remains: Is there some vehicle to expand the thinking and approaches of law students, young lawyers, and law faculties such that they recognize the pressing need to assist ex-offenders?

Law school clinics may offer an answer. By design, they differ from conventional methods of law teaching in that clinic students are called upon to represent clients and, at the same time, to develop a critical view of the legal system.[265] Clinical legal education has maintained a primary objective of teaching students the importance of advocacy in helping individuals solve problems, defend rights, and achieve their goals.[266] Those involved in clinical teaching, however, recognize that students must do more than merely glimpse the world through the representation of clients. Clinical teachers try to "sensitize students to what they are seeing, to guide them to a deeper understanding of their clients' lives and their relationship to the social, economic, and political forces that affect their lives, and to help students develop a critical consciousness imbued with a concern for social justice."[267] Given the complexities of reentry, the law school clinic provides an excellent vehicle to think more creatively about representing those trying to reintegrate into society.

In the same way that some legal scholars have advocated for a more activist role for community lawyers through clinical teaching, law schools can encourage law students to take a broader view of the needs and problems of returning ex-offenders.[268] Encouraging law students to work on behalf of ex-offenders trying to reintegrate requires the students to consider problems that may lie outside of conventional legal representation. For the first time, many students may need to consider lobbying housing administrators informally to rethink automatic exclusions from public housing, where the law clearly provides for such exclusions.[269] Law students may need to contact employers to advocate for the hiring of ex-offenders, where the same

---

[265] *Id.*

[266] Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 328 (2001).

[267] *Id.* at 338–39.

[268] *See* Andrea M. Seielstad, *Community Building As a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 CLINICAL L. REV. 445, 447 (2002) (describing a model for a clinical program that combines independent representation of clients with community lawyering).

[269] Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 136 (2002) (holding that 42 U.S.C. § 1437(d)(*l*)(6), permitting eviction from public housing for drug-related activity, is constitutional).

employers may have shown reluctance to do so in the past.[270] In some instances, supervised law students might be called upon to meet with legislators about lifting categorical employment bans of whole classes of jobs unavailable to those with felony convictions.

Law school clinics produce wonderful opportunities to infuse the thinking of law students with the notion of collaborative lawyering.[271] In the area of reentry, the partnering of law students, young lawyers with nonprofit organizations, and legal service providers can begin the process of forming partnerships to address the needs of the ex-offender population. Once law students begin to learn the dynamics of collaboration and, perhaps, experience its benefits, they may enter practice recognizing that collaboration may be an additional weapon in their arsenal when attacking complex problems.

### 1. Teaching Reentry

In the fall of 2002, New York University School of Law launched the first-ever Offender Reentry Clinic. The clinic aimed to provide direct representation for ex-offenders as well as to expose students in the clinic to a wide range of policy and administrative issues in reentry. The clinic partnered with the Legal Action Center, an east-coast nonprofit organization with a long history of advocacy in areas of public health and criminal justice.[272]

The objectives of the clinic were twofold. First, the course sought to familiarize students with the range of legal, administrative, and social restrictions imposed on individuals with criminal records as well as on their families and communities. Second, the course was designed to examine the role that lawyers might play in helping ex-offenders navigate the obstacles that they face. Given these objectives, the course used a number of pedagogical tools to expose the students to the substantive law and the practical challenges of engaging in this work. So, for example, the students covered a range of substantive legal issues, including felon disenfranchisement and laws governing occupational bars and

---

[270] *See* Shelley Albright & Furjen Denq, *Employer Attitudes Toward Hiring Ex-Offenders*, 76 PRISON J. 118, 127–35 (1996) (describing results of a study of the factors that affect employers' decisions to hire ex-offenders).

[271] The major theorist of collaborative lawyering is Gerald Lopez. *See, e.g.*, Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 2–3 (1984); Gerald P. Lopez, *The Work We Know So Little About*, 42 STAN. L. REV. 1, 10 (1989).

[272] For more information about the Legal Action Center's areas of advocacy, see LEGAL ACTION CENTER, LAC PROGRAMS, *at* http://www.lac.org/programs/programs_top.html (last visited Mar. 18, 2004).

licensing restrictions. Because students would also be representing actual clients, the course also offered training in litigation to help the students develop theories and hone formal advocacy skills.

Still, the clinic had broader objectives. The challenges facing individual ex-offenders and their communities seem to require twin approaches: working with individual clients to help them effect a smooth transition, and working to change the political, legal, and social environment in which reentry decisions are made. This latter focus meant that the clinic needed to examine the factors that might influence the delicate balance between promoting public safety and stigmatizing people who have paid their debt to society. Such an examination led to classes focused on the ways that legislation and the media shape the reentry issue. To help students develop practical approaches that they might use in legislative, media, and community advocacy, a wide range of guest speakers offered their experiences and expertise to the class. Thus, the class helped expose students to issues in reentry on a micro and macro level.

In an attempt to break down the traditional civil/criminal divide that exists in most poverty law practices, the clinic engaged in a range of simulations that contained both criminal law and civil law problems. The students used current issues and worked to develop a media advocacy plan that included writing opinion editorials that might begin to shape public opinion about issues in reentry. They had the opportunity to hear from a journalist whose area of expertise was ex-offender reentry.[273] They questioned her about pitching stories to editorial boards and educating reporters about criminal justice issues. The students also had a unique opportunity to brief and argue a Florida felon disenfranchisement case before counsel for the ex-offenders. Counsel would argue the same case before the U.S. Court of Appeals for the Eleventh Circuit two months after the students' simulation.[274] This gave the students a more traditional appellate argument experience. Finally, the students designed programs to deliver needed services to ex-offenders and had the opportunity to argue for funding before program managers for two national foundations. This gave the students a different experience in preparation for the varied types of services with which they would need to familiarize themselves before going into this type of practice. In addition to the more nontraditional

[273] The journalist was Jennifer Gonnerman of the *Village Voice*, whose recent book chronicles the reentry of an ex-offender. *See* JENNIFER GONNERMAN, LIFE ON THE OUTSIDE: THE PRISON ODYSSEY OF ELAINE BARTLETT (2004).

[274] The case was *Johnson v. Governor of Florida*, 353 F.3d 1287 (11th Cir. 2003).

preparation, the students also had extensive simulations in trial practice including openings, closings, and direct and cross-examination. These simulations also included individual critiques.

One of the unexpected experiences came through the clinic's interaction with a group of young lawyers working in local legal aid and public defender offices. These lawyers were working primarily as "fellows" in the offices on special projects regarding reentry. As these recent graduates began their fellowships, they soon discovered that they had little, if any, guidance on how to address the issue of reentry. The reentry effort in these offices, for the most part, was left entirely to these fellows to develop and implement. This experience underscored the need for defender and civil legal aid offices to accept this responsibility and the need for them to devote resources to training and preparation. Hearing about the new attorneys' experiences helped elucidate for the students the need to bring into practice a different mindset and a different skill set in preparing for the representation of ex-offenders.

2. A Case Study in Reentry

One of the matters that the clinic handled exemplified the range of skills and knowledge that reentry involves. The case involved John, a young man who had long since paid his debt to society and reintegrated into his community, only to be haunted by a mistake he had made in the past.[275] The clinic chose this case, in part, because of the substantive issues it posed, but also elected to represent him because, given his track record in the community, his circumstances presented a compelling, though not unusual, case for relief. The client, who had been employed by the New York City Department of Education in an after-school program, received a notice of termination because a decade earlier he had been convicted of a drug offense. The program in which our client worked operated in the New York City schools and provided a range of services for at-risk youth and for adults interested in completing their education. With virtually no notice and no explanation, the Human Relations Department of the Department of Education issued letters to all employees informing them of their obligation to be fingerprinted so that the Department of Education could determine whether they had a criminal background. The Department further explained that individuals with criminal records would be barred from school property, effectively terminating their employment. The

[275] His name has been changed for purposes of confidentiality.

only recourse that the Department offered employees who received such a bar was an administrative hearing before a Department of Education administrative law judge. Administrators in the after-school program in which the clinic's client worked contacted the Legal Action Center, which, in turn, asked the clinic for assistance. Together, the clinic and the Legal Action Center worked to develop a policy strategy to propose to the city. In addition, the clinic agreed to represent some of the individuals who faced termination. This particular client came to the clinic after a referral by the Legal Action Center.

John's story was not unlike that of other young men of color. He had been involved with the criminal justice system since the age of seventeen, when he was convicted of a drug offense. He certainly was old enough to know better than to engage in unlawful behavior, but still young enough to make the sort of immature choices that typically occur in adolescence. From there, however, John's activities were far from average. As a result of his drug conviction, he attended a special boot-camp program in lieu of a standard prison commitment. As the name implies, the boot-camp program sought to mimic a military environment. He rose before dawn, engaged in a range of physical activities, and participated in mandatory programming. In the midst of this structure—and perhaps because of it—he managed to obtain his high school equivalency diploma. When John successfully completed the boot camp, state authorities released him to intensive parole supervision. His parole agent soon after reduced the level of supervision because John's conduct and attitude convinced the agent that John needed only minimal intervention and monitoring.

John had learned from his mistake. Because of his performance on parole, the parole officer granted early termination. John then obtained the job in the after-school program. After working successfully as a summer counselor, his supervisor asked him to stay on during the school year. Within a year on the job, he sought out and completed a number of training programs. Within three years, he had received specialized training for a wide range of counseling and after-school literacy programs. He completed all of the training seminars and some college courses while employed by the program. He ascended the ranks and eventually began to supervise other program counselors. At the time that he was given the Department of Education notice, he had been working as an administrator in the program for seven years. Despite the demands of his leadership position, he still made time to counsel youth. His supervisors were very pleased with his work, describing him as one of the program's most valuable assets. Upon learn-

ing of his situation, John's employers were supportive and made clear that they did not want him to be barred from the workplace.

John initially tried to handle the administrative proceeding on his own. Like most other ex-offenders, he simply was unsure of where to turn. So he took the course that was most familiar: he relied on his own instincts to guide him through this foreign system. This proved problematic. When John attended the hearing before the administrative law judge on his own without counsel, the judge ruled against him. When he was notified by mail that he effectively was being terminated and that he would be entitled to an appeal hearing, he knew he needed help. When the clinic decided to undertake representation, its participants immediately contacted the office of the administrative law judge indicating an intent to undertake representation of John. The court informed the clinic that there would be some restrictions on its representation. Among these restrictions was the limitation on who could "speak" at the hearing. The students had entered the world of departmental administrative hearings.

The students used the tools familiar to lawyers. They relied on New York state law in the brief that they filed to show that the judge had not engaged in the proper assessment of the conviction and John's conduct.[276] New York law required that the hearing officer weigh the conviction and subsequent behavior in determining the proper result. This weighing did not take place in the first hearing. While one part of the team prepared the legal documents, the other members of the team worked with the client to obtain a certificate of rehabilitation from the New York Department of Corrections, which indicated that John had done all that was required of him by the state. Nothing more could have been presented on John's behalf, but the administrative law judge was not inclined to reverse himself. Indeed, the administrative law judge's findings simply stated that the severity of the crime justified our client's immediate termination. Even with representation, the appeal hearing turned out to be little more than a rehashing of the previous hearing at which John had been unrepresented.

So, the students recognized that they needed to broaden their strategy beyond conventional legal moves. They adopted a three-prong approach to gain relief for their client and to help change the policy that led to John's predicament. First, students engaged in some outreach work. The objective of this work was to collaborate with the

[276] *See* N.Y. CORRECT. LAW §§ 750–755 (Consol. 2003).

program administrators and community activists who opposed the blanket termination policy.

The second aspect of the work involved political action. Essentially, the clinic worked with a larger coalition to help develop a political strategy designed to persuade city officials to cease blanket terminations of ex-offenders. The coalition sought to identify government officials to lobby for changes in this policy. The clinic also assisted in the development of talking points that activists could use to educate officials about the problems blanket terminations posed and the benefits of a policy that would involve individual review of the cases and facts.

The third strategy—pursuing a civil action in state court—was the principal means of obtaining individual relief for John. In working with John, the students advised him that they believed that the arguments that they had raised in the brief submitted to the administrative law judge would have perhaps greater persuasive power in a civil action reviewing the administrative actions. With John's agreement, the students filed suit in New York State District Court. The Assistant Corporation Counsel assigned to the case requested and received an extension of time within which to reply to the students' complaint.[277] During the period of the extension, the students engaged in a series of negotiations with the lawyer, urging that the city consider settlement. Ultimately, the city agreed to the students' terms. They agreed to reinstate John to his former position with full salary and benefits.

### 3. Lessons Learned in Rethinking Reentry

The problems posed by reentry are complex and necessarily demand multidimensional strategies. The New York University School of Law clinic found value in a combination of individual strategies on both the administrative level and the more formal legal level. The participants recognized, however, that the larger problem cannot be solved one case at a time. There are simply too many ex-offenders and too few resources for the participants to guide them to relief. Therefore, collaborative efforts to change the social and political context become critical.

---

[277] The Corporation Counsel, a division of the New York City Law Department, represents the city and its agencies in a variety of legal matters ranging from personal injury to constitutional challenges. N. Y. CITY LAW DEP'T, MESSAGE FROM THE CORPORATION COUNSEL, *at* http://www.nyc.gov/html/law/html/ccmsg.html (last visited Mar. 18, 2004).

One key component in the clinic's success was that students did not approach the effort with pre-established notions about the boundaries of their representation. They had not yet been sucked into the compartmentalization that defines and simultaneously limits practice strategies. Instead, the students were constantly brainstorming ways to influence both the outcome of the instant case as well as the overall policies that burden ex-offenders because of their status. Before each activity, interview, investigation, filing, and appearance, the students met and prepared for the various potential outcomes. This team meeting illustrated to the students that working collaboratively with the rest of the team provides a broader source of information and options than working solo on a case by case approach. The post-session meetings after each activity provided necessary feedback and reflection in the students' learning process and also helped foreshadow planning for the next stage of the litigation.

This approach varied dramatically from the conventional approach to individual representation in a legal aid or public defender setting. It also served to reinforce to the students that they are part of a dynamic process that is not limited in scope to a set group of actors or institutions. Rather, their representation of ex-offenders in the reentry context is limited only by their creativity and their contacts in the communities in which they work. In addition, by mixing traditional litigation strategies with media advocacy, legislative advocacy, and foundation advocacy, students immediately recognized that lawyering and lawyering skills are not mastered in one context alone. Rather, lawyers must maintain the ability to be flexible to changing moments in the representation and to be sensitive to a wide range of solution possibilities at those critical junctures. Overall, these lessons were a central part of the clinic and the larger effort to think creatively about the difficult problem of ex-offender reentry.

Of course, the task of addressing reentry cannot be left to law students or law fellows. They may be able to offer some help in filling the representational gap, but the magnitude of the reentry crisis demands the contribution of more than just the least experienced lawyers in the system.[278] Lawyers across disciplines and specialties will

---

[278] At a similar juncture in our legal history, the U.S. Supreme Court in 1972, in *Argersinger*, extended the right to counsel to misdemeanor cases, recognizing that this mandate would place demands on an already overtaxed legal system. *See* 407 U.S. at 34 & n.4, 37. At that time, the Court offered no real guidance regarding how to implement its ruling. *See id.* at 38. Indeed, Justice William Brennan suggested that states enlist law students in super-

need to work with government officials, community activists, and ex-offenders in devising comprehensive strategies to resolve this crisis.

## Conclusion

Instead of expecting individual ex-offenders to navigate their transitions back into their communities without help, the legal community needs to give them the tools that might better guarantee success. At a minimum, ex-offenders will need a point of entry where they can seek assistance ranging from information about what they can expect to more specific representational assistance particularly in the areas of employment, housing, and family law. Through coordinating the types of interventions that ex-offenders tend to need, these individuals might be less likely to fall through the cracks. As important, this type of coordination will necessitate a fundamental shift in how lawyers engaged in civil and criminal public interest practices conceive of their roles.

A similar recognition of the enormity of the reentry problem will need to take place at the local community level as well as within local and state governments. Until officials begin to see the economic and social impact of short-sighted policy making in this area, affected communities will continue to suffer economic and political losses. Legal educators should begin to think critically and creatively about what preparation and training lawyers for ex-offenders need. As the numbers of ex-offenders being released continues to increase, lawyers and communities hopefully will learn to collaborate on devising approaches to providing quality services.

---

vised clinics to provide representation. *Id.* at 40 (Brennan, J., concurring). In hindsight, it is clear that such a proposal could not possibly meet the demand of the system.