OFFENDER REENTRY AND THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: AN INTRODUCTION*

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I.
THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS

Relatively recently, a burgeoning chorus of advocates,[1] policy analysts, and commentators has called attention to the various collateral consequences that attend criminal convictions. Such consequences exist at the federal[2] and state[3]

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1. For a prosecutor's perspective on collateral consequences, see Robert M.A. Johnson, Collateral Consequences, Crim. Just., Fall 2001, at 32. For a defense attorney's perspective, see Robert G. Morvillo, Consequences of Conviction, N.Y.L.J., Dec. 7, 1999, at 3.

2. For an overview of these consequences, see Office of the Pardon Attorney, U.S. Dep't of Justice, Federal Statutes Imposing Collateral Consequences Upon Conviction, available at http://www.usdoj.gov/pardon/collateral_consequences.pdf.

3. For an overview of the various state-level collateral consequences, see Office of the

levels, and are considered to be the indirect, rather than direct, consequences that flow from a criminal conviction.[4] While direct consequences include the length of the jail or prison sentence the defendant receives as well as, in some jurisdictions, the defendant's parole eligibility[5] or imposition of fines,[6] collateral consequences encompass a wide array of sanctions—termed civil disabilities—that attach to, but are legally separate from, the criminal sentence. Some of these consequences are imposed automatically by operation of law, while others are imposed at the discretion of agencies detached from the criminal justice system.[7] Although such sanctions are too numerous to detail here,[8] some of the most prominent include permanent or temporary ineligibility for federal welfare benefits,[9] educational grants,[10] public housing,[11] voting,[12] handgun licenses and

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Pardon Attorney, U.S. Dep't. of Justice, Civil Disabilities of Convicted Felons: A State-by-State Survey (1996), available at http://www.usdoj.gov/pardon/forms/state_survey.pdf.

4. See, e.g., State v. Byrge, 614 N.W.2d 477, 494 (Wis. 2000) ("collateral consequences are indirect and do not flow from the conviction").

5. See, e.g., United States. v. Yazbeck, 524 F.2d 641, 643 (1st Cir. 1975) (mandatory special parole term is direct consequence of guilty plea); Michel v. United States, 507 F.2d 461, 463 (2d Cir. 1974) (defendant must be informed and advised of special parole term that automatically attaches to sentence of imprisonment); Durant v. United States, 410 F.2d 689, 693 (1st Cir. 1969) (ineligibility for parole is a direct consequence of guilty plea); In re Moser, 862 P.2d 723, 729 (Cal. 1993) (trial court is obligated to advise defendant of direct mandatory parole consequences of a guilty plea); Young v. People, 30 P.3d 202, 207 (Colo. 2001) (defendant entitled to advisement of mandatory parole consequences); People v. Melio, 304 A.D.2d 247, 250 (2d Dept. 2003) (mandatory parole is a direct consequence of guilty plea).

6. See, e.g., Duke v. Cockrell, 292 F.3d 414, 417 (5th Cir. 2002) (imposition of fine is a direct consequence); Parry v. Rosemeyer, 64 F.3d 110, 114 (3d Cir. 1995) (a "fine for the offense charged" constitutes a direct consequence (internal citations omitted)); People v. Walker, 819 P.2d 861, 866 (Cal. 1991) (minimum and maximum restitution fine are direct consequences); People v. Marez, 39 P.3d 1190, 1192-93 (Colo. 2002) (fine constitutes direct consequence); Johnson v. State, 654 N.W.2d 126, 135 (Minn. App. 2002), rev'd on other grounds, 673 N.W.2d 144 (Minn. 2004) (amount of "any fine" constitutes a direct consequence).

7. See ABA Crim. Just. Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Std. 19-1.1(a)-(b) (2003) [hereinafter ABA Standards on Collateral Sanctions] (distinguishing between a collateral sanction, which is imposed "automatically upon [a] person's conviction," and a discretionary disqualification, which is a "penalty, disability or disadvantage . . . that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense. . . ."); Glen Edward Murray, Civil Consequences of Criminal Conduct, N.Y.S.B.J., Nov. 1991, at 28 (noting that the various collateral consequences are either imposed automatically or are discretionary); Ethan Venner Torrey, "The Dignity of Crimes": Judicial Removal of Aliens and the Civil-Criminal Distinction, 32 Colum. J.L. & Soc. Probs. 187, 197 (1999) (noting that a collateral consequence is one that is imposed by an "agent independent of the court").

8. In addition to the discussion of this subject in this section of this article, see also infra Parts II and III.

9. 21 U.S.C. § 862a (2004) (denying benefits and assistance for certain drug-related convictions).

10. 20 U.S.C. § 1091(r)(1) (2004). This statute sets forth escalated periods of ineligibility depending on number of convictions, and whether the conviction involved possession or sale of a controlled substance. Id. The statute also restores eligibility before the end of the ineligibility period if the person completes a prescribed rehabilitation program, id. § (r)(2)(A), or if the conviction has been set aside or reversed. Id., § (r)(2)(B).

military service;[13] prohibitions from various forms of employment as well as employment-related licensing;[14] and, for non-citizens, deportation.[15]

While collateral consequences have historically attended criminal convictions,[16] the last two decades have witnessed their dramatic expansion.[17]

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11. See, e.g., 42 U.S.C. § 13661(a) (2004) ("any tenant evicted from federally assisted housing by reason of drug-related criminal activity... shall not be eligible for federally assisted housing during the 3-year period beginning on the date of such eviction, unless the evicted tenant successfully completes a rehabilitation program approved by the public housing agency"); 42 U.S.C. § 1437f(d)(1)(B)(iii) (2004), noting that:

> [A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

See also Gwen Rubinstein & Debbie Mukamal, Welfare and Housing – Denial of Benefits to Drug Offenders, in Invisible Punishment 37, 43-46 (Marc Mauer & Meda Chesney-Lind eds., 2002) (providing an overview of federal housing laws that render those with criminal histories ineligible for public housing). Local housing authorities have the discretion to implement their own policies regarding ex-offenders, and some of these agencies have broadened the category of excludable offenses. See, e.g., Laura Vozzella, City Seeks to Change Housing Policy; HUD Needs to OK Rule Allowing Ex-convicts to Live in Public Units, Balt. Sun, Nov. 17, 2003, at 1B (reporting plan by Baltimore City Housing Authority to change its guidelines from routinely barring those with criminal records from public housing to restoring eligibility after a three year waiting period to those convicted of felony offenses, and after an eighteen month waiting period to those convicted of misdemeanor offenses).

12. Voting restrictions are matters of state law. Forty-eight states and the District of Columbia prohibit prisoners from voting. Felony Disenfranchisement Laws in the United States, Sentencing Project, available at http://www.sentencingproject.org/pdfs/1046.pdf. Thirty-three states disenfranchise felons who are on parole or probation. Id. In seven states a felony conviction will result in lifetime disenfranchisement, while in seven other states certain categories of ex-felons are disenfranchised and/or they are allowed to apply to restore their rights after a specified waiting period. Id.

13. 10 U.S.C. § 504 (2004).

14. See, e.g., Homeless Persons Representation Project, Ex-Offenders and Employment: A Review of Maryland's Public Policy and a Look at Other Statutes (2002) (providing an overview of Maryland's statutory restrictions pertaining to ex-offender employment and comparing those restrictions with those set forth in some other states, including New York, Pennsylvania, and Wisconsin), available at http://www.altrue.net/altruesite/files/hprp/publications/abell%20final.pdf; see also Nora V. Demleitner, Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences, 11 Stan. L. & Pol'y Rev. 153, 156 (1999) (noting that professional licenses for which ex-offenders can be ineligible "range from lawyer to bartender, from nurse to barber, from plumber to beautician"); Clyde Haberman, Ex-inmate Denied Chair (and Clippers), N.Y. Times, Feb. 25, 2003, at B1 (describing how criminal history can result in denial of barbers' license in New York).

15. 8 U.S.C. § 1227(a) (2004).

16. For a description of the history of collateral consequences, from the "civil death" imposed in continental European countries through the various reform movements of the 1950s, 1960s, and 1970s, to the upward surge of collateral consequences in the late 1980s and 1990s, see Demleitner, supra note 14, at 155. See also Note, The Need for Coram Nobis in the Federal Courts, 59 Yale L.J. 786, 786-87 (1950) (observing in 1950 that ex-offenders may be ineligible for naturalization, military service and certain civil rights including voting and holding public office).

17. See Joan Petersilia, When Prisoners Come Home 136 (2003) ("What is new is that these

Much of this growth is directly linked to the "tough on crime" and "war on drugs" movements. As one scholar observes, drug offenses "are subjected to more and harsher collateral consequences than any other category of crime."[18] Indeed, those convicted of drug offenses face a collection of collateral consequences under federal and state law that impact all aspects of their lives, as they are ineligible to receive certain federal welfare benefits,[19] are disqualified from federal educational programs,[20] and are prohibited from securing employment in various industries.[21]

Much of the literature describing and debating these various consequences has focused primarily on felony convictions.[22] In fact, on a much broader level,

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invisible punishments and legal restrictions are growing in number and kind, being applied to a larger percentage of the U.S. population and for longer periods of time than at any point in U.S. history."); Travis et al., Prisoner Reentry: Issues for Practice and Policy, Crim. Just., Spring 2002, at 17 (providing examples of how Congress and state legislatures have expanded the number and scope of collateral consequences over the last twenty years); see also Skok v. State, 760 A.2d 647, 660 (Md. 2000) (observing that "serious collateral consequences of criminal convictions have become much more frequent in recent years.").

18. Gabriel J. Chin, Race, The War on Drugs, and The Collateral Consequences of Criminal Conviction, 6 J. Gender Race & Just. 253, 259 (2002); see also Nora V. Demleitner, Collateral Damage: No Re-entry for Drug Offenders, 47 Vill. L. Rev. 1027, 1033 (2002) (observing that those convicted of drug offenses "suffer from [collateral consequences] disproportionately because many... consequences target them specifically").

19. 21 U.S.C. § 862a (1)-(2) (2004) (individuals convicted under federal or state law "of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance ... shall not be eligible" for cash assistance under the Temporary Assistance to Needy Family program or food stamps). States can elect to completely opt out of these prohibitions, id. § (d)(1)(A), or to limit ineligibility to a certain time period. Id. § (d)(1)(B). Approximately forty-two states fully or partly enforce the ban. Patricia Allard, Sentencing Project, Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses 1 (2002), available at http://www.sentencingproject.org/pdfs/9088.pdf.

20. See supra note 10 and accompanying text.

21. See supra note 14 and accompanying text.

22. For instance, there has been vast media coverage of felon disenfranchisement laws. See, e.g., Maya Bell, Ex-Cons Struggle to Regain Rights: For Felons Who Have Done the Time for Their Crimes, Recovering their Civil Rights Can Be a Long, Tough Haul, Orlando Sentinel Trib., Mar. 12, 2001, at A1; Gregory Lewis, The Right to be Angry: Though Their Prison Sentences are Behind Them, Florida is Slow to Reinstate Former Felons' Voting Rights, Sun Sentinel (Ft. Lauderdale), Sept. 29, 2002, at 1A; Alexandra Marks, Fairness and Felons: A Push to Enfranchise Prisoners, Christian Sci. Monitor, Sept. 25, 2003, at 2; Mary Mitchell, Hard-won Voting Rights Threatened by Prison, Chi. Sun Times, Mar. 14, 2002, at 18. There has also been, to a lesser extent, considerable media focus on the inability of those convicted of felony drug offenses to receive certain public benefits. See, e.g., Fox Butterfield, Freed from Prison, but Still Paying a Penalty, N.Y. Times, Dec. 29, 2002, at 18; Herman Schwartz, Losing Food Stamps is Now Part of the War on Drugs, Balt. Sun, Jun. 15, 1999, at 21A; Shannon Tan, Unexpected Penalties Can Fetter Felons for Life; Sanctions May Restrict Jobs, Welfare, Housing, Indianapolis Star, Jan. 20, 2003, at 1A; Cheryl W. Thompson, Seeking a Welfare Rule's Repeal; Report Says Ban on Aid to Drug Users 'Devastates' Children, Wash. Post, Mar. 1, 2002, at A09. Likewise, policies and discussions pertaining to reentry have focused on the increased prison population as well as the longer prisons sentences imposed on those convicted of felony offenses, particularly because the reentry obstacles increase exponentially the longer a person is incarcerated. See, e.g., Bureau of Justice Statistics, U.S. Dep't. of Justice, Reentry Trends in the U.S. (2003) (reporting that from

neither the lawyering methodologies nor the overall provision of defense services in the misdemeanor context, as compared to the felony context,[23] has been vigorously analyzed and critiqued.[24] This relative lack of recognition stems largely from the fact that misdemeanors are considered to be the least serious cases in the criminal justice system. As a result, resource-deprived defender organizations focus their limited time and energy on the more serious cases.[25]

Several collateral consequences, however, also attach to misdemeanor convictions. For instance, the federal law declaring those convicted of drug offenses ineligible for educational loans makes no distinctions between felony and misdemeanor convictions.[26] In addition, misdemeanor convictions can render defendants ineligible for several employment related licenses.[27] Perhaps most critically, for non-citizen defendants certain misdemeanor convictions constitute "aggravated felonies" under federal law.[28] As a result, numerous

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1990 to 2002, the state prison population nearly doubled from 708,393 to 1,277,127 and that approximately ninety-five percent of these inmates will ultimately be released), available at http://www.ojp.usdoj.gov/bjs/reentry/growth.htm.

23. Chief Administrative Judge Juanita Bing Newton, Remarks at Working Conference, New York City Criminal Courts: Are We Achieving Justice? (Oct. 18, 2003) (commending the working conference for focusing on issues pertinent to misdemeanor practice, observing that most of the critical attention centers on felonies or death penalty issues).

24. The debates surrounding this aspect of the criminal justice system have largely been confined to criminalization policies and the implementation of zero tolerance policies that have focused on quality of life offenses and lower-level misdemeanors. Commentators note that such policies have led to increased misdemeanor arrests and higher incarceration rates. See, e.g., David Cole, No Equal Justice: Race and Class In the American Criminal Justice System 193 (1999) (stating that zero tolerance polices have further overloaded New York City criminal courts); 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, 421 (2001) (stating that arrests for "quality of life" offenses have contributed to the "increased misdemeanor arrest rates and record-high incarceration rates for low-level offenses" and have further strained criminal courts); Douglas L. Colbert, Baltimore's Pretrial Injustice, Balt. Sun, Jan. 6, 2003, at 9A (stating that increased arrests for "low-level" crimes in Baltimore have further strained its courts and jails); Vickie Ferstel, Zero Tolerance Policies Create Court Problems, Advoc. (Baton Rouge), Jun. 13, 2001, at 7B (reporting that zero tolerance policies have further burdened Louisiana's juvenile courts).

25. See Cait Clarke, Taking Alabama v. Shelton to Heart, Champion, Jan-Feb. 2003, at 26 (quoting correspondence).

26. See 20 U.S.C. § 1091(r)(1) (2004) (the suspension of eligibility applies to "a student who has been convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance. . . .").

27. See, e.g., Ala. Code § 5-25-6 (c) (2003) (ineligibility for mortgage broker's license if convicted for any offense involving "breach of trust, fraud or dishonesty in any jurisdiction"); Md. Code Ann. Bus. Occ. & Prof. §5-314(a)(1)(vii)(2) (2004) (noting that the State Board of Cosmetologists may deny a cosmetology license to any applicant, or suspend or revoke said license if the applicant or licensee has been convicted of "a misdemeanor that is directly related to the fitness and qualification of the applicant or licensee to practice cosmetology.")

28. See Clarke, supra note 25, at 26 ("For many, the most serious consequence of a misdemeanor conviction is the impact on immigration status."). The definitions of "aggravated felonies" are spelled out at 8 U.S.C.A. § 1101(M)(43) (2004).

convictions that are misdemeanors under state law can result in deportation.[29]

Accordingly, collateral consequences apply to both felony and misdemeanor convictions and often outlast the direct sentences imposed on defendants. For this reason, several commentators have noted that these disabilities in many circumstances impose harsher and more longstanding penalties than the formal criminal sentence.[30]

II.
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 civil restrictions that flow, sometimes without prior warning, from a criminal conviction.[31] 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.[32] 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

29. See Teresa A. Miller, The Impact of Mass Incarceration on Immigration Policy, in Invisible Punishment 214, 220 (Marc Mauer & Meda Chesney-Lind eds., 2002) (providing examples of misdemeanors that constitute "aggravated felonies"); Miram Gohara, Indigent Defense, Champion, Sept.-Oct. 2003, at 46, 47 (pleading guilty to a misdemeanor can "trigger deportation proceedings, regardless of how long the person has lived in the United States and regardless of family ties here"); Tova Indritz, Puzzling Consequences of Criminal Immigration Cases, Champion, Jan.-Feb. 2002, at 12 (stating that other than acquittals, any other resolution of a criminal case, including misdemeanors "may have collateral immigration consequences to (or for) a client who is not a . . . citizen").

30. See Chin, supra note 18, at 253 (stating that "collateral consequences may be the most significant penalties resulting from a criminal conviction"); Rodney J. Uphoff, The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach, 2 Clinical L. Rev. 73, 100-01 (1995) ("[t]hese . . . collateral consequences may be considerably more important to the defendant than the punishment meted out by the judge at sentencing.").

31. See Demleitner, supra note 14, at 153-54.

32. Gabriel J. Chin & Richard W. Holmes, Jr., Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 705-06 (2002). 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).

the entire impact of a conviction.[33] 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.[34]

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.[35] 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 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.[36]

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.[37]

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.[38] 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.[39] Thus, a guilty plea that permits an

33. See Mirjan R. Damaska, Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study, 59 J. Crim. L. & Criminology 347, 347 (1968).

34. See Chin & Holmes, supra note 32, at 700.

35. See Robert M.A. Johnson, Message from the President: Collateral Consequences, Prosecutor, May-June 2001, at 5, 5.

36. Id.

37. Id.

38. 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

39. Nancy Morawetz, Rethinking Retroactive Deportation Laws and the Due Process Clause, 73 N.Y.U. L. Rev. 97, 99, 120 (1998).

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.[40]

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 the full range of consequences involved.[41] Courts have also declined to hold that defendants should be advised of collateral consequences.[42] 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.[43] 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."[44] The grant program hoped to award approximately $100 million toward this effort.[45] 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.[46] The solicitation also called for the establishment of

40. See NLADA, supra note 38, at 8. Reentry was a central theme of the NLADA 2002 annual conference. See id.

41. See Damaska, supra note 33, at 347.

42. 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 32, at 704.

43. 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).

44. 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.

45. Reentry Courts, supra note 44, at 15.

46. Id.

reentry courts because the federal government considered reentry courts a promising approach, and hoped to encourage their development throughout the nation.[47]

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 recognition 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.

III.
THE CHALLENGES OF REENTRY FOR EX-OFFENDERS AND THEIR COMMUNITIES

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.

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. Health care 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.

47. See U.S. Dep't of Justice, supra note 44; see also Reentry Courts, supra note 44, at 15.

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.[48] 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.[49] 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.[50]

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.[51] Where specific legal barriers are not in place, powerful incentives drive local authorities to exercise their discretion in a manner that limits access to services for ex-offenders in the interest of the larger community.[52]

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.[53] 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.[54] Public housing officials,

48. 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, 15-16, http://www.urban.org/UploadedPDF/410213_reentry.pdf.

49. 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.

50. 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).

51. 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).

52. 42 U.S.C. § 1437d(q) (2000) (permitting public housing agencies to access criminal records); 24 C.F.R. § 5.903 (2003).

53. 24 C.F.R. § 966.4(l)(5)(vii).

54. Id.

however, have interpreted this mandate to cover individuals who may pose no current danger, but who happen to have criminal histories.[55]

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.[56] 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.[57] 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.[58] 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.[59] 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 incarceration.[60] 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.[61]

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.[62] The relationship between stable housing and seeking and maintaining employment has been described as interconnected.[63] 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.

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55. See id. § 902.43(a)(5); Michael Barbosa, Lawyering at the Margins, 11 Am. U. J. Gender Soc. Pol'y & l. 135, 139 (2003).

56. 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).

57. Id.

58. 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)).

59. Id.

60. See Fox Butterfield, Invisible Penalties Stalking Ex-Convicts, Sanctions Target Jobs, Housing, Welfare, Voting, Pittsburgh Post-gazette, Dec. 29, 2002, at A9.

61. See id.

62. See id.

63. See Brian Maney & Sheila Crowley, Scarcity and Success: Perspectives on Assisted Housing, 9 J. Affordable Housing & Community Dev. L. 319, 328 (2000).

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.[64] 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.[65] This situation adds to the feeling of instability in the lives of ex-offenders when stability is precisely what they need.[66]

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.[67] 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.[68] A number of states permanently bar ex-offenders from public employment.[69] California, for example, prohibits parolees from working in real estate, nursing, or physical therapy.[70]

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

64. 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).

65. See Tusan, supra note 64, 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 64, at B1.

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

67. Demleitner, supra note 18, at 1038.

68. Id. at 1038-39.

69. Id. at 1038.

70. Id.

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.[71]

Complicating the bars to employment are occupational licensing restrictions that apply to ex-felons nationwide.[72] 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 professional licenses.[73] 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.[74]

Good moral character statutes pose a significant barrier to the ex-felon obtaining an occupational license.[75] These statutes rarely define "good moral character" with any specificity making statutory interpretations of this term ambiguous at best.[76] 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.[77] 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.[78] 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.[79] Licensing requirements apply to a wide spectrum of professions—from lawyer to bartender, nurse to barber, and plumber to beautician.[80] Professional disqualifications do not depend on the existence of a nexus between the prior offense and the employment.[81] 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

71. See id.

72. 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).

73. See id. at 193-94.

74. See id.

75. Id. at 197.

76. 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).

77. See May, supra note 72, at 197.

78. See id.

79. See id. at 195-96.

80. See id. at 193-94 & n.52 (listing licensed occupations that exclude former offenders).

81. Id. at 206-07.

been hailed as necessary "to foster high professional standards."[82] 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."[83] The end result of these 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.[84] Mr. LaCloche served a term in the Clinton Correctional Facility in New York after being convicted of first-degree robbery.[85] 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.[86] 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."[87] 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."[88] 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.[89] 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.[90] Others either permanently disenfranchise after a second felony conviction or allow ex-felons to vote only after they finish probation or parole.[91]

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82. Note, Civil Disabilities of Felons, 53 Va. L. Rev. 403, 406 (1967).

83. Parker v. Ellis, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting).

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

85. Id.

86. Id.

87. Id.

88. Id.

89. See Developments in the Law — One Person. No Vote: The Laws of Felon Disenfranchisement, 115 Harv. L. Rev. 1939, 1941 (2002)

90. 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/legchangesreport.pdf (providing updates from several states).

91. Fellner & Mauer, supra note 90, at 4; see Patricia Allard & Marc Mauer, Regaining the

The loss of voting power has ramifications not only for the 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.[92] 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.[93] Yet, perhaps the most significant factor that distinguishes women from their male counterparts relates to their real and perceived responsibility for their children.[94] 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.[95] Generally, when a father goes to prison, the mother keeps the family intact.[96] When a mother enters prison, however, the father too often does not remain involved in the caretaking of the children.[97] Therefore, families are more likely to be broken as a result of mothers being incarcerated than fathers.[98] Although some children live with a relative during their mother's incarceration, many enter the foster care system because no family member is available to care for them.[99] 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

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Vote: an Assessment of Activity Relating to Felon Disenfranchisement Laws 3-4 (2000), http://www.sentencingproject.org/pdfs/9085.pdf (for an overview of current laws and initiatives relating to felon disenfranchisement).

92. 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).

93. Ellen M. Barry, Bad Medicine: Health Care Inadequacies in Women's Prisons, Crim. Just., Spring 2001, at 39, 39-42.

94. See Acoca & Raeder, supra note 92, at 135-36.

95. 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).

96. See Raeder, supra note 95, at 952 (revealing that ninety percent of male inmates reported that their children's mother was caring for their children).

97. See Acoca & Raeder, supra note 92, at 135-36 (reporting that only twenty-six percent of female inmates indicated their children's father was caring for their children).

98. 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.

99. See id.

children under the age of eighteen have a parent in state or federal prison.[100] This means that 1.5 million children in the United States are affected by the lack of any coherent reentry policy.[101] In addition, between 1985 and 1997 the number of women in jails and prisons nearly tripled.[102] 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.[103]

Additionally, the fight for custody can be overwhelming. Federal welfare and adoption legislation create significant obstacles for women ex-offenders.[104] Welfare laws reduce their access to benefits that might provide transitional support as they seek employment.[105] 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.[106] At the same time, increased rates of incarceration of men and women of color have meant an increase in fragmented families in those communities.[107] Although measuring emotional harm is difficult, some judgments about the ways in which high imprisonment affects families, the life chances of children, and the economic circumstances of at-risk communities are possible.[108]

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

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100. 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).

101. Id.

102. See Acoca & Raeder, supra note 92, at 134.

103. 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).

104. Acoca & Raeder, supra note 92, at 140-41.

105. 42 U.S.C. § 608(a)(9) (2000); Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 115, id. § 862a; Acoca & Raeder, supra note 92, 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).

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

107. Tracey L. Meares, Social Organization and Drug Law Enforcement, 35 Am. Crim. L. Rev. 191, 206 (1998).

108. 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 107, at 206.

their community.[109] Although men who commit crimes are not necessarily seen as good members of the community, they are rarely ostracized.[110] Women who engage in crime are often seen as defying gender roles, which is perceived by communities as deviance of a higher order.[111] 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.[112] This distance means fewer visits and limited contact with family members.[113] This distance has consequences such as loss of physical or legal custody of children.[114] 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.

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.[115] 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.[116] 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.[117] 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

109. See Regina Austin, "The Black Community," Its Lawbreakers, and a Politics of Identification, 65 S. Cal. L. Rev. 1769, 1791-92 (1992).

110. Id.

111. Id.

112. 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).

113. Id.

114. Raeder, supra note 95, 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.

115. 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.

116. Wagner, supra note 115, at 4.

117. Id. at 4-6.

figures to distribute state tax revenue and other funds.[118] One hundred and eighty-five billion dollars a year in federal aid are distributed on the basis of census figures.[119] Federal programs based at least partially on census data include job training programs, school funding, national school lunch programs, Medicaid, and community development programs.[120] 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.[121] Thus, the towns appeared poorer and became eligible for more poverty-related grants.[122]

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.[123] Such transfers of people and funds reduce the money available for resources that have been proven to reduce crime, such as schools and poverty programs.[124]

The census count simultaneously reduced the political power of low-income urban communities.[125] 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.[126] 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.[127] 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.[128] 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.[129] All prisons built in New York since 1982 have been built upstate,

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

119. Id.

120. See id.

121. Id.

122. Id.

123. Wagner, supra note 115, at 1.

124. See id.

125. See Prison Policy Initiative, Diluting Democracy: Census Quirk Fuels Prison Expansion 1 (2003), at http://www.prisonpolicy.org/articles/dilutingdemocracy.pdf.

126. Id.; Wagner, supra note 115, at 4.

127. 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.

128. Id.

129. 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,

and although only 24% of New York prisoners are from the upstate region, over 91% of its prisoners are incarcerated there.[130]

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.[131] 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."[132] With a considerable 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.[133] 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.[134] 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.[135]

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

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supra note 115, 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/storyla031202.html.

130. 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 127, at 22.

131. Tilove, supra note 129, at A1.

132. See Prison Policy Initiative, supra note 125, at 1.

133. See id.

134. Id.

135. 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 129, at A1.

Institute of Justice (the "NIJ"), began to trumpet the call for increased attention to the problem.[136] 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.[137] 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.[138] The government provided considerable funds for the development of these prototype courts to give the states and local jurisdictions the incentive to undertake such projects.[139]

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.[140] 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.[141] 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.[142] Like their predecessor, the drug courts, reentry courts mandate regular meetings where the judge monitors the progress of an individual's transition.[143] In this way, judges have assumed the traditional role of parole officers as the primary overseers in an ex-offender's reentry.[144]

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

136. 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/txtfilesl/nij/181413.txt (comparing parole supervision to more collaborative programs such as drug treatment and pretrial services).

137. Id.

138. Reentry Courts, supra note 44, at 15.

139. 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 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, 5, http://www.ncjrs.org/pdffilesl/nij/184253.pdf.

140. William Schma, Kalamazoo County Circuit Court, 29 Fordham Urb. L.J. 2016, 2019 (2002).

141. Reentry Courts, supra note 44, at 15.

142. See id.

143. Id.

144. See id. For a description of the judge-centered model, see Robinson & Travis, supra note 43, 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 139, at 5.

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.[145] The safeguard that judicial detachment is designed to provide, namely "reduc[ing] the likelihood of decision making based on favor or bias," is absent from a "hands-on" court.[146] Questions arise about the amount of judicial discretion available in reentry courts and other types of "problem-solving courts."[147] 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.[148] Will that judge "become personally invested in the success" of the efforts of that person, and perhaps react to failure "personally" and "inappropriately"?[149]

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?[150] Judges have only limited training in the areas of responsibility required by these courts and, consequently, may not perform this role well.[151] 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.

IV.
A ROLE FOR LAWYERS WHO TAKE A HOLISTIC APPROACH TO REPRESENTATION

Over the past two decades, public defender offices across the country have broadened the range of defense services provided to indigent clients. These

145. See Morris Hoffman, Commentary: The Drug Court Scandal, 78 N.C. L. Rev. 1437, 1533 (2000).

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

147. 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?").

148. 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.").

149. Thompson, supra note 146, at 79.

150. See Goldkamp, supra note 147, 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").

151. See Thompson, supra note 146, 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?").

expanded services, some of which involve representing clients on related non-criminal matters such as housing and public benefits, are included in what is now commonly referred to as "holistic representation."[152] This form of representation strives to encompass the various underlying issues that often lead to clients' experiences with the criminal justice system, with the aim of addressing those circumstances and preventing future criminal involvement.[153]

The past several years have witnessed many ways in which defender organizations, utilizing a holistic mindset, have reconceptualized their roles. For instance, the community defender movement, which has led to certain defender offices establishing concrete ties with their relevant communities,[154] has radicalized both the ways in which defender organizations perceive those communities[155] as well as the level of services those offices employ on behalf of their clients.[156]

While defender offices have viewed these expanded services as new and improved ways to represent clients, in fact holistic—or "whole client"—representation signals a paradigmatic shift in defense philosophy and ideology. It marks a significant departure from the traditional defense role, which focused narrowly on the criminal case and left unaddressed the related convergent issues.[157] Accordingly, the holistic approach has transformed criminal defense practice by broadening the conception of what defense lawyers

152. See, e.g., Terry Brooks & Shubhangi Deoras, New Frontiers in Public Defense, Crim. Just., Spring 2002, at 51.

153. See Erik Luna, The Practice of Restorative Justice: Punishment Theory, Holism and the Procedural Conception of Restorative Justice, 2003 Utah L. Rev. 205, 283 (2003) (holistic representation "suggests that legal practitioners should be client-centered in their approach, viewing their responsibilities as not just solving issues of law but also helping address the various problems (both legal and non-legal) that have contributed to their client's troubles.").

154. See Kim Taylor-Thompson, Tuning Up Gideon's Trumpet, 71 Fordham L. Rev. 1461, 1509 (2003) (asserting that quality representation cannot be achieved "without a working familiarity with the concerns of the communities in which defender officers operate and from which their clients come").

155. See Kim Taylor-Thompson, Individual Actor vs. Institutional Player: Alternating Visions of the Public Defender, 84 Geo. L.J. 2419, 2458 (1996) (noting that "public defender offices traditionally have ignored" community relationships and "in contrast, the community defender office sees its clients as individuals with ties to the community, who should be understood in the context of that community, and thereby rejects a wholly individualized conception of its role.").

156. See Anthony V. Alfieri, Retrying Race, 101 Mich. L. Rev. 1141, 1146 n.10 (2003) (observing the community defender movement to have fostered holistic, multidisciplinary approaches to defense representation); Kirsten D. Levingston, Indigent Defense, Champion, Sept.-Oct. 2002, at 34, 35 (describing the link between community defense and holistic representation by observing that attorneys often rely on "community contacts" to address a client's non-criminal needs, such as housing, employment and child custody issues).

157. See, e.g., Robin Steinberg & David Feige, Cultural Revolution: Transforming the Public Defender's Office, 29 N.Y.U. Rev. L. & Soc. Change 123, 124 (2004) (noting that "[t]raditional defenders address themselves primarily to the client's immediate legal needs, believing that removing or reducing the imminent threat of incarceration is their function.").

actually do.[158]

Viewing holistic representation, however, as a paradigmatic shift that has transformed criminal defense lawyering, rather than as an organically progressive extension of traditional defense services, reveals that much more is needed to truly fulfill its various mandates. The holistic mindset is an ever-searching one; it critiques the traditional and contemporary practice methods, searches for improved delivery of defense services and constantly presses for role reformation.

The holistic approach sets in at the very beginning of a criminal case.[159] Early intervention usually entails an immediate outpouring of investigative resources directed at the integral actors in the particular case, most importantly witnesses. It also involves, however, contacting people who are not necessarily factually relevant to the particular incident for which the defendant is charged, but who are critical to other aspects of the case, such as the defendant's background and case disposition. These people could include parents, children, doctors, church members, school teachers, social workers, co-workers, and neighbors. Accordingly the holistic mindset envisions every contingency and seeks to find creative ways to best resolve the myriad issues that contributed to the client's entanglement in the criminal justice system.[160]

The holistic mindset also recognizes the relevance of clients' communities in this process. Several defender organizations, particularly those that are situated squarely in client communities and neighborhoods, have implemented innovative programs and services that utilize their communities as part of a collective enterprise that seeks alternative criminal justice approaches.[161] On a broader level, some of these organizations envision themselves as full community partners and engage in activities unrelated to the provision of direct legal services.[162] Accordingly, these defender offices are part of a network

158. See Adele Bernhard, Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services, 63 U. Pitt. L. Rev. 293, 302 (2002) (noting that as a result of the holistic approach, defense attorneys view their roles differently today than did their predecessors two decades ago).

159. In some instances it begins even before the client is arrested. For instance, the Neighborhood Defender Service of Harlem, a community defender office that services clients from Upper Manhattan, provides pre-arrest services that include voluntary surrenders and appearing with clients at investigatory lineups. Telephone Interview with Leonard E. Noisette, Executive Director, The Neighorhood Defender Service of Harlem (Dec. 18, 2003).

160. For purposes of this discussion, the holistic mindset assumes that the client was in some way involved in the activity that led to the criminal charge, and holistic representation seeks to effect strategies to prevent future problems. Of course, any form of criminal defense lawyering must consider the client's possible factual innocence.

161. See Clarke, supra note 24, at 445-53 (providing detailed descriptions of some of these organizations).

162. For instance the Bronx Defenders, a community public defender office that opened in 1997, collaborates with community based organizations and local high schools on diverse activities ranging from organizing street fairs to teaching debate skills to high school students. Community Outreach, Bronx Defenders, at http://www.bronxdefenders.org/comm/index.cfm#. Another example is the "Raising Voices" series put together by the Brennan Center for Justice's

of community resources available to address clients' multiple legal and social issues.

While the holistic mindset has been lauded for broadening perspectives and greatly enriching the provision of defense services, it has largely overlooked two facets of representation that are critical to the adequate provision of both direct criminal defense services and to indirect quasi-criminal defense services: collateral consequences of criminal convictions and ex-offender reentry. While these are technically independent components, in many ways they are intertwined as the nature and extent of collateral consequences stemming from a particular conviction often influences directly the ex-offender's ability to reenter her community productively.[163]

As a collective, defense attorneys—as well as trial judges and prosecutors—are generally unaware of the existence and scope of collateral consequences. This lack of knowledge stems largely from the fact that these consequences are scattered throughout federal and state statutes as well as numerous regulations.[164] Also, from a legal standpoint, such consequences either attach automatically to the conviction or are imposed at the discretion of governmental or regulatory agencies independent of the criminal justice system. As a result, judges, prosecutors, and defense attorneys neither discuss nor reference these consequences during the various procedural stages of the criminal process.[165]

A true holistic legal mindset requires that defense attorneys incorporate the full ramifications of criminal convictions into all aspects of their practices.[166]

Community Justice Institute, which is "aimed at those seeking to make the criminal justice system more responsive to the needs of low-income communities and communities of color." Cmty. Just. Inst., Brennan Ctr. for Justice, Raising Voices: Taking Public Defense to the Streets 1-3 (Mar. 2002), available at http://www.brennancenter.org/resources/cji/cji1.pdf.

163. See, e.g., Demleitner, supra note 18, at 1034 (noting "[t]he civil sanctions most devastating to offenders are those that deprive them of the ability to reintegrate successfully"); Webb Hubbell, The Mark of Cain, Crim. Just., Fall 2001, at 33 (providing a personal narrative describing how collateral consequences impact various life activities upon reentry); Jeremy Travis et al., Prisoner Reentry: Issues for Practice and Policy, Crim. Just., Spring 2002, at 16-17 (noting the relationship between collateral consequences and ex-offender reentry).

164. See ABA Crim. Just. Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, R-5 (2003) ("collateral consequences have accumulated with little coordination in disparate provisions of state and federal codes, making it difficult to determine all of the penalties and disabilities applicable to a particular offense"); Chin, supra note 18, at 253-54 (stating that any inclination judges or attorneys may have to thoroughly explain collateral consequences to the accused would be stymied by their inability to gather all consequences relevant to the particular case); Demleitner, supra note 14, at 154 (noting that institutional actors have no knowledge of the number and scope of collateral consequences "because they are scattered throughout different bodies of law").

165. Jeremy Travis, Invisible Punishment: An Instrument of Social Exclusion, in Invisible Punishment 15, 16 (Marc Mauer & Meda Chesney-Lind eds., 2002) ("Because these punishments typically take place outside of the traditional sentencing framework—in other words, are imposed by operation of law rather than by decision of the sentencing judge—they are not considered part of the practice or jurisprudence of sentencing.").

166. See, e.g., Anthony G. Amsterdam, I Trial Manual for the Defense of Criminal Cases 344-46, subpart 205 (1988) (providing a "checklist of possible consequences of conviction" that

Including collateral consequences among this panoply serves two purposes. First, information regarding these consequences provides clients with all pertinent factors necessary to make a truly informed decision about how to proceed with the case. Second, defense attorneys' knowledge of these consequences elevates the provision of legal services by fully contextualizing the representation. Such understanding affords counsel a broader and deeper perspective within which to evaluate all aspects of the particular case. Thus, thorough knowledge of the particular collateral consequences would enrich not only the information attorneys impart to clients, but also the strategies they would employ throughout the representation.[167]

Defender organizations, as part of the holistic philosophy, should play a crucial role in the reentry component.[168] A true holistic mindset needs to recognize the relevance of the back-end reentry process to front-end, direct representation. Just as the current holistic model incorporates the client's myriad legal and social needs into the direct representation, it should also recognize the centrality of those same needs to the client's transition back into his or her community.[169] These needs exist irrespective of the client's sentence, although they are obviously more acute if she has been incarcerated, particularly for longer periods of time.[170] Because one of the chief goals of holistic advocacy is to address issues that contributed to the client's entanglement in the criminal justice system, with the aim of preventing any future involvement, critically examining and fostering the reentry component is vital to the integrity of those front-end defense services.

Perhaps the most significant obstacle that defenders must confront is simply

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counsel should know about in assessing a guilty plea).

167. For example, thinking expansively about collateral consequences would enhance defense counsel's ability to negotiate and help craft creative and individualized dispositions. As Professor Kim Taylor-Thompson observes, because collateral consequences potentially flow from any decision to negotiate, "lawyers, at a minimum, must maintain a working knowledge of the potential sentencing consequences of any negotiated settlement of the charges." Taylor-Thompson, supra note 154, at 1502; see also Flo Messier, Note, Alien Defendants in Criminal Proceedings: Justice Shrugs, 36 Am. Crim. L. Rev. 1395, 1415 (1999) (explaining some negotiation scenarios that could avoid the defendant's deportation); Morvillo, supra note 1 (stating that "affirmative strategies" are available to ameliorate collateral consequences); Murray, supra note 7, at 30 (observing that defense attorneys can seek to avoid or mitigate collateral consequences during plea negotiations).

168. See generally Anthony C. Thompson, Address at the National Legal Aid Defender Association Annual Conference (Nov. 14, 2002) (addressing the need for collaboration among criminal defense attorneys, civil attorneys, social workers and community members to address reentry-related issues), available at http://www.nlada.org/DMS/Documents/1038340494.03/Anthony%20Thompson%20Re-entry% 20Speech.doc.

169. See, e.g., Cynthia Works, Reentry – The Tie that Binds Civil Legal Aid Attorneys and Public Defenders, J. Poverty L. & Pol'y, Sept.-Oct. 2003, at 332-34 (suggesting various ways in which attorneys can assist with reentry related matters, including housing and family reunification).

170. Lynch & Sabol, supra note 48, at 8 (stating that longer prison stays possibly further complicate reentry as the ex-offender may have less employment opportunities and be more detached from family members).

figuring out which of the myriad collateral consequences are relevant to particular situations. As noted above this is an onerous task, largely because these consequences are not statutorily centralized, but rather must be pieced together by combing through various criminal and civil statutes as well as regulatory codes.[171]

The American Bar Association has recognized the difficulties posed by the non-systematic codification of these consequences. As part of the ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, the House of Delegates adopted a standard in 2003 recommending that the legislature:

> [C]ollect, set out or reference all collateral sanctions in a single chapter or section of the jurisdiction's criminal code. The chapter or section should identify with particularity the type, severity and duration of collateral sanctions applicable to each offense, or to a group of offenses specifically identified by name, section number, severity level, or other easily determinable means.[172]

While these standards are aspirational and not binding, they provide key insights into how defense organizations could manage the collateral consequences component. For instance, many defender offices have recognized the importance of linking criminal and civil issues. Some offices have formed civil teams that handle civil issues, such as housing and public benefits, related to the underlying criminal matter. Other offices do not have civil teams but assign identified attorneys to develop expertise in certain related areas, such as immigration. These attorneys are then responsible both for training other lawyers to recognize situations where these issues are likely to exist, and for providing any related legal services. Still other offices that do not handle civil issues have established referral relationships with relevant legal services organizations that can take on these matters.

Defender organizations can use each of these models in moving toward fully incorporating collateral consequences into their practices. As an initial step, organizations can assign an attorney to collect and organize information about the relevant collateral consequences for each criminal offense. The attorney would then be responsible for training her colleagues on these issues, which could include written materials such as annotated outlines or other reference guides, and answering legal questions that arise in particular instances.

Another potential obstacle is the resistance some attorneys may have to

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171. See Michael Pinard, Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering, 31 Fordham Urb. L.J. 1067, 1080 & n.58 (2004).

172. ABA Standards on Collateral Sanctions, supra note 7, at Std. 19-2.1; see Chin, supra note 18, at 254 ("Basic fairness requires first that collateral consequences be collected in one place, and second that persons charged with a crime be notified of what the consequences are when they plead guilty or are sentenced.").

incorporating collateral consequences into their practices because of the effect this component would have on their workloads. Defense attorneys, particularly public defenders and assigned counsel, have burdensome caseloads and are often under tremendous time and resource constraints to provide individualized and zealous representation. Thus, requiring that attorneys ascertain and then advise all clients of the myriad consequences attending their convictions would further strain their capacities.[173]

Attorneys, however, already spend significant time advising clients about various aspects of their cases, including many other ramifications of accepting plea bargains and the benefits and drawbacks of proceeding to trial. Adding collateral consequences to this mix is not likely to pose significant additional burdens, particularly as attorneys would soon develop an internal database of these consequences, which would allow them to quickly summon those consequences that are relevant to the particular case. Moreover, any additional responsibilities resulting from this component are consistent with their ethical duties to provide clients with sufficient information to allow them to make informed decisions.[174]

While significant resources are necessary to provide effective reentry assistance, several possibilities exist to enable this extension of defense services. Similar to the collateral consequences component, defender offices could form "reentry teams," which could be part of the civil teams some defender offices have already formed. These teams would help clients navigate through various reentry obstacles, including access to housing, substance abuse treatment and public benefits, family reunification efforts, child support and expungement of criminal records.

To the extent that defender organizations lack the resources to fund such teams, they could sponsor fellowships or grants that are geared toward recent law school graduates to provide civil legal services. Within the past several years, several fellowships have been awarded for attorneys to establish, provide or expand civil practices within public defender offices. While many of

173. At least one court, in holding that the failure to advise defendants of deportation possibilities does not constitute ineffective assistance, reasoned that "[t]o hold otherwise would place the unreasonable burden on defense counsel to ascertain and advise of the collateral consequences of a guilty plea. . . ." United States v. Yearwood, 863 F.2d 6, 7 (4th Cir. 1988). Kim Taylor-Thompson notes the possible resistance by defenders to add new responsibilities to the demands already placed upon them. See Kim Taylor-Thompson, Taking It to the Streets, 29 N.Y.U. Rev. L. & Soc. Change 153, 176 (2004).

174. Model Rules of Prof'l Conduct R. 1.4(b) (2004) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"); ABA Standards on Collateral Sanctions, supra note 7, at Std. 4-3.8(b) ("Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Id. at Std. 4-5.2(a)(ii) (the accused makes the decision whether to accept a plea agreement "after full consultation with counsel"); id. at Guilty Pleas, Std. 14-3.2(f) ("To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of the plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea").

these fellows provide an array of pre-dispositional civil services, several have focused their efforts on developing reentry strategies, which are also primarily civil in nature.

Those offices or individual defenders that have no plans to expand their legal services to cover reentry issues have available several community organizations that have begun to provide these services. These defender offices—as well as those that have begun to provide reentry-related services—can partner with these community organizations. These partnerships can either be formal or informal. The formal partnerships would be collaborative in scope, in which defenders and these organizations work together to handle the array of reentry issues faced by their clients. The informal partnerships would be more referral-based, as defender offices could establish a referral network that would allow the outsourcing of reentry related legal and non-legal issues. This would allow defender organizations to inform clients of the various community-based services available both before and after the completion of their sentences. This referral network could be utilized both by those defender organizations that will not provide direct reentry services because of resources, as well as those organizations that do provide such services but which may be confronted by a particular issue that is outside their expertise or capacity.

Several defender organizations have already begun to model the range of reentry-related services that can be offered to clients as they are released from incarceration or while they are serving community-based sentences such as probation. These offices have extended the spirit of holistic representation by providing an array of services to facilitate eventual reintegration. These services include representation in employment-related proceedings, deportation-related proceedings, and housing-related proceedings, as well as assistance with expunging criminal records.[175]

For example, the Bronx Defenders, a community defender organization that serves clients from the Bronx, has instituted a Civil Action Project that provides services related to the collateral consequences and reentry components. The reentry services involve collaborations between the office's civil and criminal attorneys in representing and advising clients "on the full range of legal issues, including housing, public benefits, employment, civil rights, immigration, forfeiture, and family law."[176] With regard to collateral consequences, this organization has implemented a Community Defender Resource Center, which

175. At least two public defender offices have programs that help clients expunge records for purposes of securing employment and public benefits. See Clarke, supra note 24, at 435 (describing a program set up by the Kern County Public Defender in California that helps those convicted of misdemeanors expunge their records, and a program set up by volunteer public defenders with the Somona County Public Defender Office that helps welfare recipients expunge criminal records for purposes of applying for certificates of relief or qualifying for employment).

176. McGregor Smyth, Bridging the Gap: A Practical Guide to Civil-Defender Collaboration, J. Poverty L. & Pol'y, May-June 2003, at 56, 59, available at http://www.nlada.org/DMS/Documents/1058455948.26/Bridging%20the% 20Gap.pdf.

serves as an institutional resource to assist defense attorneys throughout New York State in developing strategies to surmount collateral consequences.[177]

The Neighborhood Defender Service of Harlem, long recognized for providing innovative community-based defense services, has a Harlem Re-entry Advocacy Project that utilizes a multidisciplinary approach to reentry services, including social services, civil legal representation and community education. The social services component helps address issues related to public benefits, mental health, substance abuse treatment, family reunification and employment. The civil legal representation component includes representing ex-offenders in employment and housing related proceedings. Similarly, the D.C. Public Defender Service's Civil Legal Services represents clients on various matters related to the collateral consequences of criminal convictions, including eviction proceedings, denial of public benefits, termination of parental rights, deportation and academic expulsion.[178]

Likewise, several defender organizations have sponsored training programs and workshops that focus on these critical collateral consequences and reentry issues.[179] Consistent with the holistic mindset, this attention points to an emerging recognition that defense attorneys need to evaluate their clients' legal and extra-legal situations more expansively and that both the traditional and the contemporary holistic defense roles fail to consider the extent to which criminal convictions impact clients' lives, particularly after the formal sentence has concluded.

V.
A ROLE FOR LAW SCHOOL CLINICS

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. 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

177. Id. To assist with this effort, the Civil Action Project has composed a comprehensive guide setting forth the various consequences accompanying criminal convictions in New York State. Bronx Defenders Civil Action Project, The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records (on file with the author). The guide also offers suggestions for alleviating the effects of these consequences and lists numerous organizational resources for attorneys to consult. Id.

178. Information pertaining to the Civil Legal Service Unit can be found at http://www.pdsdc.org/Civil/Index.asp.

179. For an overview of one of these training programs, which includes federal and state case law, see Penny Beardslee, Civil/Collateral Consequences of Criminal Convictions, presented at the Advanced Training Conference of the Criminal Defense Attorneys of Michigan (CDAM) (Nov. 2, 2001) available at http://www.sado.org/training/collateral1.htm.

problems offenders reentering communities face.[180] Law schools have tended to perpetuate the notion that their mission is to prepare students to engage in conventional notions of legal advocacy.[181] So the 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.[182] 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.[183] 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."[184] 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.[185] 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.[186] Law students may need to contact employers to advocate for the hiring of ex-offenders, where the same employers may have shown reluctance to

180. 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.

181. Stephen Wizner, The Law School Clinic: Legal Education in the Interests of Justice, 70 Fordham L. Rev. 1929, 1930 (2002).

182. Id.

183. Stephen Wizner, Beyond Skills Training, 7 Clinical L. Rev. 327, 328 (2001).

184. Id. at 338-39.

185. 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).

186. 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).

do so in the past.[187] 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.[188] 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.

A. 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.[189]

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 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.

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187. 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).

188. The major theorist of collaborative lawyering is Gerald López. See, e.g., Gerald P. López, Lay Lawyering, 32 UCLA L. Rev. 1, 2-3 (1984); Gerald P. López. The Work We Know So Little About, 42 Stan. L. Rev. 1, 10 (1989).

189. 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.

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.[190] 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.[191] 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 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

190. The journalist was Jennifer Gonnerman of the Village Voice, who chronicles the reentry of an ex-offender in Jennifer Gonnerman, Life on the Outside: the Prison Odyssey of Elaine Bartlett (2004).

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

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.

B. 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.[192] 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 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 equiv-

192. His name has been changed for purposes of confidentiality.

alency 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 learning 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.[193] 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

193. See N.Y. Correct. Law §§ 750-55 (2003).

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 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.[194] 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.

C. 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,

194. 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.

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.

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. 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.[195] Lawyers across disciplines and specialties will need to work with government officials, community activists, and ex-offenders in devising comprehensive strategies to resolve this crisis.

195. At a similar juncture in our legal history, the U.S. Supreme Court in 1972, in Argersinger v. Hamlin, 407 U.S. 25 (1972), extended the right to counsel to misdemeanor cases, recognizing that this mandate would place demands on an already overtaxed legal system. See id. 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 supervised 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.