Unequal Justice: Mobilizing the Private Bar to Fight Mass Incarceration

PRESENTED BY

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

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About THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

The principal mission of the Lawyers' Committee for Civil Rights Under Law is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combatting racial discrimination and the resulting inequality of opportunity – work that continues to be vital today.

Confronting the nation today are debilitating and subtle forms of racial discrimination; the emergence of new, racially-targeted predatory practices; and the continuing impact of historical racial discrimination based on *de jure* segregation and *de facto* inequity. The Lawyers' Committee seeks to address this evolving landscape and secure equal opportunity for disadvantaged and excluded minorities by marshaling the leadership, skills, and *pro bono* resources of the private bar. While the Lawyers' Committee's primary focus is to represent the interests of African Americans, the Lawyers' Committee also represents the interests of other victims of discrimination where doing so can help further the organization's mission.

The Lawyers' Committee implements its mission and objectives through collaborative, multi-dimensional approaches to litigation, public policy advocacy, public education, transactional representation, and other forms of service in the cause of civil rights. The organization operates six projects, namely, Educational Opportunities, Employment, Fair Housing and Community Development, Pro Bono and Legal Mobilization, Public Policy, and Voting Rights. The Criminal Justice Initiative operates as part of the Legal Mobilization Project.

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EXECUTIVE SUMMARY

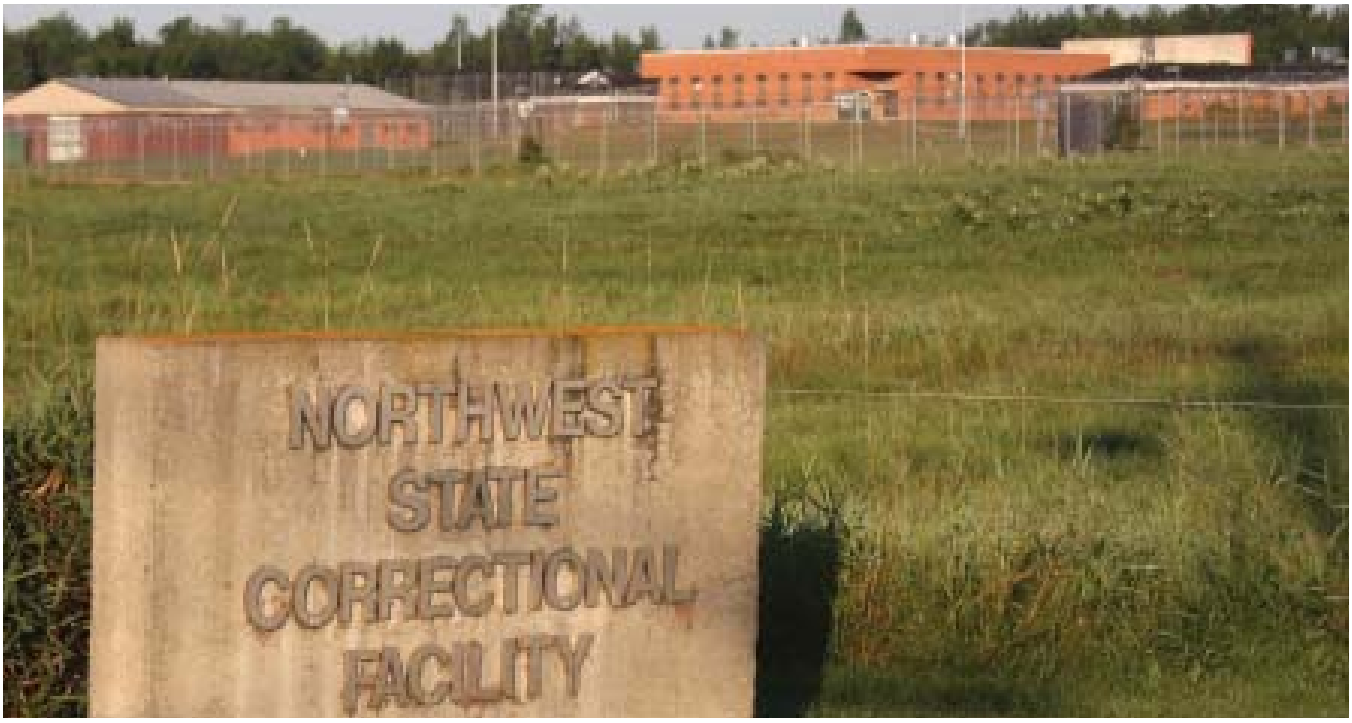
This report marks the beginning of Lawyers' Committee for Civil Rights Under Law's Criminal Justice Initiative, created to mobilize the private bar in the fight against mass incarceration. *Mass incarceration* – a term that refers to the cluster of issues associated with the historic scale of present-day American incarceration – presents the greatest contemporary threat to civil and human rights in the United States today. Two key facts about this phenomenon gird its importance to the Lawyers' Committee's mission: (1) mass incarceration is a racially, spatially, and socioeconomically targeted phenomenon that disproportionately affects lower-class African-American and Hispanic residents of degraded urban spaces, and (2) mass incarceration results in large part from aggregate policy choices, rather than from poor personal decisions or increases in overall levels of crime, meaning solutions too will be legal and policy in nature. There is no single solution to the problem of mass incarceration. This is because there is no single cause. Many issues are subsumed under the heading of "mass incarceration," some with deep historical roots. It is the combination of various factors working in tandem that produces the result.

In September 2013, Lawyers' Committee for Civil Rights Under Law launched the Criminal Justice Initiative in response to the deepening crisis of mass incarceration in the United States, a historically and internationally unique growth in incarceration, which affects individuals and communities disproportionately comprised of minority, poor, and relatively uneducated individuals.

Founded in 1963, the Lawyers' Committee has fought for a fair and equal criminal justice system since its founding when the organization began its work defending black protestors fighting for an end to segregation in Mississippi. Over the following fifty years, the Lawyers' Committee has played an important role in advocating for a fair and equal justice system. However, the explosion of the criminal justice system that has accelerated over the past forty years and is today at a breaking point, necessitates a renewed, strategic, and focused effort by the organization. With this in mind, the Lawyers' Committee created the Criminal Justice Initiative.

In its first year, the Lawyers' Committee has propelled itself into the criminal justice legal sphere through a variety of means, including program development, research, public policy advocacy, programmatic work, and most notably, through a series of ten "**listening sessions**" on race and imprisonment. Held across the country, the listening sessions brought together leaders, advocates, practitioners, experts, academics, national law firm representatives, and formerly incarcerated individuals to discuss the state of mass incarceration, reform efforts, and the role of national law firms in this movement. The sessions were an unprecedented effort to assess the state of criminal justice reform nationwide; to foster collaboration and strategic solutions among participants; to gather first-person accounts of the toll the criminal justice system takes on individuals, families and communities; and to determine the most strategic role for national law firms in the fight to end mass incarceration and it disproportionate targeting of individuals and communities of color.

The knowledge and insight gained during the listening session is immeasurable. However, Lawyers' Committee identified several common themes which emerged:



There is consensus that the criminal justice system is broken. Or in the words of one participant at a listening session, the criminal justice system does *exactly* what it is designed to do: to punitively punish large swaths of society's most disadvantaged individuals. Experts, academics, practitioners, and formerly incarcerated individuals alike agreed that the criminal justice system is unnecessarily punitive, fails wholesale to rehabilitate through its method of incarceration, destroys any opportunity for success after release from incarceration due to the thousands of collateral consequences, decreases public safety, and undermines public trust in the ability of the system to deliver justice. A key fact will guide the Lawyers' Committee's work in this area: nationally, 95% of criminal cases end in guilty pleas; of cases in the federal court system, that figure is 97%. In considering how best to harness the resources of the private bar, the importance of the criminal justice system's *negotiated* nature cannot be overstated.

Glaring racial disparities are often absent from reform discourse. There is no question that the criminal justice system treats individuals differently based on the color of their skin. This is especially true when combined with other disadvantage factors like income, education, geography, and access to healthcare. However, this fact is often absent in public discourse and almost never formally addressed in reform efforts. This is particularly troubling since racial disparities in incarceration are often the result of implicit racial bias and structural or institutionalized racial discrimination, deep-rooted species of dysfunction which can only begin to be addressed by the acknowledgement and recognition that it exists.

There is a huge gap in legal approaches to fight mass incarceration. Simply put, very few organizations in the nation have the resources, expertise, and will to fight mass incarceration in the courts. Lawyers' Committee is particularly well-suited to filling this gap given the organization's model of engaging large national law firms in impact litigation aimed at strategic and system-wide change.

The time is now. As Lawyers' Committee heard from a diverse array of advocates, experts, practitioners and those affected by the system, the urgency of accelerated and increased reform efforts became palpable. State and federal budgets are stretched to a breaking point. After four decades of "tough on crime" policies, public discourse around criminal justice has begun to change to "smart on crime" policies which concentrate resources on the most serious crime, reduce overly harsh prison sentences, especially for drug offenses, and focus on rehabilitation and reducing recidivism rates.

The Lawyers' Committee presents in this final report robust and strategic priorities that the Criminal Justice Initiative intends to undertake over the next months and years. In particular, the Criminal Justice Initiative will continue of the work begun during its first year in development, including:

- **Clemency Project 2014:** The Criminal Justice Initiative developed its first programmatic endeavor as a member organization of the Clemency Project 2014, a presidential clemency initiative, and leads the national law firm pro bono recruitment efforts and provides structural and mobilization expertise to the development of other parts of the project.
- **Public Policy Advocacy:** The Lawyers' Committee solidified itself as a leader in criminal justice public policy advocacy, especially in the areas of racial profiling, sentencing reform, and collateral consequences of criminal conviction. This works has been done by public appearances, consistent and active leadership in coalition work, legislative advocacy, public comment to executive agency rulemakings, and public education campaigns.
- **Work through Other Lawyers' Committee Projects:** The Criminal Justice Initiative also encompasses work done under the banner of other Lawyers' Committee Projects.
    - With the **Employment Discrimination Project**, the Access Campaign is designed to examine and dismantle barriers to gainful employment for persons with arrest and conviction records and negative credit histories. In addition, the Employment Discrimination Project is involved in active litigation against the improper use of criminal background checks in hiring which results in the disproportionate exclusion of African American and Hispanic applicants.
    - The **Educational Opportunities Project**'s South Jersey Educational Reentry Program has seen universal success helping to end the school-to-prison pipeline by representing students who are experiencing problems with school placement. The Educational Opportunities Project works to end the "school-to-prison pipeline," for example through litigation targeting discriminatory school disciplinary practices.

The Lawyers' Committee aims to expand the Criminal Justice Initiative to include several new programs and increased public policy advocacy. After careful and inclusive consultation and strategic planning discussions with a variety of stakeholders, the Lawyers' Committee has selected the following priorities for future work by the Criminal Justice Initiative. These programs are designed to address the complex problem of mass incarceration in ways that are best suited to Lawyers' Committee as a legal organization with national focus, harness the resources, leadership, and interest of the private bar in areas not currently or sufficiently covered by others. The Lawyers' Committee is committed to continuing its work to combat mass incarceration, to the extent that is possible with the resources currently available; however, significant funding and several additional staff members are required to implement fully the expanded programs below.

Litigation & Programmatic Work

- **Indigent Defense Litigation:** The Criminal Justice Initiative will partner with private law firms to research, investigate and bring strategic

litigation in jurisdictions which have failed to provide indigent criminal defendants with their constitutional right to counsel due to underfunding, excessive indigent defender caseloads, or lack of independence from the prosecution and the judiciary.

- **Modern-Day Debtors' Prisons**: The Criminal Justice Initiative will partner with law firms to bring litigation challenging modern day "debtors' prisons," the practice of state and local jurisdictions of imprisoning disproportionately minority and poor defendants who cannot afford to pay court fees and fines.
- **Law Enforcement Reform:** In targeted jurisdictions, Lawyers' Committee will conduct analyses on police data and bring civil rights litigation in situations where police departments have a policy, pattern or practice of targeting minority communities for disproportionate policing or abusive use of force tactics. The Lawyers' Committee will seek remedies such as required implicit racial bias training, other programs to reduce prejudice, the required use of body-worn cameras or videotapes, police vehicle dashboard cameras, and independent court monitors.
- **"Crimmigration":** Lawyers' Committee's Criminal Justice Initiative will investigate issues at the intersection of immigration and law enforcement, and the growing criminalization of immigrants. For example, Lawyers' Committee will enlist the help of the private bar to research and investigate U.S. Immigration and Customs Enforcement (ICE) apprehension, interrogation and detention practices.
- **Pretrial Detention & Bail:** The Criminal Justice Initiative will challenge the overuse of pretrial detention and the imposition of excessive bail without individualized hearings in jurisdictions around the country. High rates of pretrial detention is one of the major components of mass incarceration, disproportionately affects minority and poor individuals, may have profoundly negative effects on an individual still "presumed innocent," and correlates with higher guilty plea rates. Lawyers' Committee will partner with law firms to explore new and amplify existing legal and programmatic solutions.
- **Prison Conditions Litigation:** Lawyers' Committee is perfectly situated to harness the resources of the private bar to challenge chronic, inhumane, and degrading conditions in our nation's prisons. To this end, the Criminal Justice Initiative will enlist pro bono attorneys to analyze degrading and harmful conditions in prison, conduct legal research on legal strategies to challenge the failure of federal, state, and local governments to protect prisoners from harm, with an eye toward future litigation.

Public Policy, Public Education & Coalition Leadership

- **Police Militarization & Racial Profiling:** Lawyers' Committee's Criminal Justice Initiative will advocate for an end to racial profiling in law enforcement and a stop to abusive police tactics in communities of color. The Lawyers' Committee leads a coalition of civil rights organizations dedicated to a shift in policing culture from one of militarized control to one of equality, public service and public safety.
- **Sentencing Reform:** Criminal Justice Initiative will advocate for a the repeal of mandatory minimum sentencing, three strikes laws, expanded use of parole and probation, and more proportional sentences, especially for drug crimes, a pillar of its public policy agenda. Changes in sentencing policy have been the single biggest cause of mass incarceration, and will be central to its reversal.
- **Indigent Defense:** The Criminal Justice Initiative will advocate for the adoption of public defender caseload caps in federal, state, and local jurisdictions that comply with professional standards and ensure effective assistance of counsel for indigent defendants. Similarly, the organization will advocate for sustainable funding schemes for indigent defense delivery systems that incentivize full, fair and effective representation of indigent defendants.
- **Collateral Consequences of Criminal Conviction on Civil Rights:** Addressing the collateral consequences of criminal conviction on civil rights is woven into the fabric of Lawyers Committee's Project areas. The Criminal Justice Initiative will continue to be lead advocacy for policies and legislation that reduce the impact of collateral consequences of conviction on civil rights, working on issues such as felony

disenfranchisement, the use of criminal records in employment hiring, and the use of criminal histories in public housing determinations.

- **International Human Rights:** The Lawyers' Committee will use the mechanisms available in the international human rights context to bring global accountability to the United States' practice of mass incarceration and violations of civil rights stemming from this crisis.
- **Public Education:** Lawyers' Committee will use its position as a leader on civil rights and criminal justice, especially in the areas of racial profiling and law enforcement tactics, to seek greater awareness of mass incarceration and its potential to effect civil rights on a grassroots level.

Part I of this report outlines the origin of the Criminal Justice Initiative and the program development approach taken by the Lawyers' Committee; this section describes major themes drawn from the criminal justice "listening sessions" and lays out mission-driven reasons Lawyers' Committee launched the Initiative. **Part II** describes the crisis of mass incarceration in the United States, with a focus on the severe racial disparities in the nation's prison population. **Part III** details the legal and empirical background for each of the substantive priority areas of the Criminal Justice Initiative. This section also identifies best practices gleaned by the Lawyers' Committee's research, advocacy, and criminal justice listening sessions held over the past year. **Part IV** describes other issue areas and best practices to address them, which, though not one of the Lawyers' Committee's priority areas, are areas deserving of reform. An **Appendix** contains graphics and descriptions of the "life of a criminal case," for those unfamiliar with criminal procedure and terminology.

Part I:

LAUNCHING THE CRIMINAL JUSTICE INITIATIVE

Origin and Methodology:

In September 2013, the Lawyers' Committee created the Criminal Justice Initiative, an effort to research, explore, analyze, define, strategize, and engage in criminal justice reform that addresses the devastating direct and indirect effects of mass incarceration on the civil rights of individuals and communities of color in America. With the goal of identifying gaps in coverage and best practices that could be emulated, the organization focused not only on the research and advocacy already being done by experts, practitioners, scholars, and advocates, but also on the contributions of the private bar to these efforts.

Creation of a criminal justice project originated with discussions between Lawyers' Committee's President and Executive Director Barbara Arnwine and Michelle Alexander, author of *The New Jim Crow*. Alexander urged the Lawyers' Committee to examine the crisis of mass incarceration and to take a leading role, especially in the area of access to legal representation. This conversation occurred at a time when the ballooning criminal justice system was increasingly encroaching on work being done in the Lawyers' Committee's other project areas, such as voting rights, educational opportunities, fair housing, and employment discrimination.

About six months later, the Lawyers' Committee began a concerted effort to concentrate resources on criminal justice issues. The organization secured a fellow, Hallie Ryan, a recent graduate of the University of Michigan Law School. Ryan started work in September 2013, was hired full-time as Associate Counsel in the Legal Mobilization Project, and continues to focus exclusively on criminal justice work.

Employing a variety of methods, the Lawyers' Committee has laid the groundwork for a multi-dimensional project that aims to reform a criminal justice system that has incarcerated Americans, and minority, poor, and uneducated citizens in particular, at historically and comparatively unprecedented rates, and become a vehicle for violations of civil rights, repression of communities of color, and discrimination. Knowing that the deep and complex causes of mass incarceration will require the most creative and collaborative solutions, the Lawyers' Committee undertook to convene a series of "listening sessions" on the topic of race and imprisonment with advocates, experts, academics, practitioners,

pro bono counsel and other representatives from national law firms, and formerly incarcerated individuals. A total of ten sessions were held in six locations across the country, bringing together over 250 people. In addition to these sessions, the Lawyers' Committee held individual meetings with numerous other advocates, experts, academics, and law firm representatives.

- Comprehending the urgent nature of crisis, the Lawyers' Committee commenced legal, policy, and programmatic activities, including:
- Conducting investigation and legal research in anticipation of potential litigation;
- Submitting official public comments in response to federal agency rulemakings;
- Submitting an *amicus* brief in a case challenging federal regulation of prison phone rates;
- Leading recruitment and coordination of national law firm *pro bono* efforts of Clemency Project 2014, a presidential clemency initiative;
- Undertaking an ambitious criminal justice policy agenda, and becoming a leader of a policing reform coalition and regular contributor at Justice Roundtable coalition meetings and strategy discussions; and
- Conducting extensive research.

Listening Sessions:

The Lawyers' Committee convened an extensive series of criminal justice listening sessions between October 2013 and August 2014. The sessions brought together leaders, advocates, experts, academics, practitioners, and individuals personally affected by the criminal justice system to discuss efforts to reverse mass incarceration, reduce racial disparities, and strategize about how the Lawyers' Committee might best engage firms on the pressing crisis of mass incarceration.

Sessions with advocates, practitioners, and law firm representatives focused on the successes, challenges, and gaps in advocacy in the field of criminal justice reform. The following is a list of the sessions:

- October 3, 2013 – New York session with advocates and firm representatives (hosted by Schulte Roth & Zabel)
- February 5, 2014 – Washington D.C. session with advocates and firm representatives (hosted by WilmerHale)
- April 2, 2014 – Los Angeles session with advocates (hosted by O'Melveny & Myers)
- April 3, 2014 – Los Angeles session with firm representatives (hosted by O'Melveny & Myers)
- May 7, 2014 – Chicago session with advocates and firm representatives (hosted by DLA Piper)
- July 29, 2014 – Atlanta session with advocates and firm representatives (hosted by Kilpatrick Townsend)

Sessions with formerly incarcerated individuals focused on participants' first-hand interactions with the criminal justice system, with a special focus on access to legal representation at all stages. Participants were asked about their knowledge of the criminal justice system; the legal representation they received from public defenders, court-appointed attorneys, or privately hired lawyers; the conditions they experienced while incarcerated; and the struggles they faced after reentering society. The following is a list of the sessions:

- May 8, 2014 – Chicago session with formerly incarcerated individuals, part I
- June 5, 2014 – Oakland session with formerly incarcerated individuals
- June 10, 2014 – Chicago session with formerly incarcerated individuals, part II
- August 1, 2014 – Atlanta session with formerly incarcerated individuals

Individual meetings were held with the following people:

- Ellen Barry, Executive Director, Insight Prison Project
- Wilder "Ken" Berry, wrongfully convicted individual; paralegal, Winston & Strawn LLP
- Eve Brensike Primus, Professor of Law, University of Michigan Law School
- Anne Chapman, Osborn Maledon
- Daniel Kolb, Senior Counsel, Davis Polk & Wardwell LLP; Board Member, Lawyers' Committee for Civil Rights Under Law
- Zachary Norris, Executive Director, Ella Baker Center for Human Rights
- Oren Sellstrom, Legal Director, and Meredith Desautels, Staff Attorney, San Francisco Lawyers' Committee
- Virginia Sloan, President and Founder, The Constitution Project
- Gretchen Slusser, Executive Director; Beth Johnson, Director of Legal Programs, Cabrini Green Legal Aid
- Eleanor Smith, Partner, Zuckerman Spaeder LLP; Board Member, Lawyers' Committee for Civil Rights Under Law
- Eliza Solowiej, Executive Director, First Defense Legal Aid
- Phil Telfeyan, Co-Founder, Equal Justice Under Law
- Joe Tulman, Professor of Law, University of District of Columbia David A. Clarke School of Law; Director, Took Crowell Institute for At-Risk Youth
- Melanie Velez, Managing Attorney, Impact Litigation, Southern Center for Human Rights

Though this report cannot cover the breadth and depth of the knowledge that was shared with the Lawyers' Committee in these sessions and other conversations, a few broad themes emerged and are highlighted below.

Consensus that Major Reform is Necessary

Participants in the listening sessions were unanimously of the opinion that the criminal justice system as whole is fundamentally broken. The extraordinarily high level of incarceration is the most glaring symptom of problems which undermine justice, rehabilitation, and retribution – the ostensible justification of punishment. Experts, academics, practitioners, and formerly incarcerated individuals alike agreed that the criminal justice system is unnecessarily punitive, fails wholesale to rehabilitate through its method of incarceration, limits opportunity for success after release from incarceration due to collateral consequences, decreases public safety, and undermines public trust in the ability of the system to deliver justice.

The dire need for criminal justice reform on the federal, state, and local level has wide bipartisan support. Democrats and Republicans agree that both so-called "front end" reforms – such as changes to sentencing laws – and "back end" reforms – like the elimination of collateral consequences of conviction such as felony disenfranchisement laws – are necessary. While many conservatives point to the fiscal consequences of mass incarceration as a basis of support, others are compelled by the threat of government overreach into the lives of too many Americans and Christian conservatives are also speaking in increasingly loud voices about the moral implications of depriving citizens of their liberty.

Among formerly incarcerated individuals, there is a near-universal sense of injustice stemming from experience in the criminal justice system, and in particular, their treatment since release from prison. The Lawyers' Committee heard many stories of corrupt and abusive police practices,

including planting evidence, conspiring with prosecutors determined to win long prison sentences, and frequently lying under oath.

Almost all formerly incarcerated individuals participating in the listening sessions experienced an "assembly line" justice system: one bent on churning criminal defendants through the courts and into prison, and lacking any safeguards for due process or individual rights. Formerly incarcerated participants confirmed that they knew little about the criminal justice system before they were arrested and defense attorneys did little to demystify the process. The Lawyers' Committee often heard, "My public defender just told me I should plead guilty. I didn't know at the time the effect that would have on my life."

Participants were nearly unanimous: defense attorneys – whether public defenders, court-appointed, or privately paid – had not provided legal assistance which enabled defendants to make informed decisions about their cases or futures. Time and again, participants spoke of attorneys who did not know the client's name – to say nothing of having conducted an investigation – before suggesting a plea deal; attorneys who relied on bad precedent; attorneys forced to prioritize clients over others in their caseload; attorneys who made deals with prosecutors making "tradeoffs" between two defendants. One participant recounted spending eight months in jail awaiting trial without speaking with her public defender, despite repeated attempts to reach the attorney by both herself and her family. Another participant described how her attorney left during a government-administered polygraph test, leaving the government to ask several questions far outside the scope of the investigation. One man was convicted of murder after a trial in which the public defender assigned to him filed no pretrial motions and made only two in-court objections during the three-day trial. Many participants recalled that they held misconceptions about the amount of prison time they expected to serve. In one extreme case, a participant recalled that he pleaded guilty on the belief that he would serve two months in prison. It was not until he arrived at the prison that he found out his parole had been revoked without his knowledge. He went on to serve a total of 11 years in prison.

Engaging and empowering formerly incarcerated individuals must be central to the Lawyers' Committee's criminal justice work. Their stories illustrate the most egregious harms that are suffered within an unjust system, and leadership by these individuals is essential. Among the participants were several individuals who were wrongfully convicted and later exonerated of heinous crimes. Their testimony about incarceration and reentrance into society contains powerful examples of the irreversible consequences the criminal justice system has for human lives.

Lastly, mass incarceration has emerged as one of the greatest civil rights challenges of the 21st century. The system is plagued by overt racial

discrimination, implicit racial bias and institutional targeting of African Americans and other minorities. As evidenced by the recent killings of young African American men and women, racial profiling by police and immigration enforcement agencies is not a mere inconvenience for minority communities. Moreover, the country's system of mass incarceration reverses hard-fought civil rights victories of the past 50 years. Gains in voting rights are undermined by the huge number of African Americans who lose the right to vote because of felony disenfranchisement laws. Successes against racial discrimination in hiring and promotion practices mean little when African American men are turned away because of arrest and conviction records before they even apply for the job. The Lawyers' Committee must undertake to bring the resources and leadership of the private bar to meet this formidable barrier to equal justice under law.

Disproportionate Racial Impact Absent from the Public Discourse

There is no question that individuals fare differently in the criminal justice system based on the color of their skin, and that this reality is exacerbated by other factors affecting communities of color, such as lower incomes, more limited educational opportunities, residential segregation, and less access to healthcare. However, this fact is often absent from public discourse and is almost never formally addressed in reform efforts. This is particularly troubling since racial disparities in incarceration are often the result of implicit racial bias on the part of law enforcement, jurors, prosecutors, and so on, as well as structural or institutionalized racial discrimination. These deep-rooted forms of prejudice can only be addressed once their existence is acknowledged. The listening sessions helped the Lawyers' Committee identify and contextualize the various ways in which racial bias functions in the criminal justice system. Overt racial bias certainly continues to plague all sectors of society, and the criminal justice system is no exception. However, the more pervasive and challenging problems are implicit racial bias and institutionalized racism. The listening sessions hosted experts on implicit bias, such as a representative from Equal Justice Society, who shared strategies for educating the public and designing legal solutions for implicit and institutionalized racial bias.

Research has shown that implicit racial bias – attitudes or stereotypes about race that affect our understanding, actions, and decisions in an unconscious manner – creeps into the criminal justice system at every point involving human decision making. Police, prosecutors, judges, corrections officers, parole and probation workers, and public defenders are just a few of the actors through which implicit bias may play out. While many look to diversified police forces and judicial benches, empirical studies demonstrate that this alone will not reverse the effects of implicit racial bias, in part because even minorities may have implicit biases against members of their own community.[1]

With implicit bias functioning at the level of individual actors, the criminal justice system as an institution fails to compensate, and this constitutes institutionalized racism. Institutionalized racism in the criminal justice system manifests as both a "commission" and "omission." As a commission, methods or mechanisms of crime control and prevention have foreseeable disproportionate impacts on a racial minority group, largely in conjunction with other social and economic factors such as poverty and education level. Federal sentencing laws for crack cocaine offenses are one example. Under the 1984 Anti-Drug Abuse Act, the relative length of federal prison sentences for crack and powder cocaine offenses – which differ only in that African Americans are widely known to be prosecuted for crack-related offenses at far greater rates than whites – were in a 100-to-1 ratio.

Other times, the criminal justice system enacts institutionalized racism through omission when it openly ignores the reality of race in America and fails to protect against implicit bias. For example, the Supreme Court found in *Whren v. United States* that a police officer's subjective racial

bias did not affect the legality of a search so long as there was an objective basis of probable cause, meaning that racial profiling was effectively immune from legal challenge in the courts.[2] Any effort the Lawyers' Committee undertakes will involve uncovering evidence of implicit racial bias and convincing policymakers and courts that the numbers indeed constitute racial discrimination, and therefore a violation of civil rights.

Insufficient Legal Advocacy and Representation

Despite the tireless work being done by experts, advocates, and practitioners, the listening sessions conducted by the Lawyers' Committee revealed a large need for additional legal advocacy and representation. Simply put, very few organizations in the nation have the reach, resources, expertise, and mission to fight mass incarceration in the legal arena. Public defender offices around the country are buckling under excessive caseloads; legal aid organizations already stretch to cover the civil legal need; and organizations working in prisons cannot hope to sate the vast need for effective programming for the nation's 2.3 million prisoners. Advocacy organizations dedicated to reversing mass incarceration are growing in number and do tremendous work, but this work pales in comparison to the need that still exists. Notably, after decades of courts chipping away at criminal defendants' rights, very few organizations litigate violations of rights of the accused and incarcerated outside of individual defendants' cases.[3] Even legal victories suffer from lack of organized enforcement efforts, such as with the recent Supreme Court case which declared unconstitutional mandatory life without parole sentencing for juvenile offenders.

Lawyers' Committee is particularly well-suited to filling this gap given the organization's model of engaging large national law firms in impact litigation, large-scale pro bono projects, and policy advocacy aimed at system-wide change.

The Time is Now

Advocates working in the field of criminal justice agree that we are at a "moment" in criminal justice reform. Some veteran criminal justice experts at the listening sessions expressed exasperation, and sometimes frustration, at the inertia of public and political opinion of criminal justice reform. They were hesitant to predict a permanent shift in public opinion. However, the urgent need for accelerated and increased reform efforts became palpable as the year progressed. State and federal budgets are stretched to a breaking point. After four decades of "tough on crime" policies, public discourse around criminal justice has begun to change to "smart on crime" policies which concentrate resources on the most serious crime, reduce overly harsh prison sentences, especially for drug offenses, and focus on rehabilitation and reducing recidivism rates. Federal reform is supported on both sides of the aisle, the Department of Justice and the White House, liberal and conservative advocacy groups alike. States have led the way, particularly those with very high incarceration rates in the South such as Texas and Georgia, and have made significant reforms. Early indications point to simultaneously increasing public safety measures and falling incarceration rates.

Despite the growing movement, rates of incarceration nationwide remain stubbornly high. As of this writing, the most recent data show that while the number of people in local jails declined slightly in 2013, the number of people in prisons actually grew about .3%.[4] At this rate, it would take 215 years for the incarceration rate to drop to where it was in 1985.[5]

The Lawyers' Committee, inspired by the work of others in this field, has undertaken to harness the resources and leadership of the private bar to contribute to this movement. The private bar can contribute by lending their resources, leadership, credibility, network, and legal skills.

Mission:

The mission of the Lawyers' Committee Criminal Justice Initiative is to combat the mass incarceration of Americans and work to eliminate racial disparities in the criminal justice system through impact litigation, public education, programming, and public policy advocacy. The Criminal Justice Initiative will seek to accomplish this by pursuing matters which address mass incarceration or the impact of interaction with the criminal justice system on an individual's constitutional rights. The Criminal Justice Initiative will target in particular the inequities confronting African Americans and other racial and ethnic minorities in the criminal justice system. As an impact organization, the Lawyers' Committee will undertake matters which have the potential to affect a large number of individuals or to effect systemic change. Priority matters will be designed to effectively and efficiently utilize the leadership, skills, and *pro bono* resources of the private bar, and will have a clear legal role, including in litigating, conducting transactions, mobilizing legal resources, and supporting public policy advocacy and public education campaigns with legal expertise.

The work of the Criminal Justice Initiative will reflect a deep understanding of mass incarceration, not as the inevitable result of historical forces, but as a series of deliberate policy choices, which have cumulatively resulted in the marginalization of communities which are disproportionately minority, poor, and uneducated. The Initiative will pursue legal solutions in both the courts and the public policy sphere which reflect the empirically-proven causes of mass incarceration. By and large, these solutions will aim to: (1) de-criminalize conduct which is better addressed outside the criminal justice system and end disproportionate policing of minority and poor communities, (2) de-carcerate by reducing exorbitantly long sentences, especially for drug offenses, and increasing the use of alternatives to incarceration, and (3) de-collateralize the consequences of a criminal conviction, which create a second class status for those caught in its web.

The Lawyers' Committee has taken an inclusive approach in determining the priorities of the Criminal Justice Initiative. The complicated and technical nature of mass incarceration, as well as its staggering reach into the lives of hundreds of millions of Americans, made consultation with stakeholders at every level a central part of the organization's prioritization process. Going forward, the direction of the Criminal Justice Initiative's work will continue to be informed by the perspectives of formerly incarcerated individuals, their family members and friends, advocates, experts, practitioners, academics, and leaders at private law firms.

The Lawyers' Committee is committed to continuing its history of criminal justice work which has been rooted in years of advocacy and which has expanded significantly over the past year. Clemency Project 2014 will remain a top priority of the Criminal Justice Initiative. The Access Campaign's Best Practice Standards conferences will remain a central activity of the Employment Discrimination Project and the Criminal Justice Initiative, as well as the ongoing class action suit brought against the U.S. Census Bureau and National Collegiate Athletic Association. Public policy work in law enforcement reform, sentencing reform, reentry, and collateral consequences will continue to grow.

Part III of this report describes the priority programs of the Criminal Justice Initiative. These programs will expand on and amplify the work currently being done by the Criminal Justice Initiative's single staff attorney, and staff in other Lawyers' Committee projects. Substantial funding and several additional staff members, however, are required to enable Lawyers' Committee to implement the full initiative.

Role of the Private Bar:

There is substantial untapped potential to engage the private bar in work aimed at combatting mass incarceration and pervasive racial disparities in the criminal justice system. The Lawyers' Committee listening sessions held around the country brought representatives from national law firms into conversation with advocates, experts, practitioners, and academics in the criminal justice field. These law firm representatives universally expressed both concern with the intractable inequalities and injustices that infect our nation's criminal justice system, and keen interest in working with the Lawyers' Committee to increase their *pro bono* work on criminal justice matters. Though most were interested in impact civil litigation concerning criminal justice issues, firms were varied in the type of *pro bono* work that is best suited to their interests and capacities. The Lawyers' Committee Criminal Justice Initiative views this diversity of interests as an opportunity to launch a program that can attack mass incarceration from multiple angles.

Opportunities for Engaging Private Law Firms

A primary focus of the Lawyers' Committee's criminal justice listening sessions was to brainstorm ways in which firms may best be utilized in the fight to end mass incarceration and the systemic violations of civil rights which accompany the crisis. While firms have in the past tended to focus *pro bono* work on death penalty, wrongful convictions, and other appellate-level issues, firms expressed wide-ranging interest in entering other areas of criminal justice, such as racial profiling, indigent defense reform, and modern day debtors prisons. Evidence of this interest can be seen in the enthusiastic response from the private bar to the Lawyers' Committee's recruitment efforts for Clemency Project 2014, the presidential clemency initiative.[6]

Law firms expressed interest in contributing to efforts to end mass incarceration using varied types of legal work. Many firms are attracted to impact litigation aimed at effectuating systemic reform, brought largely under federal civil rights laws. This was particularly true in areas such as indigent defense systems and modern day "debtors' prisons." Firms are well-suited for impact litigation, partly because of the length and complexity of these cases. Firm representatives were also intrigued by hybrid approaches, such as "case aggregation," in which a series of individual cases are brought to ensure enforcement of an existing right. Given the dearth of organizations litigating criminal justice cases, impact litigation and case aggregation are especially promising strategies for national law firms to bring their resources and leadership to bear.

In contrast to civil impact litigation, direct representation of criminal defendants and individuals in other criminal justice-related civil matters (e.g. parole hearings) was an interest of some, but not all, law firms. Some firms, especially those with partners or associates who were previously state- or federal-level prosecutors or defenders, have successfully partnered with public defender services to relieve some of the caseload burden. Other firms, however, hesitated to fulfill a need that arguably should be met by the government. In other areas, however, where there is no indigent right to counsel (e.g. parole hearings), law firms saw a role for the private bar in providing direct representation.

The movement to end mass incarceration suffers from a lack of data. Firms are well-suited and open to the opportunity to help fill the data deficit by funding or conducting research. For example, a firm recently funded a study by the Vera Institute which uncovered severe racial disparities Manhattan District Attorney's charging decisions.

The Lawyers' Committee identified an opportunity to use law firms in criminal justice public policy work. While some firms saw this area as "off limits," others identified in-house policy practice areas that would be interested in taking on a public policy *pro bono* project. Policy work may include writing briefing letters to legislators, testifying at legislative hearings, writing timely and provocative "op eds," and providing the resources to bring those with direct experience, such as formerly incarcerated individuals, to legislators and hearings. A great example of this is Davis and Polk's successful lobbying and advocacy work on caseload caps for public defenders in New York City.

In some cases, law firm partners and associates have the ability to form alliances and earn legitimacy in a way that other groups do not. Law firms' clients come from all business sectors, and firms frequently form long-term relationships with client businesses and leaders. Through these relationships, firms and corporate counsel are better situated than public interest groups to make advantageous alliances in the business community. Similarly, advocates noted that there is an opportunity for firms to serve as "legitimators." Firms are able to use their stature and prestige in the community, their connections, and their financial clout to create a broader recognition of the crisis of mass incarceration. Many listening session participants acknowledged that a phone call to a legislator or policymaker from a partner at a law firm brings import to an issue in a way that nonprofits and public interest organizations cannot.

Law firms also have a superior ability to form politically diverse coalitions. Politically conservative partners and associates at firms are an untapped resource: many want to be involved, but find that the typical *pro bono* project does not speak to their ideological interests. Mass incarceration, however, is uniquely situated to foster support from both major political parties. Conservatives tend to support reform because of the fiscal burden of mass incarceration and the expansion of government activity inherent to over-criminalization and over-incarceration. Firms could provide a neutral forum for brainstorming meetings, incorporating a host of actors sometimes left out of the conversation, such as judges, prosecutors, and conservative groups. On a similar note, firms are also well-positioned to bring together private and public interest attorneys that do not often cooperate.

Firm representatives who participated in the listening sessions urged organizations like the Lawyers' Committee to use firms for not only their material resources, but also their manpower. Partners and associates at firms are often some of the top litigators and legal strategists in the country. Law firms are able to host mock trials and work as partners and "sounding boards" for legal arguments and strategies. Firms would provide fresh eyes and a unique perspective, often one that is overlooked when public interest organizations prepare for impact litigation. Firms were also interested in ways to increase *pro bono* work done by more junior staff including new associates, summer associates, and non-attorney support staff, such as paralegals and legal assistants. Some firms have developed programs that provide funding for a first-year associate to spend a year or two working at a public interest organization.

One idea that many firm representatives at the listening sessions found compelling was the prospect of a firm adopting a single issue and developing a multi-pronged *pro bono* effort around that issue. For instance, with "indigent defense" as a focus of their *pro bono* efforts, a firm could simultaneously develop projects that would gather data, bring litigation, and advocate at the policy level. Most firms now have dedicated *pro bono* counsel that may be especially useful in organizing and directing the firm's *pro bono* efforts toward a unified issue. The Lawyers' Committee Criminal Justice Initiative would lend its subject matter expertise.

Challenges

Harnessing the enthusiasm of the private bar for criminal justice reform work will have its challenges, but these are not insurmountable. Attorneys at large law firms hesitate to engage in criminal justice work for several reasons. One concern is a lack of familiarity with both the substantive and procedural law involved in criminal cases. This perception seems to hold whether or not the case is an actual criminal case (i.e. whether it is direct defense work or a civil case involving criminal issues).

The Lawyers' Committee is in a unique position to address this challenge. The organization has decades of experience partnering with law firms on matters that raise novel issues, and the Lawyers' Committee has the capacity to provide subject matter expertise and mobilization strategies that will assuage law firm hesitance. For instance, the Lawyers' Committee founded the Loan Modification Scam Prevention Network, a new subject matter for the organization, and has partnered with law firms to successfully litigate several cases that sprang from the Network. The Lawyers' Committee has also developed expertise over decades of working with coalition partners and alongside private law firms, of brokering relationships between the two, and bringing the best skills and expertise to bear in these collaborations. The Lawyers' Committee has already begun this process through the listening sessions, and firms and criminal justice advocates alike are eager to work with Lawyers' Committee on these new initiatives.

Past and Present Work:

The fight to restore civil rights for citizens affected by the criminal justice system is woven into the fabric of the Lawyers' Committee's work. At the Lawyers' Committee's inception, the organization represented clients in Mississippi charged with criminal offenses associated with protesting segregation. From then until now, the Lawyers' Committee has remained active in criminal justice reform largely through policy advocacy. The organization has also worked at the intersection of criminal justice and other Lawyers' Committee projects to address the marginalization of individuals and communities of color due to mass incarceration. This includes work on employment and

earnings with the Employment Discrimination Project; school disciplinary practices, the "school-to-prison pipeline," and educational reentry with the Educational Opportunities Project; and the denial of public housing benefits due to criminal records with the Fair Housing and Community Development Project.

Public Policy Project

To the extent that the Lawyers' Committee has engaged in criminal justice work over the past several years, this work was done largely through the Public Policy Project. Over the past year, the Lawyers' Committee has further increased its involvement in criminal justice reform policy work on the federal level and on select state issues. The Public Policy Project has targeted its advocacy resources to issue areas that best suit the Lawyers' Committee's mission, including racial profiling, law enforcement reform, sentencing reform, and issues at the intersection of other Lawyers' Committee project areas, as discussed above.

The Lawyers' Committee actively engages in this area through coalitions of criminal justice and civil rights organizations, targets advocacy efforts at all three branches of government, and has been increasingly active in international human rights work.

Coalition Membership

The Lawyers' Committee is an active member in coalitions of national criminal justice and civil rights organizations. Staff regularly represent the organization at weekly – or oftentimes more frequent – events and working group meetings as part of the Lawyers' Committee's membership in the Justice Roundtable. The Justice Roundtable is a diverse coalition of over 50 national organizations working to reform the U.S. justice system, convened by the Open Society Policy Center. The Lawyers' Committee has also been active in other working groups focusing on law enforcement reform, sentencing reform, pardons and commutations, and reentry. In the aftermath of the shootings of unarmed young African American women and men, the Lawyers' Committee convened a new coalition of civil rights organizations dedicated to police reform. The Lawyers' Committee continues to lead this coalition, which has released a Unified Statement of Action outlining measures necessary to transform policing in America from one of militarized control to one of public service. Finally, the Lawyers' Committee is active in the Criminal Justice Task Force and the Racial Profiling Task Force, organized through the Leadership Conference on Civil and Human Rights.

Legislative Branch Advocacy

The Lawyers' Committee has actively supported several key pieces legislation related to criminal justice issues over the past several years, including the Fair Sentencing Act, which was signed into law in 2010; the Democracy Restoration Act; and the End Racial Profiling Act (S.1038, H.R.2851). Over the past year, the Public Policy Project and the Criminal Justice Initiative wrote and joined support letters for key pieces of federal legislation, including the Smarter Sentencing Act (S.1410/H.R. 3382), the Recidivism Reduction and Public Safety Act (S.1675), the Second Chance Act Reauthorization Act (S.1690/H.R.3465), and the Democracy Restoration Act (S.2235/H.R.4459) – and supported other legislation in other non-formal ways.

The organization actively attended congressional hearings, Hill briefings, and summits. The Lawyers' Committee submitted testimony for Senate Judiciary Committee hearings on "stand your ground" laws and on racial profiling, attended a Senate hearing on solitary confinement, and attended Senate Judiciary Committee Business Meetings held on the Smarter Sentencing Act and the Recidivism Reduction and Public Safety Act. Since fall 2013, the Lawyers' Committee has attended House Over-Criminalization Task Force hearings on criminal code reform, over-federalization, penalties, collateral consequences, executive agency perspectives on criminal justice reform, state perspectives on criminal justice reform, and the crimes in the federal criminal code. The Lawyers' Committee has also attended other congressional hearings and events such as oversight of the Federal Bureau of Prison, oversight of federal funding of equipment for state and local law enforcement, oversight of the Drug Enforcement Administration, and advancements in reentry strategies on addiction and mental health treatment.

Executive Branch Advocacy

Attorney General Eric Holder's "Smart on Crime Initiative" launched in August 2013 and has provided the Lawyers' Committee with several opportunities to participate in high-level meetings with government officials. The Lawyers' Committee met with Department of Justice and White House officials several times in the weeks after the killing of Michael Brown in Ferguson, Missouri, and on separate occasions regarding federal sentencing reform and felony disenfranchisement matters. On June 30, 2014, the Lawyers' Committee was invited to participate in a White House Champions of Change event on Reentry and Employment Opportunities, due to Lawyers' Committee's vocal leadership on the intersecting issues of civil rights, employment discrimination, and criminal justice, as well as the organization's development of the report "Best Practices in the Use of Criminal Background Checks in Hiring," and ongoing work to convene a series of nationwide conferences to promote these practices. The Lawyers' Committee has also collaborated with Department of Justice officials as part of Clemency Project 2014 (details follow).

Judicial Branch Advocacy

In the past six months, the Lawyers' Committee submitted two official public comments to the United States Sentencing Commission supporting the adoption and retroactive application of the "All Drugs Minus Two" amendment. This amendment updates the Drug Quantity Table to address unwarranted racial disparities in federal sentencing practice and decreases the disproportionately negative impact of mandatory minimum sentences on African American and Hispanic defendants. The retroactive application of the amendment applies these changes to those currently held in federal prison under qualifying drug offenses, allowing incarcerated individuals to petition a court for a reduced sentence. The Lawyers' Committee's comments focused on the effect of the proposed amendments on racial disparities in federal sentencing and the federal prison population and situated the amendments within the Commission's authority to rectify unwarranted disparities in federal sentencing practice.

International Advocacy

A growing part of Lawyers' Committee's public policy work has been in the international human rights field. The Lawyers' Committee worked with coalition members to submit a shadow report on the International Convention on the Elimination of All Forms of Racial Discrimination, including sections on criminal justice issues such as police misconduct, "stand your ground" laws, and the impact of prosecutorial discretion on criminal defendants of color. The Lawyers' Committee was represented at the Department of Justice's Civil Society Consultation on the Universal Periodic Review Implementation on criminal justice issues, and presented on the topics of the death penalty, federal sentencing, and presidential clemency. A Lawyers' Committee team worked with the Commissioner and Special Rapporteur on the Inter-American Commission for Human Rights to petition the Commission for a hearing on racial disparities in the U.S. criminal justice system, which took place in October 2014. In addition, Lawyers' Committee staff has met with delegations from Ukraine and Iraq, organized by the State Department's International Visitor Leadership Program. The group discussed the role of legal defense in an adversarial criminal justice system and best practices in promoting minority rights.

Clemency Project 2014

As a member organization of Clemency Project 2014, the Lawyers' Committee leads and coordinates the national law firm *pro bono* efforts in a historical presidential clemency initiative. In addition, the Lawyers' Committee provides infrastructure and mobilization expertise in the design and implementation of the project.

Beginning in January 2014, President Obama and the Department of Justice launched a sweeping clemency initiative aimed at addressing the large number of federal inmates who are serving unjust and disproportionately long sentences. U.S. Deputy Attorney General James Cole solicited the assistance of the nation's bar to help the Justice Department identify nonviolent prisoners who, if sentenced under today's sentencing laws and policies, would likely have received a substantially shorter sentence. To be eligible for a commutation, an inmate must: be a relatively low-level offender; have demonstrated good conduct while in prison; not have significant ties to large-scale criminal organizations, gangs, or cartels; have no "significant criminal history" or history of violence either before prison or while incarcerated; and have served ten years in prison.

Clemency Project 2014 was formed in response to this call and is being led by a coalition of organizations including the Lawyers' Committee for Civil Rights Under Law, the Federal Defenders, the American Civil Liberties Union, Families Against Mandatory Minimums, the American Bar Association, and the National Association of Criminal Defense Lawyers. Clemency Project 2014 will coordinate volunteer attorneys across the country to help identify individuals eligible under the Justice Department's clemency criteria. Clemency Project 2014 will provide training, support, and resources for those lawyers to ensure that the highest quality petitions are prepared and transmitted to the Department of Justice on an expedited basis.

The Lawyers' Committee's role in these efforts has been to lead and coordinate national law firms to provide *pro bono* attorneys for the 26,000 federal prisoners who applied to Clemency Project 2014 seeking consideration for clemency. The Lawyers' Committee has been instrumental in designing an infrastructure to screen the cases, provide oversight and management of volunteer attorneys, facilitate quality assurance, and provide expert resources for volunteers. Drawing on the organization's experience with Election Protection, the Lawyers' Committee has introduced a management structure that utilizes law firms in both the administration and operations of the project. To date, Lawyers' Committee has placed about 1,000 cases with over 50 national law firms.

Other Lawyers' Committee Projects

Employment Discrimination Project

Under the banner of the Employment Discrimination Project, the Lawyers' Committee has fought employment discrimination that results from the improper use of criminal background checks in the hiring process. This has been done through the Access Campaign and through the project's civil impact litigation.

The Access Campaign is designed to examine and dismantle barriers to gainful employment for persons with arrest and conviction records. Increasingly, employers conduct background checks when vetting potential employees. In 2003, 80% of large employers conducted criminal background checks, and this practice is now far more prevalent. Of members of the Society of Human Resource Management polled in January 2010, 92% conducted background checks. Furthermore, the poll revealed that, when deciding whether to extend a job offer, 73% of employers would be influenced by a conviction of a non-violent misdemeanor and 31% would be influenced by an arrest with no conviction. Due to a myriad of reasons, people of color are more likely to have a criminal history. Thus, any employer implementing a blanket policy denying employment to applicants with criminal histories will disproportionately exclude otherwise qualified applicants of color.

As a national leader in combating employment discrimination, the Lawyers' Committee is uniquely equipped to mount a comprehensive challenge to the misuse of background check information, and the Access Campaign is exactly that. The Access Campaign seeks to ensure that employers utilize the information gained from these checks responsibly and in accordance with their legal obligations. To those ends, the Access Campaign has developed "Best Practice Standards: The Proper Use of Criminal Records in Hiring," and other resources for employers and job seekers. Over the next 18 months, the Lawyers' Committee will conduct a national employer education and engagement project to increase the number of employers that adopt best practices for the proper use of criminal records in hiring. Among other things, the Access Campaign will convene regional summits across the country to educate employers, human resource and management companies, commercial reporting

agencies, attorneys, and civil and human rights agencies about the Best Practice Standards.

Additionally and critically, the Access Campaign challenges the misuse of background checks through litigation. The Lawyers' Committee's Employment Discrimination Project is actively involved multiple lawsuits, including one against the U.S. Census Bureau.[7] The plaintiffs, who number in the thousands, allege under Title VII of the Civil Rights Act of 1964 that the procedures and criminal history criteria that the U.S. Census Bureau used to hire workers for the 2010 Census had a disparate impact on African American and Hispanic applicants. The federal court in the Southern District of New York recently certified the class of African American plaintiffs, making it one of the largest Title VII classes in the country.

Educational Opportunities Project

The Lawyers' Committee's Educational Opportunities Project works to combat the so-called "school-to-prison pipeline," the widespread funneling of disproportionately poor and minority students out of school and into to the criminal justice system.

For the past two years, the South Jersey Educational Reentry Program (SJERP) has offered educational advocacy to students involved in the juvenile justice system and experiencing difficulty with school placement. National research suggests that juvenile recidivism rates range from 55 to 75%, and more than two-thirds of youth leaving the juvenile justice system do not return to school. These problems are especially acute in New Jersey, where the State's "educational liaisons" have long been defunded. Helping to fill that void, SJERP assigned private attorneys to assist court-involved youth with school enrollment denials, unwanted school transfers and placements (e.g., alternative school or out-of-district placements), long-term suspensions, expulsions, and other legal obstacles standing in the way of a student's desired school placement. During that time, SJERP achieved successful outcomes for the more than 50 youth referred to our program. More importantly, their circumstances revealed widespread legal violations in a number of school districts.

In response, SJERP filed four complaints with the New Jersey Department of Education Office of Special Education Programs to challenge these systemic violations. For example, youth awaiting adjudication on delinquency charges are sometimes required to wear electronic ankle bracelets as part of a community supervision program. Since 2003, one school district allowed its superintendent to exclude those students from school by unilaterally determining that those students wearing electronic ankle bracelets and awaiting adjudication present a risk to school safety. As a result, many were placed on homebound instruction with limited educational services.

All of the school policies challenged by SJERP exclude special education students from school or deny them due process of law, facilitating the segregation and isolation of students with disabilities – many of whom are students of color. These practices also result in the widespread denial of appropriate educational services and placements.

Over the next few months, SJERP will continue only those activities designed to achieve more long-term impact within targeted communities. SJERP will finalize a white paper outlining specific policy recommendations to promote educational opportunity for court-involved youth. With funding, SJERP will cooperate with local advocates to present those recommendations to state legislators. SJERP is also preparing to file a class action in New Jersey to address racial discrimination in the application of school discipline policies and reliance on alternative schools for

disruptive youth.

Fair Housing and Community Development

The Lawyers' Committee's Fair Housing and Community Development Project has done significant research and strategizing on potential claims of wrongful denial of public housing benefits due to an individual's criminal history record.

Intensive Research

Over the past year, the Lawyers' Committee has conducted extensive research on trends in U.S. corrections, racial disparities, causes and consequences of mass incarceration, underlying causes of criminality, police practices, access to legal representation, indigent defense reform, prosecutorial discretion and charging authority, pretrial incarceration and bail, jury selection and judicial diversity issues, prison conditions, sentencing structures, death penalty, reentry and diversion programs, recidivism, collateral consequences of conviction, juvenile justice, modern-day debtors prisons, drug law reform, private prisons, the intersection of immigration and law enforcement, and related issues. This research encompasses not only the legal framework for each of these issues, but empirical research underpinning criminal laws, policies, and advocacy materials upon which courts and policymakers increasingly rely.

Part II:

DEFINING MASS INCARCERATION

To guide the Lawyers' Committee's strategy as it becomes more involved in efforts to address mass incarceration, and bearing in mind the organization's particular interest in the consequences of mass incarceration for minority communities, this section provides an overview of the issue and its racial dimensions, describing the scale, causes, mechanisms, and consequences of mass incarceration.

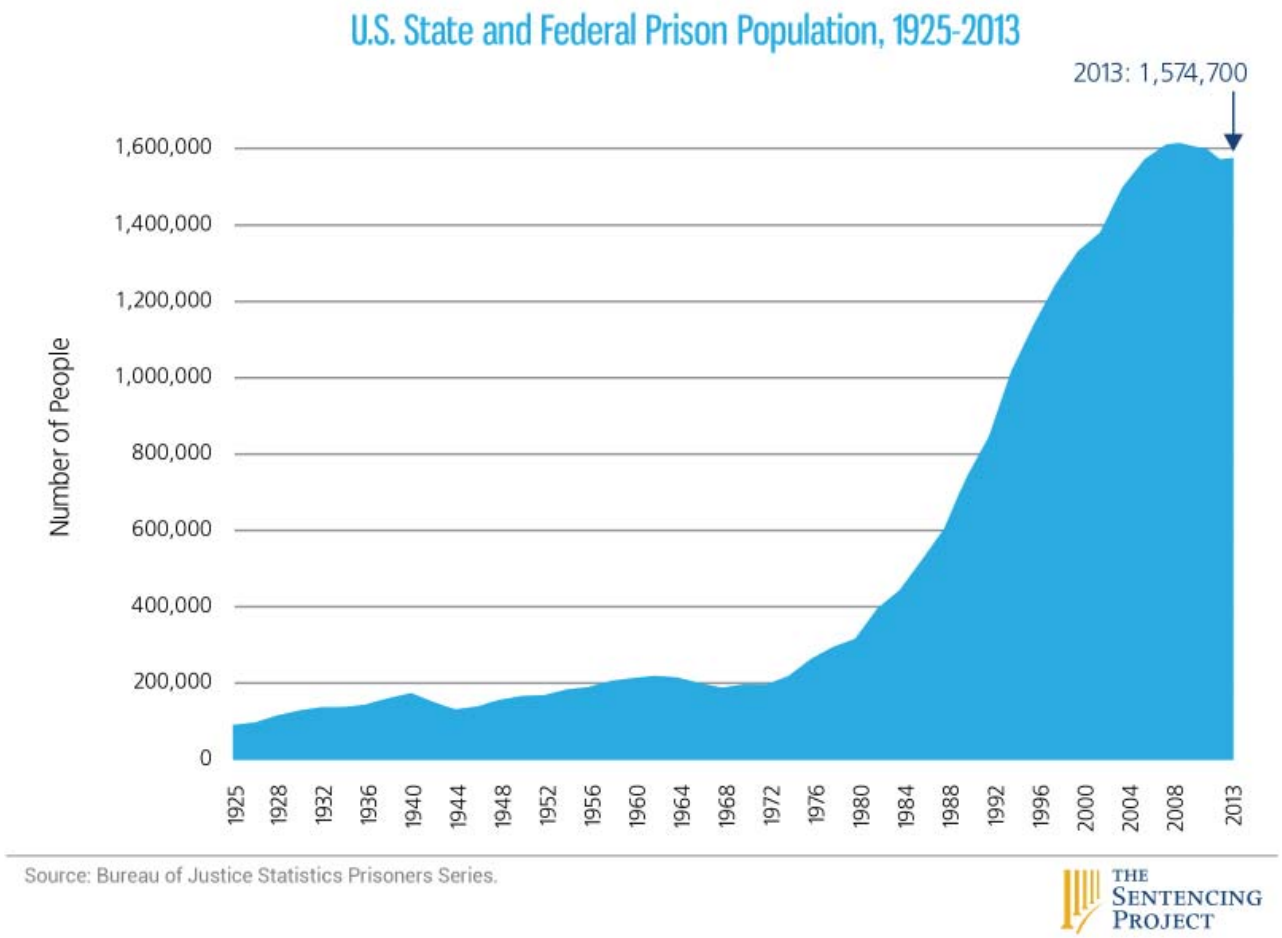
The Rise of Mass Incarceration:

The scale of incarceration in the United States is historically and comparatively unprecedented.[8] According to the International Centre for Prison Studies ("IPS"),[9] the United States has the highest incarceration rate in the world: an estimated 716 per 100,000 of the national population (2,239,751 people in total) are incarcerated in federal and state prisons and local jails.[10] This places the United States well ahead of the next three largest per capita rates of imprisonment, Cuba (510 per 100,000), Rwanda (492 per 100,000) and Russia (475 per 100,000),[11] and is roughly 7 times the average rate among Western European democracies (roughly 100 per 100,000).[12]

Incarceration at this scale is a recent phenomenon in the United States. By 2012, state, federal, and local authorities together had expanded the incarcerated population seven times what it was in 1972, a 1.9 million person increase.[13] According to the Department of Justice's Bureau of Justice Statistics, about 4.7 million people are under community supervision, which includes those on probation or parole, bringing the number of people under the supervision of the adult correctional systems at year end 2012 to 6.9 million, which is 1 in every 35 or 2.9% of all adult residents in the United States.[14] Figure 1 provides a visual representation of the scale and pace of the incarceration boom in federal and state prisons only (excluding local jails):

In further discussing the scale of incarceration, it is important to distinguish between the three levels of government institutions charged with the responsibility to incarcerate: state prisons, federal prisons, and local jails.[15]

State prisons accounted for about 57% of the adult incarcerated population in 2012, incarcerating mainly those serving time for felony convictions and parolees re-incarcerated for violating their parole terms.[16] Felony convictions at the state level fall into three categories: violent offenses (e.g., murder, robbery), property offenses (e.g., larceny, auto vehicle theft), and drug offenses (e.g., manufacturing, possession, sale). Of these, drug offenders have seen the most dramatic expansion in their share of the state prison population – whereas at the beginning of the prison



expansion in the 1970s persons convicted of drug crimes made up only a small percentage of those serving time, by 1996 they made up 23%, and as of 2010, 17.4%.[17] The three states with the largest prison populations (not counting persons incarcerated in local jails) are Texas (157,900 inmates, or 601 per 100,000 residents), California (134,200 inmates, or 351 per 100,000 residents), and Florida (101,900 inmates, or 524 per 100,000 residents).[18]

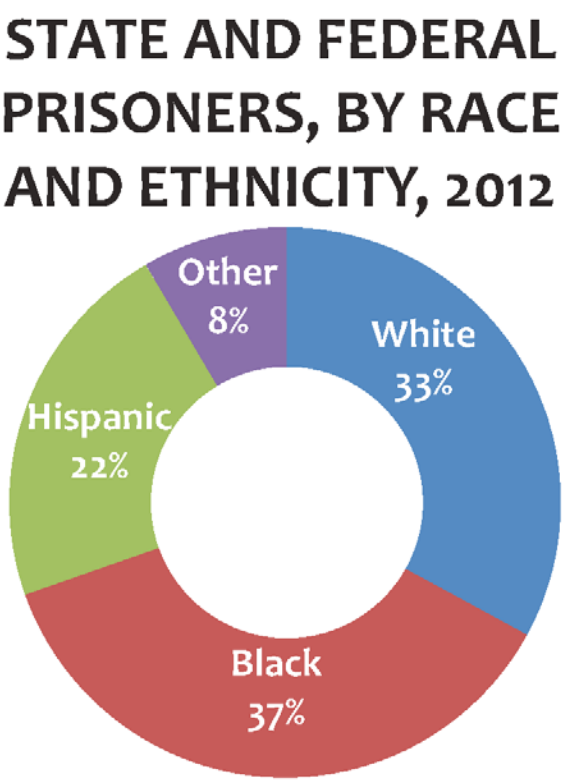
While federal prisons might seem to account for a relatively small amount of the total prison population (as of September 7, 2014, there were 215,103 inmates in the federal system,[19] which accounts for roughly 10% of the total incarcerated population[20]), the federally managed prison population has seen tremendous growth. It became the largest single prison system in the nation when its population surpassed those of California and Texas in 2002, and it still retains that title today.[21] As with state prisons, drug crimes are a significant factor contributing to increased federal incarceration. According to the Bureau of Prisons, about half (100,549, or 49.7%) of all inmates in the federal system were convicted of a drug offense as of 2014,[22] notwithstanding the significant variety of federal crimes punishable by a prison term.

The third group of government institutions tasked with incarceration is local jails. In 2012, 744,524 persons,[23] or one third of the adult incarcerated population,[24] were held in city and county jails. Jails hold those who have been arrested, those who refuse to pay or are incapable of paying bail, those awaiting trial, those accused of misdemeanor offenses (often drug-related or public disorder offenses), and those who are sentenced to less than a year.[25] Because of the short sentences and the nature of pre-trial detention, the jail population is characterized by high turnover and

a huge number of admissions. The jail population is concentrated in a relatively small number of large urban counties,[26] which contributes to the spatial unevenness of mass incarceration.

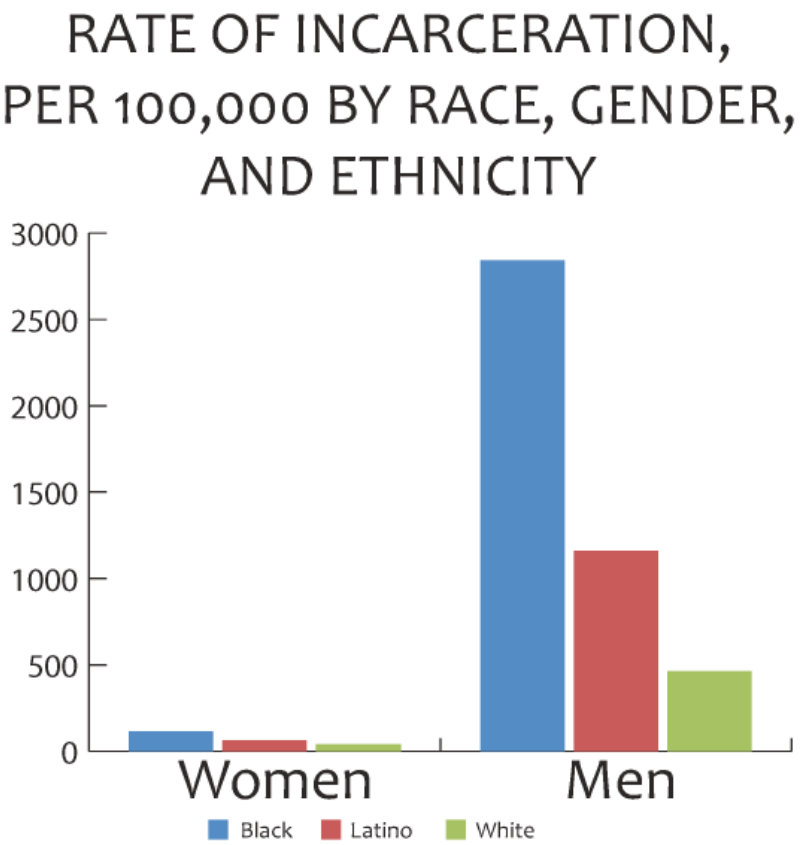
The criminal justice system's penetration into the lives of millions of Americans is also carried out through the expanded scope of correctional supervision – in particular, probation and parole. Probation refers to the practice of placing and overseeing off enders in the community. If an individual's probation is revoked for breach of conditions (e.g., remaining drug-free, maintaining employment), that person can be resentenced to prison or jail.[27] Parole refers to the conditional release of an off ender from prison to serve the remainder of the sentence in the community, subject to re-imprisonment for breach of conditions.[28] In absolute terms, the growth in the probation population has tracked growth in the scale of incarceration. The number of persons on probation went from 923,000 in 1976 to 4.06 million in 2010, and then down slightly to 3.94 million in 2012.[29] Today, probation represents the largest portion (57%) of all adults under correctional supervision.[30] Similarly, the number of persons under parole supervision has grown by a factor of six, from 143,000 to 841,000 between 1975 and 2010.[31]

Racial Disparities in Incarcerated Population:

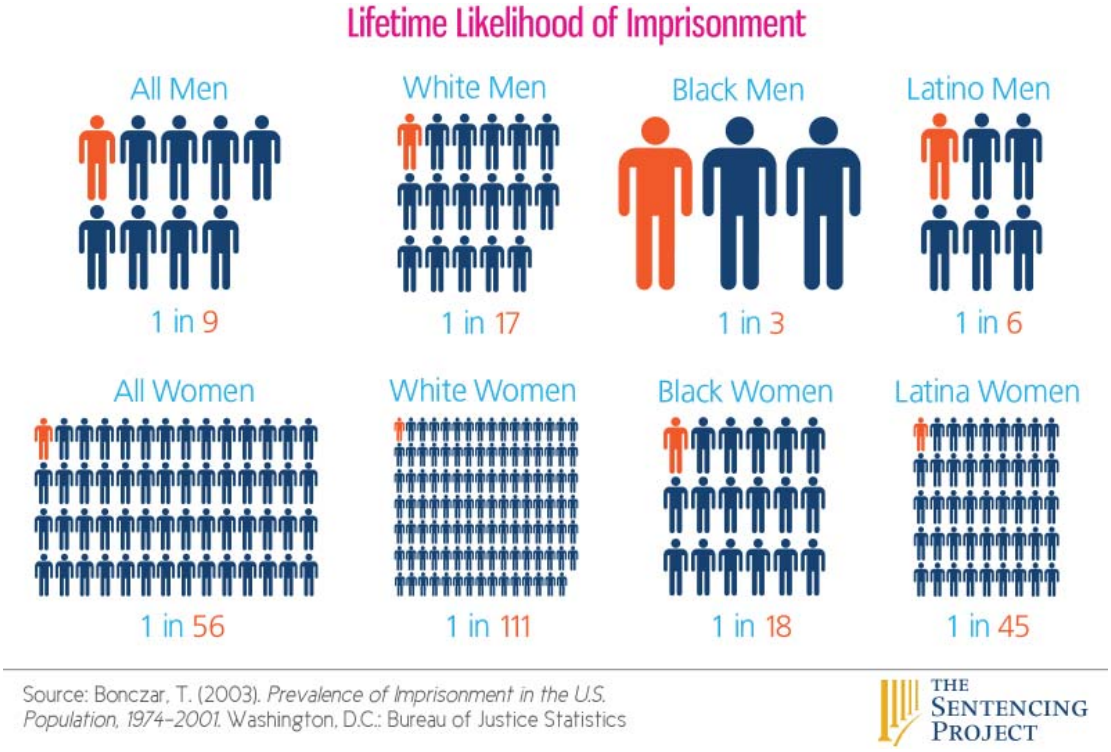


Statistics consistently show that African Americans and Hispanics are imprisoned at a higher rate than whites in the federal and state systems, in all age groups, and for both male and female inmates. Overall, African American men are six times more likely than white men to be incarcerated, and 2.5 times more likely than Hispanic men.[32] African Americans and Hispanics make up only 13.1% and 16.9% of the population respectively,[33] yet they make up 38% and 21% of the total population incarcerated in state prison systems.[34] Meanwhile, whites – who make up 77.9% of the total U.S. population[35] – make up only 37.3% of those imprisoned under state jurisdiction.[36]

African Americans and Hispanics are disproportionately represented in the prison population at all ages. In 2011, between 6.6% and 7.5% of all African American men aged 25 to 39 were imprisoned – the highest imprisonment rates among the measured sex, race, Hispanic origin, and age groups.[37] In 2012, African American men had imprisonment rates at least four times those of white men in all age groups, and the rates for African American men aged 39 or younger were six times greater than those for white men of the same age.[38] In particular, men aged 18 to 19 displayed the largest disparity in imprisonment rates – African American men were almost 9.5 times more likely than white men to be imprisoned.[39] For their part, Hispanic men aged 18 to 19 were three times as likely to be imprisoned as white men of the same age, and at all other age groups were at least twice as likely.[40] In sum, comparing racial and ethnic groups across ages, African American men were six times and Hispanic males 2.5 times more likely to be imprisoned than white men in 2012.[41] Racial disparities are found in imprisonment rates of both



men and women. Although the proportion of men in the incarcerated population dwarfs that of women (in 2012, men accounted for 93% of the prison population sentenced to one year or more),[42] the incarceration rate women females has been growing more rapidly than that for men since the early 1970s.[43] As far as racial disparities, African American women were imprisoned at about three times the rate of white women, while Hispanic women were imprisoned at somewhere between one and two times the rate of white women.[44]



Understanding the Incarceration Boom:

Although one might expect elevated incarceration rates to be strongly correlated with elevated crime rates, the dramatic increase in American incarceration since 1973 bears only a weak relationship to the national incidence of crime (violent and property crimes). From the early 1960s to the 1980s, there was a significant increase in crime rates, but since the 1980s, the relationship between the incarceration rate and crime rates is more complicated.[45] During the 1980s, incarceration rates experienced their greatest period of growth, even though violent crime decreased in the first half of the decade and increased in the second.[46] Even more striking, incarceration rates continued to climb throughout the 1990s, while violent crime was actually *falling* precipitously, and in the 2000s, crime rates remained at low levels while the incarcerated population rose to its peak in 2010.[47] Because crime rates have varied significantly since 1972 (with the most notable trend since the 1990s being one of significant decline) and because incarceration rates sustained a largely consistent increase, high levels of incarceration cannot be explained by high levels of crime.

There is significant debate about the causes of the decline in crime rates since the 1990s.[48] There is now relatively widespread agreement, however, that high levels of incarceration are principally the product of a specific set of policy choices that have increased the use, certainty of imposition, and severity of prison sentences.[49] Prominent among these policy choices are mandatory minimum sentences, three strikes laws, truth-in-sentencing laws, and life without the possibility of parole laws – the major tools adopted by the federal and state governments from the mid-1980s through 1996.[50]

The increase in length of stay contributed to over half of the population increase from 1998 to 2010, and the increase in the time to be served by drug offenders alone accounts for one-third of total growth in the federal prison population.[51] Other big contributors include heightened federal enforcement activity between 1998 and 2010, especially in the areas of immigration and weapon offenses, and higher conviction rates in federal cases, especially in drug cases. There is a loose consensus that the U.S. government's "war on drugs" was the primary driver behind these causes.

Economic Cost:

As the nation's jails and prisons fill to over-capacity with inmates, the associated costs rise as well. The cost of incarceration in the United States was $80 billion in 2010, according to the Justice Department.[52] Corrections has been the fastest growing item in state budgets, outpacing other government services like education, transportation, and public assistance.[53] The National Association of State Budget Officers estimates that states spent a record $51.7 billion on corrections in Fiscal Year 2008, or one in every 15 general fund dollars. At the same time, state spending on health care, mental health services, substance abuse treatment, job training, education, and other forms of public support for the socially slowed or even decreased.[54]

These dollar amounts do not include the longer-term economic impacts arising from the effects of incarceration, such as increased income inequality and more concentrated poverty. The larger prison populations may also skew the distribution of federal funding and voter districts, which are often based on raw U.S. Census data which counts individuals where they reside.[55]

It is only in the last three or four years that the issue of mass incarceration has garnered significant national attention, but the tide of change is moving quickly. In August 2013, Attorney General Eric Holder delivered a speech acknowledging the crisis and laying out new Department of Justice policies meant to reduce prison populations. He said...

> "it's time to ask tough questions about how we can strengthen our communities, support young people, and address the fact that young black and Latino men are disproportionately likely to become involved in our criminal justice system – as victims as well as perpetrators. We also must confront the reality that – once they're in that system – people of color often face harsher punishments than their peers."[56]

Part III:

SUBSTANTIVE AREAS OF FOCUS

The Lawyers' Committee Criminal Justice Initiative is a dynamic and robust project that aims to reform a criminal justice system that has disproportionately incarcerated minority, poor, and uneducated individuals at historically and comparatively unprecedented rates, and become a vehicle for violations of civil rights, repression of communities of color, and discrimination. The Criminal Justice Initiative will be multi-dimensional. First, the Initiative will partner with law firms to bring impact litigation aimed at systemic reform. Given the wide array of potential litigation, the organization will focus its efforts on cases that will decrease prison populations, reduce racial disparities in the system, or guarantee integrity in the legal representation of indigent defendants. Second, it will draw from the organization's expertise designing large-scale pro bono projects to scale successful projects nationwide.

Finally, the Initiative will advance a robust public policy agenda, focusing on laws and policies aimed at racial disparities in federal and state criminal justice systems. Much of the Public Policy Project's work on the Criminal Justice Initiative will be public education around the causes and consequences of mass incarceration, and how the criminal justice system's processes contribute to this crisis. Like in other Lawyers' Committee project areas, public outreach, public appearances, building partnerships and unlikely alliances, designing materials, and providing a critical perspective on racial justice issues will be critical ongoing components of the Criminal Justice Initiative's work. Federal legislative priorities, of course, will shift according to the realities of the congressional session and opportunities for legislative support.

Substantive areas of focus are highlighted in much greater detail below.

Indigent Defense:

Every day in courts across America, criminal defendants are denied their constitutional right to counsel. These violations occur because many defendants – disproportionately individuals of color – cannot afford lawyers and because the court either refuses to appoint one, or the public defender or private attorney appointed to defend them is so overworked, under-funded, and under-staffed, that he or she cannot possibly provide adequate representation. The result is that, in the words of one advocate, "courts become assembly lines to process poor people into jail or prison without adequately sorting the guilty from the innocent."[57]

The Lawyers' Committee for Civil Rights has made securing the right to counsel for every indigent defendant a top priority of the Criminal Justice Initiative for two reasons. First, the unrealized right to counsel is often the source of other injustices. Without an able advocate to argue on a

defendant's behalf, the United States' adversarial system of justice is off balance, and this results in the excessive and discriminatory use of bail, excessively long sentences for relatively minor and nonviolent crimes, wrongful convictions, and the failure of former prisoners to successfully reenter society after release. Reforms in other areas of the criminal justice system will be only sustainable and meaningful if they are invoked and sustained by a system of attorneys working effectively on behalf of their clients.

Recent state-level cases in Washington, Florida, and New York have opened the door to successful impact litigation aimed at indigent defense reform. Policy-driven approaches like caseload caps and settlements have achieved some success in jurisdictions such as New York City – particularly when the policies are propelled by the threat of litigation. Very few national organizations have the capability and resources to bring or threaten these challenges, given the long duration of the litigation. At the same time, however, these factors make this a particularly good opportunity for firms to have an enormous impact. It is the first priority of the Criminal Justice Initiative to partner with firms to research, investigate, and bring strategic litigation modelled after the litigation in Washington, Florida, and New York in jurisdictions plagued by excessive indigent defense caseloads.

Background

Despite the fact that the 50th anniversary of the landmark opinion in *Gideon v. Wainwright*[58] fell in 2013, the Sixth Amendment right to counsel is as illusory as ever. In the famous case, the Supreme Court used sweeping language to describe the importance of the fundamental right to counsel, but later cases have chipped away at this right. Today, a right to counsel exists only for felony defendants and misdemeanor defendants who are subjected to a term of imprisonment.[59] The right to appointed counsel applies only to true criminal prosecutions and does not extend to parole or probation revocation hearings, even if those hearings could result in substantial jail time. The right does not attach in grand jury proceedings that are used to start criminal proceedings or to immigration deportation hearings that may result from criminal proceedings.[60]

In many jurisdictions, it is unclear *when* an attorney will be appointed to a case and whether the attorney will meet with the defendant before trial. The right to counsel "attaches" "when the government has used the judicial machinery to signal a commitment to prosecute."[61] However, indigent defendants are only entitled to have a lawyer present during "critical stages" of a prosecution, which amount to "trial-like confrontations, at which counsel would help the accused in coping with legal problems or . . . meeting his adversary."[62] What constitutes a "critical stage" is not well-settled. For instance, it is unclear whether a bail hearing is considered a critical stage. In practice, a lawyer is often not appointed until after the first formal hearing, and the lawyer may not meet the defendant until the day of trial.

The Supreme Court has held that if the right to counsel is to mean anything, it must mean the right to effective assistance of counsel, and effectiveness is perhaps the biggest failure of indigent defense delivery systems today. "Ineffective" counsel comes in two forms. First, accounts of "personal" ineffectiveness are prolific: attorneys who fall asleep during trial, abuse alcohol or drugs during their tenure as legal representatives of a defendant, and do not investigate their cases or meet with their clients out of laziness or arrogance. However, the second type of ineffectiveness, "structural" ineffectiveness, is the better candidate for reform. In many states, maybe even all, defense attorneys are rendered ineffective by the sheer number of cases they are forced to carry. Overworked and underfunded, defense delivery systems all over the country are buckling under the weight of caseloads that exceed by three- or four times the American Bar Association's Standards for Criminal

Justice. These Standards hold that no defense attorney can effectively handle more than 150 felony cases or 400 misdemeanors in one year. The size of caseloads is unsurprising given the fact that researchers estimate that anywhere from 60 to 90% of criminal defendants need publicly -funded attorneys.

Funding structures in many states exacerbate excessive caseloads. Seven states continue to provide no funding for trial-level indigent defense, leaving the funding of such systems to the counties. This results in wide variations in the quality of legal representation from one county to the next. Many jurisdictions rely on "flat fee" contracts that pay defenders the same amount regardless of how much time or effort they expend during a case, which creates perverse incentives for defense attorneys. In other jurisdictions, the public defender services do not have enough independence from the judiciary. There are accounts of judges who refused to appoint lawyers who tend to request too many trials or request funds to hire experts.

To make matters worse, the pervasive ineffectiveness of defense counsel is paired with inadequate legal remedies. Obtaining post-conviction relief for ineffective legal representation is incredibly difficult under the standard outlined in *Strickland v. Washington,*[63] and the right to counsel only applies to the first direct appeal. After that, the now-prisoner is left alone to appeal his case. There is no federal cause of action allowing individual challenges or challenges by the Department of Justice to systemic violations of the Sixth Amendment right to counsel with regard to adult defendants. However, 42 U.S.C. § 14141 allows the U.S. Attorney General to obtain equitable and declaratory relief in cases of systemic denials of constitutional rights to juveniles in the context of juvenile justice proceedings.

A deficient public defense system disproportionately affects people of color and low-income communities. Because of higher rates of minority poverty and higher rates of arrest, people of color are more likely to rely on public defense systems, and are therefore more vulnerable to its deficiencies. Relatedly, people of color may also be at a greater risk of wrongful conviction.

Best Practices and Strategies for Reform

Development of Professional Standards for Public Defenders

Professional standards for criminal defense representation have been developed over the years. Of particular note are the American Bar Association (ABA)'s "Criminal Justice Standards," the National Legal Aid & Defender Association (NLADA)'s "Performance Guidelines for Criminal Defense Representation," the NLADA's "Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services," and the ABA's Ten Principles, which include: (1) independence of the defense function, (2) a caseload management system, (3) prompt screening for and assignment to indigent defense counsel, (4) adequate time and space for counsel to meet with defendants, (5) workload controls to ensure adequate representation, (6) training and experience requirements for attorneys, (7) continuous representation throughout a defendant's case, (8) resource parity between the defense and prosecution functions, (9) continuing legal education for defense counsel, and (10) supervision and review of defense counsel's performance. Having such standards in place is a best practice, in part because lawsuits and advocacy efforts aimed at indigent defense reform have been able to draw on these professional standards to measure the system's shortcomings against objective indices. The positive impact of these standards is further evidenced by the fact that some of the "worst offender" jurisdictions have no such bar or professional association involvement.

Defender Caseload Caps

In April 2009, New York City became the first city to commit to phasing in caps on public defender caseloads. As recently as four years ago, the indigent defense system suffered from overburdened caseloads and a deficient number of defense attorneys. Compounding this problem was the dearth of data that demonstrated the deficit in indigent defense, partly due to the fact that defense attorneys do not "bill hours" as do attorneys at private law firms.

The Legal Aid Society of New York (LAS) partnered with the firm Davis Polk & Wardwell (Davis Polk) to compile the range of tasks required to meet professional standards at the various stages in a criminal defense and to estimate the number of cases that reach each stage of defense annually and the amount of time each task requires, taking into account the weighting of misdemeanors and felonies to project blended time estimates of each task. A task force comprising the city's defenders, investigators, and social workers met with attorneys from Davis Polk to draw upon their experience about how their practice would change and improve if they had more time and resources to spend on each case.

Meanwhile, LAS and Davis Polk undertook immense lobbying efforts at the New York state legislature. In April 2009, the state legislature passed a law which required the New York State's chief administrative judge to set caps on defender caseloads. A year later, attorneys from LAS and Davis Polk convinced the judge to adopt their analysis of the data gathered from public defenders, called the "Davis Polk Analysis," and set caseloads at their recommended, though conservative, level.

The results have been remarkable. The number of public defenders at LAS has risen from its 600 pre-cap level to more than 880. The city was in compliance with the cap by March 2014. Although complete data has not yet been gathered, anecdotal evidence suggests that public defenders are happier in their work, the "burnout" rate has decreased, and supervisors are seeing more creative tactics used on behalf of clients. Defenders reportedly ask supervisors questions that indicate a higher quality of representation not seen before.

A testament to the impact of the study, further analyses are now being conducted in other states, as well as in New York City. The Uptown People's Law Center in Chicago, for instance, has requested data from Cook County in order to assess public defender caseloads there. Missouri has also followed New York City's lead, although Missouri abandoned its case cap shortly after implementing it. Follow-up analyses in New York City, meanwhile, are aimed at ensuring that the other crucial actors in the indigent defense system – investigators and social workers – are not overburdened. This is particularly critical since more intensive lawyering has led to greater use of investigators and social workers.

Dan Kolb, who led Davis Polk's involvement in the project, reported that the project was one of the most popular and rewarding *pro bono* opportunities in the firm's history. The firm's lawyers were able to put their skills to use in the analysis and legislative efforts, a welcome change for those who normally work solely doing litigation.

Impact Litigation

Despite the widespread and acute indigent defense crisis, very few legal organizations litigate right-to-counsel claims. For years, courts analyzed these claims in terms of ineffective assistance of counsel, under the notoriously stringent *Strickland* standard. Despite the high bar, litigation led

by the American Civil Liberties Union (ACLU) achieved relative success on the state level. In the 1995 case *Rivera v. Rowland*, the ACLU and the Connecticut Civil Liberties Union brought suit in Connecticut alleging that the legislature's failure to adequately fund the state's indigent defense system – specifically, excessive attorney caseloads, substandard rates of compensation for attorneys, and a lack of adequate representation for juvenile defendants – was a violation of its clients' Sixth and Fourteenth Amendment rights.[64] After four and a half years of litigation, the parties reached a settlement that substantially improved the system. Since then, the ACLU has obtained similarly successful results in lawsuits in Pennsylvania, Montana, Massachusetts, and Washington.[65]

Key to the success of these lawsuits was the plaintiffs' ability to prove harm, both anecdotally and empirically. In all of the cases, partnerships with research groups like the National Legal Aid and Defender Association (NLADA) and Spangenberg Group (specializing in improving justice programs) were instrumental in providing empirical evidence of the indigent defense crisis.

A recent case in Washington State, *Wilbur v. City of Mount Vernon*,[66] has opened a new door for legal challenges to overburdened indigent defense systems. In that case, the plaintiffs argued – and the court agreed – that the indigent defense systems in Mount Vernon and Burlington, Washington were so underfunded and overburdened that indigent defendants were constructively denied counsel. They argued that because the attorneys assigned to indigent defendants were unable to spend adequate time or resources preparing a proper defense, no meaningful attorney-client relationship was formed, in violation of the Sixth and Fourteenth Amendment right to counsel. The U.S. Department of Justice Civil Rights Division filed a Statement of Interest in the case, calling for an independent monitor to ensure the cities' compliance with any court orders. The U.S. District Court for the Western District of Washington (Seattle) found the appointment of counsel in Mount Vernon and Burlington to be "little more than a formality".[67] The court further found that the lack of any adversarial testing of the prosecution's case was a "natural, foreseeable, and expected" result of the overburdened indigent defense services.[68]

In a similar case, *Public Defender, Eleventh Judicial Circuit of Florida v. State*,[69] a public defender office challenged its state-assigned caseload

and a Florida statute prohibiting a trial court from granting a motion for withdrawal by a public defender based on conflicts arising from underfunding, excessive caseload or the prospective inability to adequately represent a client. The office's caseload required that each public defender handle between 500 and 600 cases annually, an amount that grossly exceeds recognized professional standards. After a five-year battle, the Florida Supreme Court in May 2013 granted the public defender office the authority to refuse new case assignments when caseloads become unmanageable. Notably, the Florida Supreme Court rejected a Florida appellate court's analysis of the case under the *Strickland* remedial standard for ineffective assistance of counsel, and found that in extreme circumstances where underfunding and excessive caseloads cause indigent defendants system-wide to receive little or no effective assistance of counsel, courts should not address the problem on an individual attorney basis and instead provide system-wide relief.[70]

Public Policy Advocacy

The most recent legislative effort has been around S.B. 597, Gideon's Promise Act of 2013, which was introduced by Senator Patrick Leahy (D-VT) in March 2013. The bill requires each applicant to the Edward Byrne Memorial Justice Assistance Grant Program – the largest federal law enforcement grant program – to include a comprehensive state-wide plan for improving administration of the criminal justice system. Additionally, the bill would prohibit state governments from engaging in a pattern or practice that deprives indigent defendants of their Sixth Amendment right to counsel. It also authorizes the Department of Justice to investigate and prosecute violations of that guarantee.

Police Practices:

The Lawyers' Committee has emerged as a leader in condemning police brutality, excessive use of force, and racial profiling against African American and other communities of color. The recent killings of Michael Brown, Eric Garner, Tamir Rice, and others have brought race to the forefront of the debate over the role of police in society. The Lawyers' Committee spearheaded a large group of civil rights organizations that released a "Unified Statement Of Action To Promote Reform And Stop Police Abuse". The Lawyers' Committee also leads a coalition of civil rights organizations dedicated to over-hauling and restructuring law enforcement in America, especially with regard to law enforcement's treatment of communities of color.

That police across the nation disproportionately target communities of color, and disproportionately use aggressive and abusive tactics in doing so, is ingrained in the everyday experience of man people of color in America. While studies of numerous jurisdiction support racially-targeting policing, nationwide reporting of police arrest and use of force data, however, is nonexistent.[71]

The Lawyers' Committee's Criminal Justice Initiative will address this issue by advocating for updated and enforceable federal guidance on the use of race by law enforcement agencies. This guidance should apply to state and local law enforcement agencies that work in partnership with the federal government or receive federal funding, and it should close loopholes for activities involving the border or national security; cover surveillance activities; and prohibit profiling based on religion, national origin, and sexual orientation. Other objectives of advocacy by the Lawyers' Committee's Criminal Justice Initiative include a nationwide inventory of police arrest and use of force reports, including demographic information, such as the race, ethnicity, and gender of all those subject to police action; the establishment of an independent commission to review police tactics; and the de-militarization of equipment used by local police departments.

In targeted jurisdictions, the Lawyers' Committee will conduct analyses on police data and bring civil rights litigation where police departments have a policy, pattern, or practice of targeting minority communities for disproportionate policing or harsher use of force. The Lawyers' Committee will seek remedies such as required implicit racial bias training, other programs to reduce prejudice, the required use of body-worn cameras or police vehicle dashboard cameras, and independent court monitors.

Background

The criminal justice system as experienced by a defendant begins as an interaction between the civilian individual and law enforcement. The crisis of mass incarceration could not have occurred without a dramatic increase in law enforcement, especially in enforcement of the nation's drug laws, which has been targeted largely at people of color. Civil rights concerns with respect to law enforcement can be divided into categories of racial profiling and police brutality (i.e. excessive use of force and police militarization).

Racial Profiling

The Fourth Amendment protects all individuals against unreasonable searches or seizures. The Fourteenth Amendment's Equal Protection Clause prohibits intentional discrimination based on race, which includes a police policy of racial profiling. In reality, racial profiling evidenced in the disparate arrest rates between whites and blacks, continues unabated. Challenging racial profiling in court, however, is incredibly difficult. In *Whren v. United States*,[72] the Supreme Court held that as long as police have probable cause (an objective determination), the officer's subjective intentions play no role in the Fourth Amendment analysis. With this opinion, the Supreme Court effectively placed racial profiling beyond the reach of the Fourth Amendment. The Court stated that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause."[73] Without a "smoking gun" demonstrating that police intentionally targeted a suspect due to his or her race, however, claims under the Equal Protection Clause usually fail.

In 2012, law enforcement in the Unites States made more than 12 million arrests—of which less than 5% were for violent crimes.[74] The vast majority of arrestees were charged with low-level, non-violent offenses. As measured by the ratio of arrests to crimes, there was no increase in police effectiveness that might explain higher rates of incarceration between 1980 and 2010.[75] During this same time period, however, police arrest rates for drug possession and use offenses increased by 89%.[76]

African Americans have always been arrested for drug crimes at a higher rate than whites.[77] The immense increase in drug arrests through the 1980s had a large and disproportionate effect on African Americans. *USA Today* reports that 91% of individuals arrested in drug sting operations by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in the past decade have been racial minorities – nearly all black or Hispanic.[78] In another recent investigation of the Newark Police Department, the U. S. Department of Justice found that three-quarters of pedestrian stops by Newark police in recent years were unconstitutional.[79] Although African Americans accounted for 54% of the city's population, they made up 81% of pedestrian stops and 79% of arrests.[80] African Americans were also more than three times as likely to be frisked as whites, even though rates of recovering evidence did not differ by race.[81] Based on its investigation, the Department of Justice assigned a federal monitor to the Newark Police Department.

Police Brutality

That America's experience with law enforcement is deeply divided along racial lines was never more apparent than in the aftermath of the August 9, 2014 shooting of Michael Brown, an unarmed 18-year-old, by a Ferguson, Missouri police officer. The shooting itself, and the government's response to the subsequent weeks of protest, showcase the threat that law enforcement practices pose to civil rights.

As a threshold matter, there is a disturbing lack of data collected on police brutality – and on the killing of civilians by the police in particular. There is no national database to which police departments are required to submit a record when they complete an investigation or after a police officer shoots a civilian. The Federal Bureau of Investigation (FBI) does collect some data, but their database has tremendous limitations: jurisdictions are not required to submit the data to the FBI; deaths of unauthorized immigrants, or of those who are injured by police and later die from the injuries, are unlikely to go reported; there are frequent inconsistencies caused by data processing problems; entries are also subject to manipulation by police departments.[82] What this limited dataset does reveal, however, is that 426 police homicides were reported in 2012, and 631 officers were implicated in those killings. These victims were overwhelmingly male, and like most people that interact with the criminal justice system, disproportionately African American.

Police continue to disproportionately use of all levels of force against individuals and communities of color. The National Police Misconduct Statistics and Reporting Project, run by the Cato Institute, reports that there were 4,861 unique reports of police misconduct that involved 6,613 sworn law enforcement officers and 6,826 alleged victims in 2010, the most recent year for which there is data.[83] There were 247 deaths associated with the tracked reports in 2010. States have spent an estimated $346 million on misconduct-related civil judgments and settlements, not including sealed settlements, court costs, and attorney fees.[84]

Additional abuses by the U.S. Customs and Border Protection (USCBP), the largest federal law enforcement workforce, have recently come to light.[85] From 2010 to 2013, at least 22 people have been killed by Border Patrol agents, most along the southwest border, and hundreds have filed formal complaints of official misconduct, including beatings, sexual abuse, and other assaults. Reports indicate that USCBP failed to properly investigate these claims, and refused to tell families of those injured or killed by border agents if the agency had determined that the agent had acted improperly or had been disciplined.[86]

The Department of Justice Special Litigation Section investigates state and local law enforcement agencies for compliance with federal civil rights law, and their purview includes claims of police misconduct.[87] Civil enforcement actions by the Special Litigation Section are small in number: the Section has had only 33 cases and matters since the year 2000, which is striking given the number of reports of police misconduct throughout the country.[88] Furthermore, the Special Litigation Section has not publically opened matters in some of the jurisdictions with the highest rates of reported police misconduct, such as Galveston, Texas; Lee County, Pennsylvania; and Denver, Colorado. Criminal prosecution of police for misconduct is even rarer, and investigation and prosecution are made more difficult by the "code of silence," under which police refuse to testify or cover-up evidence.[89] Prosecution, conviction, and incarceration rates of police are all much lower than for those for ordinary citizens.[90]

Best Practices and Strategies for Reform

Stop-and-Frisk Litigation

Litigation brought challenging specific police practices having discriminatory effects on minority communities, such as a "stop-and-frisk" policy, provides a model for litigation the Lawyers' Committee may pursue. In the 2011 case *Floyd v. City of New York*,[91] federal District Court Judge Shira Scheindlin found the New York Police Department (NYPD) liable for a pattern and practice of racial profiling and unconstitutional stop-and-frisks. The judge found that the NYPD made 4.4 million stops between January 2004 and June 2012 and 84% of those stopped were African American or Latino. More than half the time, police subjected the person to a frisk – a "mini-search" of the outer clothing meant to uncover hidden weapons – and in only 1.5% of these frisks was a weapon found. Judge Scheindlin concluded that the NYPD carried out more stops where there are more African American and Hispanic residents, even when other relevant variables are held constant; African Americans and Hispanics were more likely than whites to be stopped; and African Americans were 30% more likely than whites to be arrested for the same suspected crime. Taken together, Judge Scheindlin concluded that African Americans were likely targeted for stops based on a lesser degree of objectively founded suspicion than whites, resulting in a violation of equal protection rights.

As part of the ruling, Judge Scheindlin ordered a set of legal remedies, including a federal monitor who would oversee reforms to police policies, training, supervision, and disciplinary procedures that would ensure the NYPD stopped violating residents' constitutional rights. The City appealed the ruling, and on October 31, 2013, the Second Circuit stayed Judge Scheindlin's ruling and ordered her removed from the case. Then in January 2014, newly elected Mayor de Blasio dropped the City's appeal and settled the case, agreeing to reform the City's policing policies and to implement the set of reforms originally required by Judge Scheindlin.

Report on Arrest Rates in Washington, D.C.

Analyses and reports exposing racially disparate arrest rates by police are vital given the dearth of national or state data on this issue. They can also sway public opinion, spur policy reform, or form the basis for targeted litigation against these harmful policies. The Washington Lawyers' Committee for Civil Rights and Urban Affairs released a report in July 2013 analyzing arrest data provided by Washington D.C.'s Metropolitan Police Department for the years 2009 through 2011. The report found that 83% of all arrests in Washington D.C. were of African Americans, despite the fact that they comprise only about 48% of the population. Wards with more African American residents had far more arrests. The report found that 96% of all arrests were for nonviolent offenses, and 91% of individuals arrested for drug offenses were African American. Six out of ten drug arrests were for simple possession, and nearly nine out of ten arrests for possession involved African American arrestees, despite the fact that survey data shows almost no difference in rates of drug use among African Americans and whites. Furthermore, nearly seven out of ten traffic arrests were of African Americans, and eight out of ten individuals arrested for disorderly conduct were African American or Hispanic.

Police Torture Commission in Chicago

A key component of fair and effective policing is holding officers departments accountable for illegal conduct and practices. Commissions formed to investigate widespread misconduct commission or condoned by an entire law enforcement agency is oftentimes a better solution

than piecemeal litigation. For instance, Chicago is notorious for its history of police brutality, torture, and widespread corruption. From 1972 until 1991, during the term of now-infamous Police Detective and Commander Jon Burge, an estimated 100 to 200 Chicagoans – a huge proportion of whom were African-American – were systematically tortured in order to elicit false confessions. Several of these individuals have been granted new trials or exonerated. Millions of dollars in reparations have been paid to individual victims, but there has been no official city reparations program to date. Public outcry at police torture cases and other dysfunctions in the system has led to the abolition of the death penalty in Illinois.

In 2008, the U.S. Attorney Office in Illinois brought a federal indictment against Jon Burge for his involvement in police torture; he was convicted in 2010 and sentenced to four and a half years in prison. The Illinois legislature passed a bill which created the Torture Inquiry and Relief Commission to investigate claims related to police torture connected with Jon Burge. The Commission has the authority to investigate claims for credible evidence of torture, issue reports on the investigations, and refer credible claims to Illinois state court for a post-conviction hearing and possible new trial. To date, over 200 claims have filed with the Commission.[92]

Laws and Policies Prohibiting Racial Profiling

Policies prohibiting racial profiling of any kind are necessary to clearly delineate law enforcement practices which do not have a racially-discriminatory effect on minority or poor populations. Each jurisdiction and law enforcement agency have their own policies on racial profiling. At the federal level, the U.S. Department of Justice has promulgated a policy prohibiting federal law enforcement agents from using race or ethnicity in traditional law enforcement activities except when used in a specific suspect description.[93] However, the policy does not cover profiling based on religion or national origin, and it contains loopholes for the use of race in the border and national security contexts. Furthermore, the policy does not apply to law enforcement surveillance activities, or to state and local agencies working with federal agencies or receiving federal funding for law enforcement activities. The guidance also suffers from a lack of enforcement mechanisms. The guidance was last revised under the Bush Administration in 2003, and the advocacy community, including the Lawyers' Committee, have called for long-awaited revisions to the policy.

Senator Benjamin Cardin (D-MD) introduced S.B. 1038, the End Racial Profiling Act of 2013,[94] on May 23, 2013. The bill would prohibit racial profiling by federal, state, and local law enforcement agencies receiving federal grants, and would mandate law enforcement training on racial profiling and data collection. The legislation would also create a private right of action for victims of racial profiling to seek redress. While the bill has collected 16 cosponsors in the Senate and 54 cosponsors in the House of Representatives, the bill has not passed committee in either house.

Debtor's Prisons:

Rising court costs and fees, a product of strained state judiciary budgets, have fuelled a rise in the modern day debtors' prison. The birth of a private probation industry deputized by local and state courts to do the collecting work for them has only compounded the problem. Less than a handful of organizations, most of them in Georgia, Alabama, and Mississippi, have the resources to devote to researching, investigating, and litigating this practice. There have been only a few isolated legal challenges to the systemic practice.

The Criminal Justice Initiative will partner with law firms and organizations such as the Southern Center for Human Rights in Atlanta, Georgia to research and strategize potential legal challenges, with an eye toward impact litigation. Investigation will include reviewing case dockets and pleadings; speaking with public defenders, judges, court administrators, staff, and former prisoners; and conducting court-watching programs.

Background

Debtors' prisons refers to the practice of incarcerating an individual who cannot pay a court fee or legal fine. In *Bearden v. Georgia*, the Supreme Court ruled that "debtors' prisons" are unconstitutional and violate the Equal Protection Clause, holding that an individual's probation cannot be revoked, or jail time imposed, absent evidence and findings that he was somehow responsible for the failure to pay or that alternative forms of punishment were inadequate to meet the State's interest in punishment and deterrence.[95]

Courts' interpretations of this standard have varied widely across the country. Many judges routinely send defendants to jail without making any findings about their ability to pay, sometimes at hearings that last less than two minutes without a lawyer representing the defendant or a court reporter present.[96] Punishment for failing to pay is not limited to incarceration but also prolonged probation (and other community corrections) and suspension of other liberties, such as driver licenses. A report by the Brennan Center for Justice found that 15 states continue this practice: Alabama, Arizona, California, Florida, Georgia, Illinois, Louisiana, Michigan, Missouri, New York, North Carolina, Ohio, Pennsylvania, Texas, and Virginia.[97]

A recent report by the Brennan Center for Justice and National Public Radio (NPR) found that defendants are increasingly charged for the costs of an ever-expanding criminal justice system, including items that were once free and those that are constitutionally required. In at least 43 states and the District of Columbia, defendants can be billed for a public defender; in at least 41 states, inmates can be charged room and board for jail and prison stays; in at least 44 states, offenders can be billed for their own probation and parole supervision; and in the District of Columbia and all states except Hawaii, there is a fee for the electronic monitoring devices defendants and offenders are ordered to wear.[98]

Common Court Fees and Fines

Pre-conviction	Application fee to obtain public defender
	Jail fee for pretrial incarceration
	Jury fees
	Rental fee for electronic monitoring devices
Sentencing	Fines, with accompanying surcharges
	Restitution
	Fees for court administrative costs
	Fees for designated funds (e.g. libraries, prison construction)
	Public defender reimbursement fees
	Prosecution reimbursement fees
Incarceration	Fees for room and board in jail and prison
	Health care and medication fees
Probation, parole, or other supervision	Probation and parole supervision fees
	Drug testing fees
	Vehicle interlock device fees
	Rental fee for electronic monitoring devices
	Mandatory treatment (includes drugs and alcohol), therapy, and class fees
Poverty penalties	Interest
	Late fees
	Payment plan fees
	Collection fees

During all of the Lawyers' Committee's listening sessions with formerly incarcerated individuals, participants recounted their struggles with fees and fines. When an impoverished person fails to keep up with payments, he has violated probation. There may be additional fees and penalties added to the original fine, and people who are unable to pay can lose their driver's licenses or benefits like food stamps. In many states, a felon has to pay before his or her right to vote is restored.[99] Frequently, an individual who lost his or her driver's license because of failure to pay court costs continued driving – to maintain employment or to drive children to school. When apprehended, these individuals were sent to jail and assessed thousands of dollars more in fines and fees. The result is that those unable to pay court and legal fees "go underground" to avoid the police, cutting themselves off from job opportunities, welfare benefits, or other programs meant to help them succeed. In a very real sense, these individuals drop out of real society and are relegated to a life of second class citizenship.[100]

The number of people with unpaid fines and fees is enormous. In a 2004 Department of Justice survey, 66% of prison inmates said they owed court-imposed costs, restitution, fines, and fees – up from 25% percent in 1991.[101] Philadelphia courts sent bills to 320,000 people—one in five Philadelphia residents—for debts dating back to the 1970s; the median debt was over $4,500.[102]

De facto debtors' prisons are often established and expanded by state use of private probationary companies. This industry – led by corporations like Judicial Corrections Services and Sentinel Offender Services – markets their services to local governments by offering free

probation services, shifting the financial burden of probation directly onto probationers. As a recent New Yorker article reported, "probationers aren't just paying a court-ordered fine [often for traffic offenses]; they're typically paying an ever-growing share of the court's administrative expenses, as well as a separate fee to the for-profit company that supervises their probation and enforces a payment schedule."[103] The total amount owed by a single defendant commonly exceeds $500 and often is in the thousands of dollars.[104] To make matters worse, in some states interest on unpaid fees averages 12%.[105] Courts purportedly rely on incarceration of those who owe fees and fines to generate revenue for the county. The irony is that in many cases, the cost of incarcerating the individual for failing to pay is greater than the amount actually owed by the individual.[106]

Best Practices and Strategies for Reform

Litigation

During the Lawyers' Committee listening session in Atlanta, attorneys at the Southern Center for Human Rights (SCHR) summarized the organization's work against debtors' prisons in the Georgia and elsewhere in the South. The organization has sued on behalf of a detainee who was being held in perpetuity because of her inability to pay a fine related to a 15-year-old drug conviction. SCHR has filed a class action lawsuit that seeks to secure lawyers for indigent parents who have been jailed or are in danger of being jailed without counsel for being too poor to fulfill their child support obligations. SCHR has sued to end jail fees for pretrial detainees and to challenge a "debt collection task force" in Gulfport, Mississippi which patrolled African-American neighborhoods, rounded up people who had outstanding court fines, and jailed them without legal representation. Two other organizations, the Southern Poverty Law Center and Equal Justice Under Law, have also brought litigation to end de facto debtors' prisons in Montgomery, Alabama.

SCHR also receives complaints on a daily basis about private probation companies, large and small. Complainants report that the companies use inappropriate tactics, including forcing probationers to clean the private company's bathrooms to fulfill court-ordered "community service," and sending postcards to probationers threatening jail time if the person does not make his or her payments (something the company has no legal authority to do).

"Crimmigration":

Local, state, and federal governments are increasingly using immigration laws to criminalize and marginalize minority communities, in particular Hispanic communities. Individuals arrested and detained for immigration offenses have fewer constitutional protections than defendants in the criminal justice system. Protections for constitutional rights in the immigration context are as under-developed as those in the criminal law enforcement were decades ago; reports of abuses and coercion by police and other law enforcement are also similar. Police increasingly use immigration enforcement to end run procedural rights and protections in the criminal justice system. If these abusive practices are not stopped, any positive reform in the criminal justice context may in fact increase the reliance of law enforcement on immigration laws to police minority communities.

Partly because of the intersectional nature of the problem, very few organizations research, investigate, or litigate these issues. This gap presents an opportunity for law firms to engage in this cutting edge and relatively underdeveloped area of law. The Lawyers' Committee Criminal Justice Initiative has recently begun a partnership with the Los Angeles-based organization Esperanza Immigrant Rights Project to research and investigate U.S. Immigration and Customs Enforcement (ICE) interrogation and detention practices in Southern California.

Background

The growth in incarceration has led to the convergence of two distinct areas of law: criminal and immigration law. Criminal law seeks to prevent and address harm to individuals and society from violence or fraud or evil motive. Immigration law, conducted through civil proceedings, determines who may cross the border and reside in the country. In recent years, these two areas of law have increasingly overlapped, with the result that immigrant populations are criminalized to a much greater extent than in the past with tremendous consequences for these individuals.

Immigration proceedings, while subject to due process, do not have the same procedural constraints as law enforcement, such as the exclusionary rule or the right to counsel for defendants. Because of this, police routinely and consistently use immigration enforcement as a tool of criminal law enforcement, effectively bypassing constitutional protections. For example, participants at a Lawyers' Committee listening session recounted cases in which the police entered a person's home without a warrant in the name of immigration enforcement, and used the fruits of the otherwise-illegal search to criminally prosecute the defendant. The inverse is also true: police often use immigration enforcement as a tool to quickly dispose of those they have arrested on criminal charges. Those arrested on criminal charges, often on traffic or low-level offenses, are routinely over-detained in prison using "immigration retainers," in which local prisons and jails agree to hold individuals accused of immigration offenses on behalf of federal immigration authorities. There are numerous accounts of U.S. citizens wrongfully deported to Mexico and left with nothing but the clothes on their backs. It is extremely difficult to hold government actors responsible for these violations because those whose rights are violated are deported and left without legal recourse. The distinction between law enforcement and immigration enforcement has blurred as greater immigration authority is delegated to states with the Secure Communities program, Immigration and Customs Enforcement (ICE) detainers, and workplace immigration raids. The blurring of these two spheres would not be concerning but for the drastically different legal protections inherent to these regimes.

Racial profiling remains a ubiquitous and intractable problem in immigration enforcement, much as it is in law enforcement. Equally concerning are violations of civil rights during the time immediately following apprehension by immigration authorities. The arrestee is typically held in temporary detention and interrogated by ICE at so-called "processing centers."

ICE has the authority to interrogate anyone believed to be an immigrant regarding his right to be in or remain in the U.S.[107] It also has the power to detain that person briefly while conducting the interrogation, if there is a *reasonable suspicion* that the person does not have lawful immigration status in the U.S.[108] ICE is allowed to arrest an individual without a warrant if there is reason to believe that the immigrant does not have lawful immigration status and that he is likely to escape before a warrant can be obtained.[109]

While immigrants have the right to hire an attorney for their removal proceedings,[110] they do not have a right to an attorney during ICE

interrogations.[111] However, they are not required to answer questions or sign anything during an ICE interview. When interrogating a client following a warrantless arrest, ICE is not required to provide information regarding the immigrant's right to an attorney, and is not required to advise him that information he provides during an interrogation can be used against him.[112]

The result of "crimmigration" is evident in the federal prison population, which has seen an increase in incarceration of undocumented immigrants for immigration and drug offenses. Today, about a quarter of the federal prison population are non-U.S. citizens, and about 10% of inmates are serving time for an immigration offense.[113]

Best Practices and Strategies for Reform

Direct Representation in Complex Immigration Cases

Esperanza Immigrant Rights Project, based in Los Angeles, California, has successfully worked with private law firms in the past to provide individual representation in immigration proceedings which are especially complex or interwoven with criminal law issues. The firms with whom Esperanza works especially appreciate the organization's ability to screen or filter the cases, evaluate the major issues, and make a professional determination as to the case' suitability for *pro bono* representation.

Sentencing Reform:

Sentencing reform presents one of the best opportunities for the Lawyers' Committee to address mass incarceration through public policy advocacy. New laws imposing longer sentences, especially for drug crimes, are one of the primary drivers of mass incarceration. Due to the wide latitude granted to judges in sentencing, challenges to excessively long sentences have been unsuccessful in court. Court challenges to sentencing laws having severely disparate effects on African Americans have failed even when said effects were foreseeable and unjustifiable.[114]

Where court challenges do not inspire optimism, sentencing reform bills have received more promising reception in Congress. Congress passed the Fair Sentencing Act in 2011, which reduced the federal sentencing disparity between crack and powder cocaine.[115] Moreover, the Smarter Sentencing Act garnered significant support during the 113th Congress, won the support of several leading Democrats and Republicans, and remains a high priority for House and Senate Democrats. Throughout 2013 and 2014, the House of Representatives authorized a series of hearings on criminal justice reform conducted by an Over-criminalization Task Force, which included hearings on sentencing reform.

The Lawyers' Committee's Criminal Justice Initiative will continue to work with the Lawyers' Committee's Public Policy Project to advocate for passage of federal sentencing reform, including the elimination of mandatory minimum sentences, parity between crack and powder cocaine sentences, and the elimination of other sentencing regimes which disproportionately impact minority defendants. In addition, the Lawyers' Committee's efforts will extend to state-level reform. For example, over the past year, the Lawyers' Committee supported passage of the California Fair Sentencing Act, which eliminated the sentencing disparity between crack and powder cocaine.[116]

The U.S. Sentencing Commission, which is an independent agency in the judicial branch charged with creating federal sentencing guides, advising Congress and the executive on sentencing policy, and conducting research on the effects of sentencing policy, has done significant work over the past several years to reduce the length of federal sentences. The Lawyers' Committee will continue its active participation in the Commission's rulemaking activity.

Background

The single biggest contributor to mass incarceration in the last 40 years has been federal and state policymakers' decisions to increase the use and severity of prison sentences. For decades, the norm was a system of "indeterminate sentencing," premised on individualized assessment and wide judicial discretion.[117] Waves of sentencing reform, however, started in the 1970s. Initial reforms were primarily aimed at making sentencing procedures fairer and more predictable, in an attempt to reduce racial and other unwarranted disparities. Later phases of reform aimed to make sentences for drug and violent crimes harsher and their imposition more certain; these later reforms included the introduction and proliferation of mandatory minimum sentencing and "three strikes" laws.[118]

Juvenile Life Without Parole

Participants at nearly every listening session with advocates and experts identified the need for *pro bono* attorneys to help identify and represent the thousands of prisoners who were sentenced as juveniles to mandatory life without parole, a sentencing practice recently declared unconstitutional by the Supreme Court in *Miller v. Alabama*.[119] These prisoners, the vast majority of whom are now adults, may not even know they are eligible for resentencing, but all of them need representation in resentencing.

Since the ruling, many state have made lackluster attempts, some even in bad faith, to comply with the Court's ruling in *Miller*. For example, the Michigan state legislature recently passed a "Miller Compliance Bill" which maintains life without parole as an optional sentence and establishes the alternative as 30 to 60 years in prison.[120] Piecemeal litigation is needed to enforce the Court's ruling, both in finding and commuting the sentences of those already sentenced to the unconstitutional sentences, and in reforming states' unconstitutional sentencing laws to ensure they are in good faith compliance.

Three Strikes Laws

California Proposition 36 modified the state's three strikes law, but implementing this successful reform has proved difficult. Over 900 prison inmates are "legally free," meaning they are eligible for release under the modified law. The California Department of Corrections requires them to meet "public safety" requirements prior to their release, such as securing a reentry plan and securing housing, but provides no services or counseling to help inmates meet the requirements. Only about 250 have been released so far, and seven have died in prison waiting for their cases to be addressed. The process is painstakingly slow, in part due to the fact that most of these individuals do not have legal representation. Advocates at the listening sessions suggested modeling a solution after a program that has been successful in securing the resentencing of battered women in California who were convicted of killing their abuser.

Risk Assessments

In the era of "smarter" crime policy, states are increasingly adopting the use of evidence-based and data-driven tools, which in many cases result in significant successes in reducing recidivism and reducing costs. However, states are also adopting these tools for application to the "front end" of the criminal justice system, in which courts use data-driven predictions of a defendant's future crime risk to shape sentences, which gives rise to unintended consequences. At least 20 states use these "risk assessments" not only in sentencing, but often in parole and probation revocation decisions.[121] While the intention is good, the way risk assessments are currently used often is deeply unfair, exacerbates racial disparities, and raises serious questions of constitutionality.

Risk assessments base a defendant's sentence or probation or parole revocation not only the defendant's crime, but at least in part, on prior characteristics: criminal history, employment status, marital status, age, education level, finances, neighborhood, and family background, including family members' criminal history.[122] Arguably, these factors are inappropriate for sentencing because they are based on factors outside of the individual's conduct and may exacerbate current inequities in the justice system, including the disproportionate policing of poor communities and communities of color and the racially-disparate use of prosecutorial discretion.[123] In many cases, measures of socioeconomic disadvantage increase a defendant's risk score, and therefore likely lengthen his sentence too, which raises serious constitutional questions.[124] Attorney General Holder publically criticized their use and urged the U.S. Sentencing Commission to study their effect.[125]

Challenging the improper use of risk assessments in court is a strategy under consideration by advocates in certain jurisdictions. University of Michigan law professor and scholar Sonja Starr has researched and written about the pitfalls of risk assessments. In anticipation of litigation, Starr recently participated in a training for Michigan defense counsel on constitutional objections to the use of risk assessments in sentencing a defendant.[126]

Best Practices and Strategies for Reform

Smarter Sentencing Act

The Smarter Sentencing Act[127] is one of the most promising sentencing reform bills to be introduced in Congress in years. The bill would reduce mandatory minimum sentences for drug trafficking crimes, for which African American are disproportionately prosecuted and convicted; expand the "safety valve" to cover defendants with more criminal history points, which African Americans are more likely to carry; and makes retroactive the Fair Sentencing Act, which reduced

the racially discriminatory crack and powder cocaine sentencing disparity, making as many as 8,800 black federal prisoners eligible to petition for sentencing reductions. The bill passed the Senate Judiciary Committee in the 113th Congress and was reintroduced by a bipartisan group of Senators in the 114th Congress, backed by the Department of Justice and the White House.

Reentry and Collateral Consequences of Conviction:

The burden of imprisonment does not end when an individual is released from prison. The web of collateral consequences of criminal conviction follow that individual for her or his entire life. The Lawyers' Committee is especially concerned by the disproportionate rate at which individuals of color have their civil rights burdened because of a criminal background. The Criminal Justice Initiative will focus on legislative changes to reduce or eliminate these barriers to full enjoyment of civil rights, such as the Democracy Restoration Act, and measures that require the proper use of criminal background checks in the employment context.

Background

The explosion of the nation's criminal justice system over the past 40 years has greatly increased the number of Americans burdened by criminal convictions. One in four Americans now has some sort of criminal record, and the consequences of conviction do not end when an individual completes his sentence or period on probation or parole. Some collateral consequences serve legitimate public safety or regulatory purposes, such as keeping firearms out of the hands of violent offenders and protecting children or the elderly from persons with a history of abuse. But many others apply to all those convicted of crimes, without having any connection to the crime committed or any limit on the duration of the penalty.

Formerly incarcerated participants at the Lawyers' Committee listening sessions told evocative stories of the collateral consequences they continue to suffer on account of their criminal convictions. One participant at the Atlanta session illustrated how the barriers faced by reentering women are at times more limiting than those faced by their male counterparts. She told of being released from prison only to find that her criminal conviction barred her from many of society's safety nets and was made even more vulnerable due to her gender. She was homeless, penniless, barred from public housing, and unemployable due to her criminal history. She slept at shelters and then in her broken van when that became too dangerous due to the threat of sexual assault. She stayed at hospitals and in a friend's closet, just to have a space where she could be alone. Eventually she was forced into prostitution to make ends meet.

Collateral consequences of convictions place physical, mental, emotional, and symbolic burdens on the individual. They affect nearly every aspect of life, and often never go away. A recent decision by the Supreme Court, *Padilla v. Kentucky*, found that a defense attorney had the duty to inform his client of the adverse immigration consequences of his guilty plea.[128] Some argue the principles laid out in *Padilla* should extend beyond immigration consequences to require that a defendant be informed about some or all collateral consequences of conviction, including in employment, housing, and public contracts. The *Strickland* standard for ineffective assistance of counsel looks to contemporary professional standards in deciding whether or not the representation was deficient, and the ABA Standards require defense lawyers to

consider the collateral consequences of conviction. Currently, however, no court has required judges or defense attorneys to warn defendants who plead guilty of collateral consequences.

Felony Disenfranchisement

While felony disenfranchisement laws have been on the books throughout the nation's history, these laws have gained new significance with the dramatic ballooning of the criminal justice system in America. Today, an estimated 5.85 million Americans are denied the fundamental right to vote because of felony convictions.[129] Up to 4 million of these are no longer incarcerated but are still unable to vote because of prior felony convictions. Because of stark disparities in arrest and conviction rates, 2.2 million black citizens – or about 7.7% of voting age African Americans – are unable to vote, compared with 2.5% of the general U.S. population.[130] Disenfranchisement is especially severe for African American males, who are disproportionately arrested, charged, and convicted of felonies: 13% of African American men cannot exercise their fundamental right to vote.[131] If these trends continue, three in ten black men can expect to be disenfranchised at some point in their lifetimes.[132]

Because each state has established its own felony disenfranchisement laws, these laws vary widely across the country. Two states – Maine and Vermont – do not deny the right to vote to anyone, even prisoners. Two states – Kentucky and Virginia – permanently disenfranchise convicted felons. The other 46 states fall somewhere in-between, some restoring the right to vote upon release from prison, others at the completion of parole or probation, still others after a specified waiting period.

Compounding the difference among these laws is the confusion they engender. Election officials are untrained in the details of these laws, and the rules and procedures for restoring one's right to vote are complicated. Because of this, untold hundreds of thousands are wrongfully denied the right to vote on Election Day. A survey of election officials conducted by the ACLU and the Brennan Center found that on the whole, election officials did not understand the basic rules regarding criminal convictions and the right to vote.[133] For instance, large percentages of officials did not understand the difference between a felony and a misdemeanor, or the difference between parole and probation, in states where these differences distinguished eligible from ineligible voters.

The Lawyers' Committee has been engaged on this issue for several years through the Voting Rights Project. Recently, the Lawyers' Committee submitted a shadow report to the United Nations Human Rights Committee, as part of a coalition of several organizations, called "Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States."

Economic Impact of Criminal Conviction

Incarceration has severe economic impacts on the individual. A report by Pew Charitable Trusts found that before being incarcerated, over two-thirds of male inmates were employed and more than half were the primary source of financial support for their children.[134] The report also found that incarceration reduces hourly wages for men by about 11%, annual employment by 9 weeks, and annual earnings by 40%.[135] Moreover, former inmates experience less upward economic mobility than those who have never been incarcerated. The effects are not only felt by the individual who was incarcerated: a child's prospect of upward economic mobility is negatively affected by the incarceration of a parent. One in 9 African American children have an incarcerated parent, compared to one in 57 white children.[136]

It has become increasingly difficult for individuals with criminal convictions to gain employment. A vast majority of large employers in the U.S. conduct criminal background checks as part of their hiring processes. Polling shows that 92% of Society of Human Resource Management members conduct criminal background checks, 73% reported being influenced by a conviction of a non-violent misdemeanor, and 31% reported being influenced by an arrest with no conviction.[137] These findings are particularly striking giving the true predictive value of past involvement with the criminal justice system. While studies show that individuals who have committed crimes in the past are more likely to commit a crime in the future, this risk of recidivism declines as the time since the last criminal act increases. The differences lessen dramatically over time so that a person who offended six or seven years ago has a very similar chance of committing a crime today as someone who has never committed a crime at all.

In April 2012, the Equal Employment Opportunity Commission released "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964," which updated its 25-year-old enforcement guidance on the use of criminal background checks in hiring.[138]

The Lawyers' Committee is engaged in this issue through the Access Campaign, and has published a series of public education materials on the proper use of criminal background checks in hiring, including "Job Seeker's Guide to Employers' Use of Criminal History Checks," "Criminal Background Checks: Know Your Rights!" "A Guide for Employers on the use of Background Checks," and "What You Need to Know About EEOC's New Guidance on Criminal Background Checks."

Consequences for Housing, Public Benefits, Licensing, Educational Financial Aid

The consequences of a conviction for an individuals' access to public benefits and other governmental aid vary by state. A person with a conviction may suffer consequences in the following areas: occupational and professional license and certification, business license and other property rights, government contracting and program participation, government loans and grants, judicial rights, government benefits, education, political and civil participation, housing, family/domestic rights, recreational licenses including firearms, and motor vehicle licensure. For example, a person convicted of a federal felony offense is no longer eligible for Pell Grants, which would enable the individual to receive federal student aid for college. At the behest of Congress and the National Institute of Justice, the ABA Criminal Justice Section has developed a national inventory of the collateral consequences of conviction, available in an interactive online tool.[139] A search of all collateral consequences of a controlled substance offense, for instance, shows 403 collateral consequences nationwide.

In his August 12, 2013 speech to the ABA, Attorney General Eric Holder highlighted the unfair burdens placed on convicted felons through collateral consequences. He highlighted the efforts of the ABA to catalogue thousands of statutes and regulations that impose collateral consequences. He announced the designation of Prevention and Reentry Coordinators in every federal district, and directed all Department of Justice components to consider in the future whether unnecessary collateral consequences are imposed by proposed rules or regulations.

Best Practices and Strategies for Reform

Best Practice: Ban the Box

Jurisdictions around the country have begun to pass what is known as "ban the box" legislation aimed at reducing the impact of criminal arrests and convictions on employment opportunities. "Ban the box" laws prohibit public and/or private employers from inquiring into criminal background information on initial job applications, which tends to increase the rate at which individuals with criminal histories are hired. Despite the success in initially passing this legislation, enforcement of "ban the box" laws is spotty in certain jurisdictions. For instance, advocates at the Lawyers' Committee's listening session impressed a need for attorneys to enforce the newly minted "ban the box" law in California.

Successful Strategy: Legislation

A slew of federal legislation has been introduced to reduce the impact of collateral consequences of criminal convictions. If enacted, the Democracy Restoration Act would restore the right to vote in federal elections after a convicted individual has completed his sentence, and the Act would incentivize states to have clear notice provisions related to a formerly incarcerated person's right to vote.[140] The REDEEM Act of 2014, introduced by Senators Cory Booker and Rand Paul, would provide for limited expungement and the sealing of federal criminal records for nonviolent offenders. The Act would also restore a right to food stamps and public benefits under certain conditions for those with drug convictions.[141]

A listening session attendee also mentioned a movement gaining traction in some states to raise the age of criminal responsibility to age 22. With this change, many individuals who are convicted of crimes early in their lives would have the ability to have those convictions erased from their criminal records. This would enable them to avoid the debilitating collateral consequences of a criminal record on employment prospects and their ability to receive public benefits.

Pretrial Detention and Bail:

The period immediately following an arrest is an essential time in the course of a criminal case. The defendant and the government each have an interest in prompt investigation. Substantive due process requires that an arrestee be aware of his or her rights – including the right to remain silent and the right to an attorney – which serve as vital protections against self-incrimination and against police coercion.

In reality, however, defendants routinely waive their right to remain silent and their right to counsel. Part of the reason for this is that in most state and local jurisdictions, public defenders are not accessible to defendants at the police station. Police frequently take advantage of the misinformation and misunderstandings of rights held by those in their custody. Defendants almost always waive their right to counsel while under arrest because there seems to be no possibility of retaining an attorney.

The time immediately after arrest also represents a time when an individual is the most vulnerable. The arrestee has often suffered some level of trauma from the arrest and deprivation of liberty, especially if the person is a juvenile, and may even be in shock. The person may require medical attention or may have personal circumstances that require immediate attention, such as unattended children or an employer waiting for the individual to report to work. At this point, the arrestee likely knows very little about the criminal justice system, his or her rights, the capabilities of the police, and what lies ahead. At the Lawyers' Committee listening sessions, dozens of individuals who personally experienced this stated that they wanted to do whatever it would take to go home. For many, going home means involuntarily waiving one's rights, making false confessions,[142] and making coerced guilty pleas later on.

Intervention by an attorney at this point in the criminal justice system presents an unparalleled opportunity to preserve the arrestee's constitutional rights, to educate the arrestee about the opaque and complicated process ahead, to prevent collateral damage that may be caused by the arrest, and to initiate the process of building an individual's defense. The Lawyers' Committee's Criminal Justice Initiative will work to bring litigation and programming aimed at reforming this critically important time in a criminal case.

Background

Pretrial Detention

Roughly half a million people in the United States are innocent in the eyes of the law and behind bars awaiting trial.[143] They occupy about 60% of the nation's jail beds, often losing their jobs and even homes, destabilizing their families, and costing taxpayers billions of dollars per year as they wait for trial. In 2011, detaining people in jails before trial cost U.S. counties alone about $9 billion.[144]

Within 48 hours of a lawful arrest, a defendant must be taken before a neutral magistrate for an initial hearing, which typically coincides with a bail determination. The magistrate determines whether pretrial detention is appropriate, considering whether or not the person's appearance

at trial can be reasonably assured if he is released and whether or not his release will endanger the safety of any other person or the community. If bail is set, it must not be excessive.[145] Jurisdictions are divided as to whether an individual has a right to appointed counsel at the bail determination.

Research shows that one of the greatest determinants of outcomes in misdemeanor and felony cases is whether or not the defendant was detained pretrial. Those who are detained pretrial serve on average two weeks in jail, and often plead quickly out of a desire to go home. Being detained pretrial also affects the ability of an individual to prepare a defense and cooperate with counsel to investigate his or her case.[146]

There are extreme racial disparities in those who are detained pretrial, which is unsurprising given the correlation between race and socio-economic status. In New York City, African Americans and Latinos make up 90% of those detained in the city's central jail on Riker's Island. On the other side of the country, a study conducted by a task force in Washington State found that pretrial detention significantly impacted the outcome of a criminal case; that extra-legal factors including race and ethnicity significantly impacted pretrial release decisions; and that African Americans and Latinos were more likely to be detained pretrial.[147]

Bail

Whether a defendant is detained pretrial often depends on the judge's bail determination and the defendant's ability to pay bail. The Bail Reform Act of 1984 allows states to deny bail for capital offenses, and about 28 states have provisions allowing for the denial of bail for offenses other than capital offenses.[148]

A defendant's ability to pay bail determines pretrial release for seven out of ten felony defendants. In New York City, nearly one third of the more than 370,000 defendants arraigned annually are detained pretrial, even though 80% of their cases involve low-level misdemeanors or violations like turnstile jumping, marijuana possession, or fighting in public. Ability to pay money bail is neither correlated with guilt nor is it an indicator of flight risk. Research conducted by the Bronx Defenders and the Criminal Justice Agency shows that most defendants do not pose a flight risk, even without posting bail. The failure to appear rate for those released without bail or bond was only 16% in New York City in 2009, and another 10% of the total number voluntarily appeared within 30 days of their court date. The difference in return rate for those released on their own recognizance and those with cash bail was only 3%.

Defendants are routinely held in jail and denied their liberty only because they were unable to post bail. According to the New York Criminal Justice Agency, nearly half of the detained non-felony defendants served time in jail only because they were unable to post bail; in these cases, the defendant was later acquitted, the case was dismissed, or the defendant was convicted but the sentence did not include any jail (not even time served).[149]

Pretrial detention and bail are significant factors fueling mass incarceration, not only because of the large number of individuals being held at one time, but also because being held pretrial increases the likelihood that a defendant will plead guilty. Bail is often used to the advantage of prosecutors as a bargaining chip to negotiate pleas. Defendants at arraignments who face the prospect of pretrial detention because they cannot post bail are likely to agree to plea bargains. If a defendant does not accept the plea, she can spend weeks or months in jail before the

case ends. She can go home immediately, however, if she pleads guilty and receives the typical sentences of conditional discharge, a fine, or time served.[150]

Access to Legal Representation

While the right to counsel is triggered the moment a person is under arrest, defendants usually do not actually gain legal representation until a bond hearing, which is often 48 to 72 hours after arrest. This is due to the fact that public defenders do not work in police stations and are only available at the courthouse. The arrestee lacks representation by an attorney and is held, sometimes for days, without contact with anyone but police and prosecutors. Consequently, arrestees almost always waive their right to counsel because there seems to be no possibility of retaining an attorney without access to a telephone. Statements made to police are then used to charge, find probably cause, and convict.

When a defendant is brought to court for an initial appearance, which often includes a bond hearing, the "assembly line" of justice does not slow down. For instance, according to participants at a Lawyers' Committee listening session, defendants at bond hearing in Cook County, Illinois have access to a public defender during these hearings, but given that the average bond hearing is 37 seconds long, access to effective legal representation is farcical. Equally prolific are reports from listening session participants that nearly all defendants of color are denied bail or are given a bail amount so high that they are not able to pay, regardless of the risk they pose or the crime with which they are charged. Not only do judges at Cook County bail hearings not utilize the well-developed risk assessment tools that are available and in use in jurisdictions across the country; these judges are also given no training on how or why to set bail. Perverse results stem from these dysfunctions. For example, there are accounts of judges refusing to appoint an attorney to an indigent defendant when the individual has managed to collect enough money to pay their bail. Bail rehearings are scheduled weeks or months out, defeating the very purpose of the hearing.

Best Practices and Strategies for Reform

Access to Counsel at the Police Station

One of the groups represented at the Chicago listening session, First Defense Legal Aid, runs a 24/7 hotline that provides police station attorneys for Chicagoans recently arrested. Friends or family members may call the hotline and reach a volunteer attorney who will then find and represent the arrested individual at the jail or police station. At the police station, the attorney establishes an attorney-client relationship with the arrestee, for the limited purpose of representing them while being held in police custody. The volunteer attorney performs an intake assessment, ensuring the arrestee does not have immediate medical or other needs, and provides basic legal advice, which usually amounts to an invocation of *Miranda* rights. First Defense Legal Aid's biggest challenge is resource constraints and lack of public awareness of this service.

Prison Conditions:

Much of the human cost of mass incarceration comes from the harsh conditions in America's prisons. Prisoners are subject to degrading treatment on a daily basis, and suffer physical, mental, and emotional trauma without any practical recourse. Challenging prison conditions was made even more difficult after the passage of the Prison Litigation Reform Act, which severely limited the ability of prisoners

to bring suit. Simply put, conditions in prisons today make rehabilitation impossible, generate criminality and constitute a public safety threat.

An organization called Just Detention International works to end sexual assault in prisons, and has programs in California jails and prisons. The organization has collected a significant amount of data from inmates who report being sexually abused but does not have the resources to analyze the data or bring litigation to address systemic dysfunction. Firms could have huge impact if paired with organizations like Just Detention International to translate the substantial advocacy work they are doing into legal issues, reports, and litigation.

As a national organization with access to enormous *pro bono* resources, the Lawyers' Committee is perfectly situated to connect organizations like Just Detention International with the resources of the private bar to challenge systemic and egregious violations of civil rights, such as sexual assault in prison. The Criminal Justice Initiative could enlist *pro bono* attorneys to analyze the database maintained by Just Detention International and conduct research on legal strategies to challenge the failure of federal, state, and local governments to protect prisoners from sexual assault, with an eye toward future litigation. Prisoners and detainees in local, state, and federal facilities – including those operated by private companies – are often subject to harsh, abusive, degrading, and dangerous conditions and treatment. Overcrowding in corrections facilities makes securing the safety of both prisoners and corrections staff increasingly challenging.

Over the last two decades, corrections systems have increasingly relied on solitary confinement as a prison management tool. Solitary confinement includes the practice of confining a prisoner alone in a small cell for 22 to 24 hours per day with little human contact or interaction; reduced or no light; restriction or denial of reading material, television, radios, and other property; severe limits on visitation; and the inability to participate in group activities.[151] Solitary confinement has been shown to cause a multitude of negative psychological effects, including exacerbation of existing mental illness, severe and chronic depression, self-mutilation, decreased brain function, hallucinations, and revenge fantasies.[152] At least 80,000 people are held in solitary confinement every day, the majority of them mentally ill or intellectually disabled.[153]

Prisons are especially dangerous for vulnerable populations such as pregnant women, juveniles, lesbian, gay, bisexual and transgender individuals, and disabled prisoners. At the Lawyers' Committee listening session in Oakland, one participant recalled her traumatic three-and-a-half-year experience as a transgender person in federal prison. She suffered sexual harassment and physical and sexual abuse constantly, but reporting abuse to corrections officers was useless since their reaction to these reports was to put her in the special housing unit ("SHU," also known as solitary confinement).

Background

Sexual Abuse in Detention

Cases of sexual abuse in detention are not rare, isolated incidents, but a prevalent and persistent occurrence in many of America's jails, prisons, and detention facilities. The Bureau of Justice Statistics (BJS) estimates that roughly 200,000 people were sexually abused behind bars in a single year.[154] Almost 10% of former state inmates reported being sexually abused during their most recent period of detention, according to a 2012 BJS study.[155] The disproportionate rate at which men and women of color are imprisoned particularly increases their risk of being sexually assaulted while incarcerated.

For victims, prisoner rape is a cycle of violence: most survivors are sexually abused repeatedly. Prisoner rape often goes unreported – and therefore untreated – because inmates fear humiliation, mockery, and retaliation from correctional staff and other inmates. Survivors suffer serious emotional and physical consequences. They are at risk of developing post-traumatic stress disorder, depression, and drug addictions, as well as contracting HIV and other sexually transmitted diseases.[156]

In 2003, Congress passed the Prison Rape Elimination Act (PREA).[157] After years of studying the incidence of prison rape, the U.S. Department of Justice promulgated national standards for the prevention of sexual assault in prisons, jails, juvenile facilities, police lockups, and halfway houses, which are binding on all federal, state, and private facilities.[158] Noncompliant jurisdictions have 5% of federal prison funding withheld unless they demonstrate an intention to comply with the law. In May 2014, state governors were required to report to the U.S. Attorney General on their progress complying with the national standards. Of the 56 jurisdictions that are subject to PREA – the 50 states, the 5 territories and the District of Columbia – 48 are in compliance or have submitted assurances committing to come into compliance. Eight jurisdictions – Arizona, Florida, Idaho, Indiana, Northern Marianas Islands, Texas, and Utah – either declined to comply or did not provide sufficient information for the governor to indicate whether or not they will affirm or certify compliance.

Prison Litigation Reform Act

The Prison Litigation Reform Act (PLRA), enacted in 1996,[159] has severely limited the ability of inmates to seek redress in court. The central requirement of the PLRA is that federal courts may enter an enforceable consent decree in prison or jail conditions cases only if "the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."[160] A prisoner wishing to make a claim regarding prison conditions must exhaust all administrative remedies through the prison's grievance procedure, which usually requires a written complaint to a prison official.[161] In addition, prisoners cannot file lawsuits for mental or emotional injuries unless they can also show evidence of physical injury or sexual abuse.[162]

Access to Counsel for Prisoners

Compounding civil rights violations due to deplorable prison conditions are the many barriers erected by prisons to an inmate's finding legal counsel. For example, programming staff in the prisons are prohibited from providing any type of legal advice, no matter how basic, to prisoners because it is characterized as "favoritism" by prison policy. Inmates report being disciplined or expelled from programs because they asked for an attorney referral. When inmates do find their way to an attorney, existing legal services, headed by Prison Law Office, simply do not have the capacity to meet the demand.

Best Practices and Strategies for Reform

Successful Strategy: Prison Overcrowding Litigation

In 2011, the U.S. Supreme Court held in the case *Brown v. Plata*[163] that the California state prison system failed to deliver minimal care to prisoners with serious medical and mental health problems, in violation of prisoners' Eighth Amendment rights to be free from cruel and

unusual punishment. The ruling upheld a lower court's three-judge panel's order to decrease the population of California's state prisons from approximately 156,000 inmates to 110,000 inmates.

Major problems have arisen in the implementation of the court's ruling, however. As a result of the ruling, the California legislature passed a bill which implemented what is known as "prison realignment" to reduce California's prison population. Strategies such as "split sentencing," which allows prisoners to serve a portion of their time outside of prison in a halfway house or on home confinement, and greater pretrial release have been summarily rejected as strategies to reduce overcrowding. Instead, according to advocates, the strategy has been to reduce overcrowding by building new prisons and prison beds, and to systematically shuffle state prisoners to county prisons, immigration detention centers, and private prisons. The law is essentially a "blank check" written to counties and contains no benchmarks or measuring criteria for its expenditures.

Advocates at a Lawyers' Committee listening session testified that the situation is now worse than before the ruling because county jails are ill-equipped to handle the influx of prisoners and do not have the services and programming available in state prisons. Detainees, especially immigration detainees, are transported to jails long distances from their families and attorneys. It has also led to an increased use of private prisons, which escape much government and public oversight. The population of California prisons has tracked the advocates' concerns: after an initial decline in the state prison population, the population has leveled out.

Targeting prison conditions, pretrial detention and bail, reentry and collateral consequences, sentencing reform, "crimmigration", debtors' prisons, police practices, and indigent defense will be Lawyers' Committee Criminal Justice Initiative's aim, and this goal will be well served by the Lawyers' Committee's singular ability to leverage the resources of the private bar and combine litigation, programmatic work, and public policy advocacy.

Part IV:

OTHER BEST PRACTICES

The Lawyers' Committee recognizes that there are areas deserving of legal effort that other organizations may be better situated to address. Similarly, the Lawyers' Committee recognizes areas of continuing need where firms are already being engaged efficiently by other organizations. With an eye toward avoiding duplicative efforts and focusing the organization's resources on the areas of greatest need, the Lawyers' Committee has declined to make such issues a top priority at this juncture. Highlighted below are a few of these areas with best practices gleaned from the listening sessions.

Direct Representation in Criminal Cases:

Best Practice: Direct Defense by Pro Bono *Attorneys*

Legal service and public defender organizations often harbor resistance toward large-scale involvement by private practitioners in *pro bono* criminal defense work, largely due to a few notorious cases of gross malpractice by *pro bono* attorneys in death penalty cases. Bridging the justice gap in indigent defense anytime soon, however, is unlikely without a major change. Many law firm representatives urged public defender services to partner with law firms to amplify their work. Under this model, public defenders would continue to provide the expertise and innovation, while law firms provide manpower and resources. Additional funding could be provided to public defender services who work with private parties to train and supervise a broader cadre of public defense lawyers. This structure of reform would also assuage fears from public defender services that their funding will dry up.

Best Practice: Public Defender Training Programs

A renowned defender training center called Gideon's Promise (formerly the Southern Public Defender Training Center), which was founded by Jon Rapping, leads the field in innovative training for public defenders. In 2010, the organization partnered with the U.S. Department of Justice and Equal Justice Works to launch the Public Defender Corps. The program was designed to provide intensive training and mentoring to new attorneys so as to raise the standard of representation across the country. The 2011 and 2012 Corps members are working in nine states across the country. However, the program came to a halt after the U.S. Department of Justice Bureau of Justice Assistance discontinued funding for the Public Defender Corps in 2012.[164]

Charging, Prosecutorial Discretion, Plea Barganing:

Background

After decades of pro-prosecution court rulings, the criminal justice system is no longer a truly adversarial system. In federal courts, 97% of cases end in a guilty plea; nationwide, the rate is 95%. Prosecutors have wide discretion to choose initial charges, bargain, and stipulate to facts upon which the sentence is based. Defendants without lawyers during the pretrial have higher rates of pretrial detention and higher rates of guilty pleas. Prosecutors are empowered by "trial penalties," mandatory minimum sentences, and almost unfettered discretion to "pile on" charges to such an extent that defendants are often coerced into pleading guilty, regardless of their guilt or innocence. Federal and some state guidelines also institutionalized a system to reward defendants who plead guilty by providing for sentence reductions if a defendant cooperates with law enforcement or prosecutors and accepts responsibility.

Racial Disparities in the Exercise of Prosecutorial Discretion

Racial disparities in the exercise of prosecutorial discretion are ubiquitous and well-documented. A recent study followed federal cases from arrest through sentencing and assessed the effect of prosecutors' initial charging decisions on the well-documented black-white disparity in sentence length.[165] The study found that certain pre-charge factors, such as arrest offense and criminal history, can explain about 80% of the disparity, but found that substantial gaps remained. On average, African Americans receive almost 10% longer sentences than whites arrested for the same crimes. The study determined that at least half of the disparity results from prosecutors' initial charging decisions, owing particularly to the fact that prosecutors are almost twice as likely to file against African Americans charges carrying mandatory minimum sentences. The remaining portion of the race gap may be explained by post-charge factors, such as plea bargaining, fact-finding, and sentencing. The importance of mandatory minimum charging in explaining sentencing disparities is significant because of the relatively few charges which carry the provision, most of which are drug crimes. The study concludes that in focusing on the abuse of judicial discretion, policy makers have overlooked a major contributor to the racial gap in sentencing: the federal prosecutor.

Prosecutorial discretion is practically immune to legal challenge. In the seminal case, *United States v. Armstrong*,[166] a criminal defendant claimed that he had been charged in federal court, as opposed to state court where he would have received a lesser penalty, because he was black. The defendant sought to discover information in the government's possession to prove his case, and provided the court with information that showed that all others prosecuted under the federal drug laws were black. The Supreme Court would not allow him to proceed to discovery, saying "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, general rests entirely in [the prosecutor's] discretion."[167] While the decision does not bar claims based on racially discriminatory use of prosecutorial discretion, it makes it incredibly difficult to obtain the necessary information, which is often in the hands of the government. The few cases that have followed have not succeeded in producing enough evidence to sustain the claim.

At the Chicago listening session for advocates, the Federal Defenders in the Northern District of Illinois spoke at length about the issue of racial disparities in federal prosecutions in Illinois. The Federal Defenders in the Northern District of Illinois, which includes Chicago, represent about 80% of federal defendants, or 1,000 per year. (Counsel for the remainder are either retained by the individual or appointed by the court from a panel of private lawyers.) There are only 19 attorneys in the office, and all defenders handle all stages of assigned cases. Racial disparities are starkly apparent, according to the defender at the listening session, especially when it comes to cases involving drugs or guns. Indeed, she stated that any defender would tell you that there are almost no white drug or gun defendants prosecuted in the district. It is not uncommon for a defender to raise the racial disparity issue with a federal judge, but it is always an uncomfortable and risky thing to do.

A recent study by the Vera Institute of Justice in partnership with the District Attorney of New York analyzed over 200,000 cases and focused on the role of prosecutors during several stages of a criminal case. These stages include: case acceptance for prosecution, dismissals, pretrial detention, plea bargaining, and sentencing recommendations. The study found that the strongest predictors of case outcomes were factors relating to the legal aspects of a case (e.g. seriousness of the charge), but that race remained a factor at certain points. Specifically, the study compared similarly situated white, black, and Latino defendants[168] and found that black and Latino defendants were more likely to be detained at arraignment (remanded or have bail set, but not met), to receive a custodial sentence offer as a result of the plea bargaining process, and to be incarcerated, but they were also more likely to have their cases dismissed.[169] In a sign that greater attention is being paid to this issue, a judge in Texas was recently indicted a state prosecutor for abuse of discretion, which is extremely rare.

Best Practices and Strategies for Reform

Implicit Bias Training

Training is extremely important in combatting the abuse of prosecutorial discretion. Well-respected professional training programs are very effective in fostering an acknowledgement of the structural and sometimes unconscious bias in the criminal justice system, and in encouraging prosecutors to invest in reversing this trend. The American Bar Association is a particularly good resource in encouraging proper training and ethical standards for prosecutors due to its prestige and nationwide scope.

Over-Criminalization:

Background: Criminalizing Mental Illness and Substance Abuse

Nationwide, there are three times as many mentally ill people in jails and prisons as in hospitals.[170] According to a Department of Justice study, more than half of prisoners in the U.S. have a mental health problem.[171] U.S. jails hold over 731,000 inmates, the majority of whom are trying to make bail or awaiting trial.[172] Last year, jails booked 11.7 million people, and this revolving door complicates the task of screening for mental illness, managing medication, providing care, and ensuring inmate safety. With the closing of state hospitals and mental illness institutions over the past few decades, many individuals with mental illness and addiction are being pushed into the criminal justice system.

For instance, a recent report found that Cook County Jail in Chicago is the largest mental health care provider in the country. Jails and prisons

are not equipped to provide the services necessary to treat these individuals, who languish in prison and are then released without having the proper treatment. This pattern makes recidivism extremely common.

At a March congressional hearing, Cook County Sherriff Tom Dart told the House Energy & Commerce Subcommittee on Oversight and Investigations that at least 30% of the Cook County Jail's 9,000 inmates suffer from serious mental health problems, making it the largest mental health provider in the state. Many of these individuals are held in pretrial detention, often on drug charges related to their mental illness. Illinois funding for mental health services has decreased by 32% since 2009, pushing those with problems into the criminal system, and the Cook County Jail does not have the resources or capabilities to provide adequate care to all those in need.[173]

Best Practice: Diversion Programs for the Mentally Ill

Instead of criminalizing the mentally ill, advocates at the Chicago listening session spoke of a successful model used in Milwaukee, Wisconsin, whereby police forego arresting an individual with a mental disorder, and instead bring the person to a non-profit where he or she can receive treatment. About 90% of those individuals, the advocates reported, would qualify for federal Medicaid funding under the Affordable Care Act, which could be used to fund their treatment. Illinois has reportedly applied for a federal waiver which would allow them to do just this, and individuals are due to be enrolled in this program in the near future.

An attendee at the Lawyers' Committee listening session in New York City warned that there have been some states that use diversion programs as a way to avoid providing indigent defendants counsel. All organizations should be aware of this inherent risk in advocating for greater use of diversion programs.

Best Practice: Drug Courts

Drug courts, one of the nation's most successful diversion program movements, are courts which address addiction through an integrated set of social and legal services instead of relying on incarceration or probation sanctions. The nation's first drug court was established in 1989 by officials in Miami-Dade County, Florida.[174] In 2004, 53% of state prisoners were identified as having a drug dependence or abuse problem, and only 15% of that 53% were receiving treatment.[175] Now, there are over 1,600 drug courts across the country, with at least one in each of the 50 states.[176]

There are several models of drug diversion programs, which makes studying them and identifying best practices difficult. Drug programs may be pre- or post-prosecution, and they also differ in eligibility criteria, costs to participate, and the duration and requirements of the program.[177] So too do drug courts' effectiveness in reducing recidivism rates and jail and prison populations vary widely, but overall, graduates of drug courts are less likely to be rearrested than persons processed through traditional court mechanisms.[178]

Participants at the Lawyers' Committee listening session with advocates and practitioners in Atlanta, Georgia reported that some counties in Georgia adopted drug courts several years ago and have seen a drop in the prison population. States and counties fund treatment program for indigent clients. However, participants also noted that some district attorneys rarely divert African American defendants to drug court, which

creates severe racial injustice in who benefits from the program.

Best Practice: Prison Education and Vocational Programming

Most crime is committed by young adults ages 18 to 25 who then face lengthy sentences and prison conditions that are anathema to rehabilitation in the U.S. Other countries have shorter lengths of imprisonment or variable sentences that are determined based on rehabilitation. Prisons should have educational and vocational training, along with substance abuse and mental health counseling.

One method for challenging harmful and ineffective prison conditions is through the relatively robust disability rights law, Americans with Disabilities Act, and the Individuals with Disabilities Education Act. On paper, state and federal prisoners with intellectual disabilities are entitled to services which are almost uniformly denied to them in practice. There have been very few challenges, but the laws include provisions for attorney fees, making impact litigation more realistic for nonprofits. Relatedly, there is also opportunity to challenge a denial of education to juveniles who are arrested and detained pretrial because there is no guardian with which to place them.

Best Practice: Community Reinvestment and Diversion of Juvenile Offenders

Studies have shown that investment in community programming (e.g. recreation, good healthcare, after-school activities, and nutrition programs) is successful in preventing juvenile criminal conduct.[179] Similarly, using community programming as an alternative to incarceration dramatically reduces recidivism rates among juvenile offenders. Efforts to invest in communities rather than juvenile detention facilities have seen some success. For instance, a community reinvestment campaign in Baltimore successfully prevented the building of a new juvenile prison facility at a time when juvenile crime and delinquency was at historical lows.

The American Civil Liberties Union of Illinois and the Juvenile Justice Initiative have challenged deplorable conditions at juvenile detention centers and succeeded in closing two facilities. There is a growing movement favoring community and rehabilitative settings over detention centers for juveniles. The State of Illinois has incentivized reducing juvenile commitments by providing funds for much-needed community

services to counties that succeed in lowering juvenile commitments by 25%. The counties are given wide latitude in designing how they accomplish the reductions in commitments, which has led to creative solutions and huge successes: some counties have lowered juvenile commitments by over 50%. These innovations have set the tone across the state, but the most populous county, Cook County, has not yet undertaken the initiative.

Like many jurisdictions throughout the U.S., Illinois passed "automatic transfer" laws requiring juveniles of a certain age to be charged as adults for certain charges. Courts consistently upheld these laws despite severe racial disparities resulting from their use and their inconsistency with international norms and conventions. In one recent success, the Illinois legislature repealed its automatic transfer law. Advocates have also succeeded in persuading the Illinois legislature to raise the age at which a juvenile may be charged as an adult from 16 to 17.

Probation and Parole:

Although the United States has the highest incarceration rate in the world, there are nearly three times more individuals on probation[180] or parole[181] collectively called "community supervision" – than in state prisons. In 2007, there were over 5 million adults – or about 1 in 45 American adults – under correctional supervision.[182] Correctional control rates are highly concentrated by race and geography, however: 1 in 11 black adults and 1 in 27 Hispanic adults – versus 1 in 45 white adults – were under correctional supervision.[183]

Probation and parole are failing, however, at helping citizens return to a successful life. Rates of re-incarceration for parolees and probationers, which can be caused either by committing a new crime or by committing a technical violation of one's probation terms, are extremely high. Researchers estimate that about half of the total violations committed nationwide are the result of a new crime. According to a recent study by the Bureau of Justice Statistics, 28% of inmates get rearrested for a new crime within six months of release. After three years, the figure rises to 68%, and by the end of five years, it is an alarming 77 percent.[184] On the other hand, offenders frequently violate the terms of their supervision; rack up pages of violations for failed drug tests and missed appointments; fail to show up for meetings because they cannot pay the probation fees; and fail to find gainful employment because they lack skills and education, or simply because their criminal records serves as a barrier to employment.

Participants at the Lawyers' Committee listening sessions with formerly incarcerated individuals spoke to the dysfunction and unfairness of the parole system itself. California, where the Lawyers' Committee heard particularly notable testimony, uses a system of indeterminate sentencing, which means that a defendant can be sentenced to a life-term with a mandatory, pre-parole base term. For example, a sentence of "15 years to life" means that a defendant would serve no less than 15 years in prison before being eligible for parole. Many participants said that when they pleaded guilty, it was based on the assurances from their attorneys that they would be paroled shortly after completing the base term. Once they arrived in prison, however, other inmates informed them that, in reality, most inmates did not receive parole for many years – sometimes decades – after serving their base term.

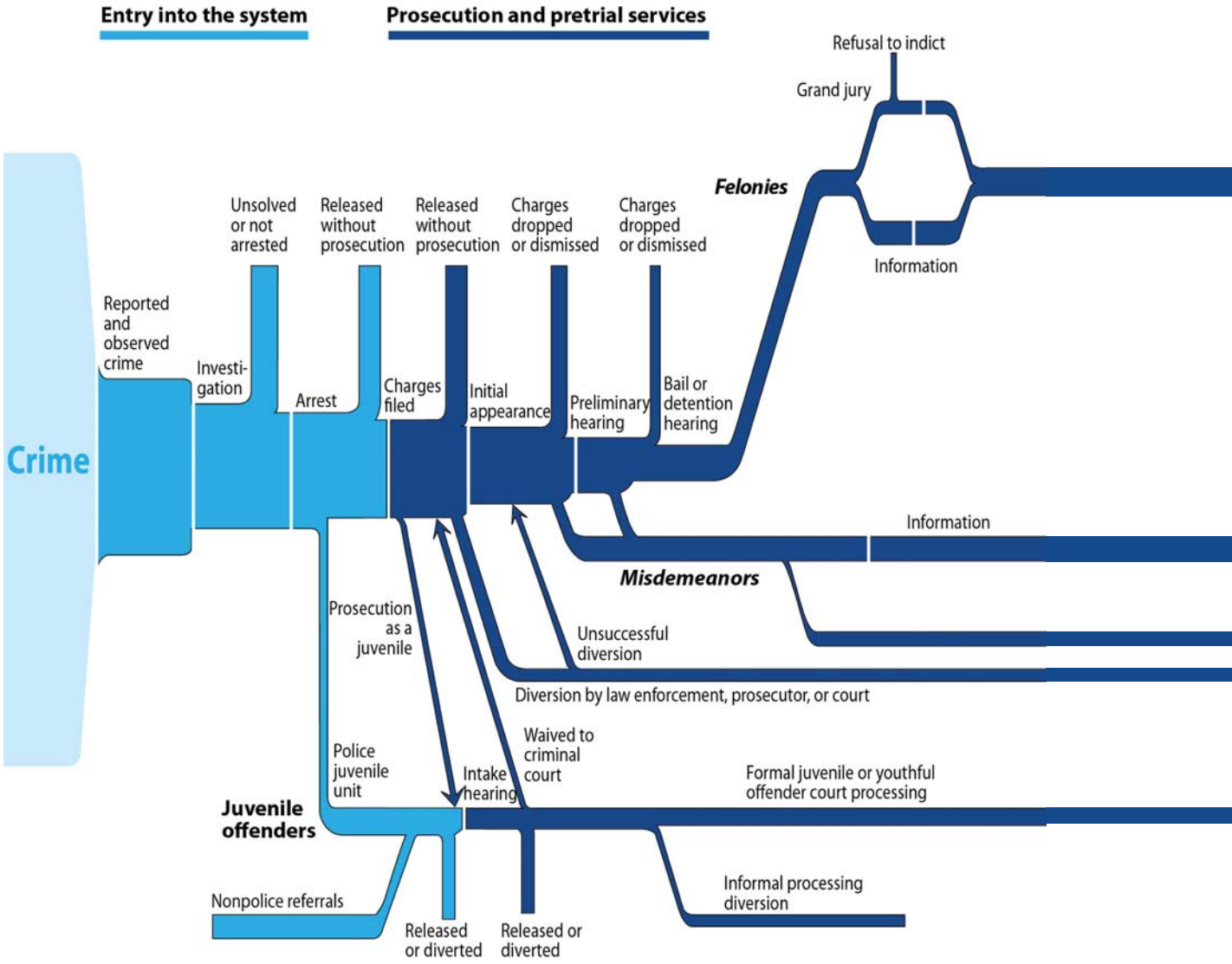
Lawyers' Committee Board member Jon Streeter challenged the arbitrary actions of California parole boards in a suit brought on behalf of an aging life-term prisoner. California parole officials settled the case in December 2013, agreeing to revamp certain parole system procedures that will hopefully benefit many aging life-term inmates.

Legal representation at parole board hearings was a major issue raised by formerly incarcerated participants at Lawyers' Committee listening sessions. Several individuals told stories about disinterested attorneys, attorneys who never visited prior to the hearings, and even one attorney who had a conflict of interest due to his personal association with one of the parole commissioners.

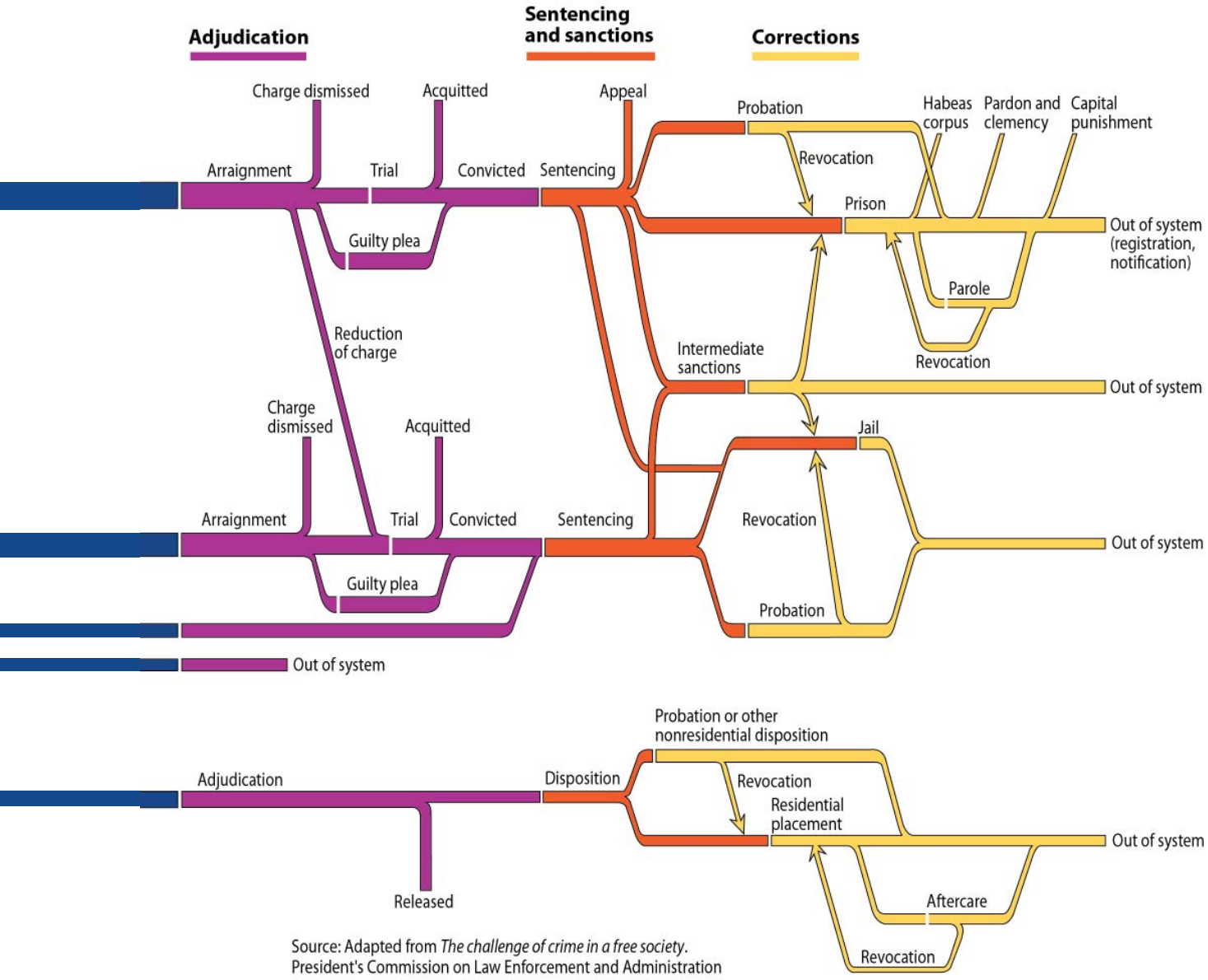
Though the opportunities for reform are ample in the areas of probation and parole; over-criminalization; charging, prosecutorial discretion, and plea bargaining; and direct representation, the Lawyers' Committee recognizes that other efforts are already underway and other organizations may be better positioned to address these injustices. As such, these aspects of the criminal justice system will not be part of the Criminal Justice Initiative's core work.

APPENDIX

What is the sequence of events in the criminal justice system?



Note: This chart gives a simplified view of caseflow through the criminal justice system. Procedures vary among jurisdictions. The weights of the lines are not intended to show actual size of caseloads.



Source: Adapted from *The challenge of crime in a free society*. President's Commission on Law Enforcement and Administration of Justice, 1967. This revision, a result of the Symposium on the 30th Anniversary of the President's Commission, was prepared by the Bureau of Justice Statistics in 1997.

1. Complaint and Arrest Warrant -- Law enforcement obtains a *Warrant for Arrest* of the alleged offender. The warrant is based on an *Indictment* (see below) or a *Complaint* filed with the U.S. District Court. An *Affidavit*, signed by a law enforcement officer, usually accompanies the Complaint. The Affidavit explains the crime committed as well as the role of the accused in that crime. In other words, the Affidavit is used to establish *probable cause* that the accused committed the crime.

2. Initial Appearance -- As soon as practicable after arrest, the alleged offender must be granted an *Initial Appearance* before a Magistrate Judge. The Magistrate Judge advises the accused of his or her rights and determines if he or she has the financial ability to hire an attorney or if a public defender must be appointed. The Magistrate Judge also sets release conditions, including any *bond*. At the same time, a federal prosecutor, known as an *Assistant United States Attorney*, may ask that the defendant be detained.

3. Detention Hearing -- If the alleged offender is detained, a *Detention Hearing* must be held within three working days. At that hearing, the Magistrate Judge listens to evidence about the accused's *risk of flight or danger to the community*. The Magistrate Judge then decides if the accused should be detained or released pending trial.

4. Preliminary Hearing -- Within ten days of arrest on a Complaint, the accused also has the right to a *Preliminary Hearing*, during which an Assistant U.S. Attorney may offer testimony to establish probable cause, and the defense attorney may provide evidence on behalf of the accused. If the Magistrate Judge overseeing the hearing finds sufficient probable cause as to the commission of the crime as well as the accused's role in it, the accused is bound over for further proceedings by a grand jury. Note that if the grand jury returns an Indictment against an alleged offender before arrest is made, a Preliminary Hearing is not necessary.

5. Grand Jury -- The final decision to prosecute a federal criminal case rests with a *grand jury*. A federal grand jury is comprised of 23 randomly selected citizens from across the judicial district. Those selected to serve on the grand jury do so for a few days each month for approximately one year, after which a new grand jury is selected by the U.S. District Court.

6. Indictment Sought -- Instead of filing a Complaint, or after filing a Complaint, Assistant U.S. Attorneys appear before the grand jury to establish probable cause that a particular person committed a federal *felony*. They do this by calling witnesses and presenting evidence obtained with *Grand Jury Subpoenas*. Defense attorneys are not allowed to appear before the grand jury; the accused does not need to testify before the grand jury; and the work of the grand jury is to be kept secret.

7. Indictment Returned -- If the grand jury decides the evidence presented establishes probable cause, it issues an *Indictment* against the accused. At least 16 of the 23 members of the grand jury must be present to conduct business, and at least 12 jurors must vote to indict. The Indictment is called a *True Bill*. If the grand jury does not find sufficient probable cause, it returns a *No Bill*. In a misdemeanor case, or in a felony case where the accused has waived indictment and has agreed, instead, to plead guilty, no case is presented to the grand jury. In those instances, an *Information*, which is a document outlining probable cause, is filed with the U.S. District Court.

8. Arraignment -- Within ten days from the time an Indictment or Information has been filed and arrest has been made, an *Arraignment* must take place before a Magistrate Judge. During an Arraignment, the accused, now called the *defendant*, is read the charges against him or her and

advised of his or her rights. The defendant also enters a *plea of guilty* or *not guilty*. If necessary, a trial date is selected and a schedule set for *motion hearings*, which may include in-court arguments as to suppression of evidence, etc. Note that the Federal Speedy Trial Act dictates that the defendant has the right to trial within 70 days of his or her initial appearance in U.S. District Court.

9. Plea Agreement -- Defendants are presumed innocent until they admit guilt or are proven guilty. If a defendant pleads not guilty, a trial takes place unless a *Plea Agreement* can be reached between the Assistant U.S. Attorney and the defense attorney. In those instances, the defendant must offer a *change of plea* before a U.S. District Court Judge, who needs to approve the terms of the Plea Agreement.

10. Trial -- A trial is heard before a jury of citizens selected at random from across the judicial district and overseen by a U.S. District Court Judge. At trial, the Assistant U.S. Attorney must -- and the defense attorneys may -- call witnesses and present evidence. (The government has the burden of proving the elements of the offense beyond a reasonable doubt.) Afterwards, the jury must unanimously decide the *verdict*. If the defendant is found not guilty, he or she is released. If he or she is *convicted*, however, the pre-sentencing process begins.

11. Pre-Sentencing -- After the entry of a guilty plea or the unanimous finding of guilt by a jury following trial, the U.S. Probation Office collects information about the defendant and crime victims and supplies it, along with a recommendation for sentence, to the U.S. District Court Judge as part of a Pre-Sentence Investigation Report.

12. Sentencing -- Approximately eight weeks after the entry of a guilty plea or a jury finding of guilt, the U.S. District Court Judge imposes sentence. The sentence may include incarceration in federal prison; a term of *supervised release*, formerly called *probation*; the imposition of a monetary fine; and/or an *Order of Restitution* directing the defendant to pay the crime victims money lost or expenses incurred due to the offense.

13. Appeal -- The defendant may *appeal* either the finding of guilt or the sentence or both. To do so, he or she must file with the sentencing court a *Notice of Appeal* within ten days of the sentencing, or *Judgment*, date. Note that if the defendant pled guilty, generally only the sentence may be appealed. Also, sometimes, the defendant gives up, or *waives*, the right to appeal in the Plea Agreement.

Endnotes

1. See, e.g. Kirwan Institute for the Study of Race and Ethnicity, "Understanding Implicit Bias," available at http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/.
2. 517 U.S. 806 (1996).
3. The few exceptions to this are the areas of death penalty and wrongful convictions.
4. Dance, Gabriel and Tom Meagher, "U.S. Incarceration: Still Mass," The Marshall Project, available at https://www.themarshallproject.org/2014/12/19/u-s-incarceration-still-mass (last accessed Feb. 9, 2015).
5. Id.
6. See "Clemency Project," *supra.*
7. *Houser et al v. Pritzker*, Case No. 1:10-cv-03105-FM (S.D.N.Y.).
8. *See,* e.g., Bruce Western and Christopher Muller, *Mass Incarceration, Macrosociology, and the Poor*, Annals of the American Academy of Political and Social Science, Vol. 647, Reconsidering the Urban Disadvantaged: The Role of Systems, Institutions, and Organizations (May, 2013) at 168.
9. The International Centre for Prison Studies is an independent research organization affiliated with the University of Essex. It performs primarily comparative research regarding punishment and imprisonment, and regularly compiles data across nations to produce comparative incarceration statistics. *See,* http://www.prisonstudies.org/
10. R. Walmsley, *World Population List, 10th Ed.* Essex: International Centre for Prison Studies (2013), available at http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf
11. *Id.*
12. National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington, DC: The National Academies Press (2014) at 37.
13. *Id.* at 35-36.
14. Lauren E. Glaze & Erinn J. Heberman, *Correctional Populations in the United States, 2012*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, December 19, 2013. Available at: http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4843
15. Statistical reports vary as to whether they include local jail populations in reports of total incarcerated populations or report them separately. This difference is what usually accounts for variation in totals of incarcerated populations reported across sources. In this report, some indication of whether local jail populations are included in a particular statistic will be given in a footnote or in the text.
16. National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences,* Washington, DC: The National Academies Press (2014), 38.
17. *Id.*
18. Prisoner totals from Carson, E. Ann and Daniela Golinelli. *Prisoners in 2012 – Trends in Admissions and Releases, 1991 – 2012,* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, December 2013 at 23. Rates per 100,000 were calculated by the Sentencing Project from data provided by the Bureau of Justice Statistics, and are available at http://www.sentencingproject.org/map/map.cfm#map.
19. *See,* http://www.bop.gov/about/statistics/population_statistics.jsp

20. National Research Council, *supra* note 5 at 55.
21. National Research Council, *supra* note 5 at 55.
22. *See,* http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp
23. Todd D. Minton, Jail Inmates at Midyear 2012 – Statistical Tables, Washington, D.C. , U.S. Department of Justice, Bureau of Justice Statistics, May 2013, at 1. Available at: www.bjs.gov/content/pub/pdf/jim12st.pdf
24. National Research Council, *supra* note 5 at 40.
25. *Id.*
26. *Id.*
27. *See,* http://www.bjs.gov/index.cfm?ty=qa&iid=324
28. *See,* id.
29. National Research Council, *supra* note 5 at 40.
30. Glaze and Heberman, *supra* note 7 at 4.
31. National Research Council, *supra* note 5 at 41.
32. The Sentencing Project, *Fact Sheet: Trends in U.S. Corrections,* 5, available at http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.
33. U.S. Census Bureau: State and County QuickFacts. Data derived from Population Estimates, American Community Survey, Census of Population and Housing, State and County Housing Unit Estimates, County Business Patterns, Nonemployer Statistics, Economic Census, Survey of Business Owners, Building Permits. Available at http://quickfacts.census.gov/qfd/states/00000.html (last updated June 11, 2014).
34. Percentages calculated from E. Ann Carson and Daniela Golinelli, *Estimated number of sentenced prisoners under state jurisdiction, by offense, sex, race, and Hispanic origin*, December 31. (Washington, DC: US Dept. of Justice Bureau of Justice Statistics, Dec. 19, 2013). Data table generated using the Corrections Statistical Analysis Tool at www.bjs.gov on July 2, 2014. http://www.bjs.gov/index.cfm?ty=nps
35. Census, *supra* note 27.
36. Carson & Golinelli, *supra* note 28.
37. E. Ann Carson, William J, Sabol, *Prisoners in 2011,* 8, Washington, DC: US Dept. of Justice Bureau of Justice Statistics, December 2012. http://www.bjs.gov/content/pub/pdf/p11.pdf
38. Prisoners in 2012, *supra* note 11 at 25.
39. *Id.*
40. *Id.*
41. *Id.*
42. Percentage calculated from Carson and Golinelli, *supra* note 30.
43. National Research Council, *supra* note 5 at 64.
44. Carson & Golinelli, *supra* note 28.
45. National Research Council, *supra* note 5 at 46.
46. *Id.* at 47.
47. *Id.*
48. A number of theories have been advanced. One perspective is that increased incarceration has led to a reduction in crime, but scholars have disagreed about how primary a causal role incarceration has really played – most assess its contributions as being limited, meaning the

decline in crime rates requires further explanation. Some have suggested that the banning of lead in gasoline and subsequent reduction in environmental lead (known to have psychological effects that increase the likelihood that those exposed at a very young age will engage in violent crime) could be the most important factor. Still others have suggested that new innovations in security technology (alarms, bullet-proof screens, DNA databases, CCTV cameras) may have made crime more difficult. The debate remains unresolved and has even garnered some press attention. For brief journalistic discussions of the state of the research on the topic, see The Economist, The curious case of the fall in crime, July 20, 2013, available at: http://www.economist.com/news/leaders/21582004-crime-plunging-rich-world-keep-it-down-governments-should-focus-prevention-not. See also, James Q. Wilson, Hard Times, Fewer Crimes, Wall Street Journal (May 28th, 2011), available at: http://online.wsj.com/news/articles/SB10001424052702304066504576345553135009870; BBC News Magazine, Did removing lead from petrol spark a decline in crime?, April 2014, available at http://www.bbc.com/news/magazine-27067615.

49. National Research Council, *supra* note 5 at 70.
50. *Id* at 71.
51. Urban Institute, "Examining Growth in the Federal Prison Population, 1998-2010."
52. Attorney General Eric Holder Remarks to American Bar Association's Annual Convention in San Francisco, CA August 12, 2013.
53. National Research Council, *supra* note 5 at 314.
54. *Id.* at 314-15.
55. Congressional Research Service, *Economic Impacts of Prison Growth*, by Suzanne M. Kirchhoff, April 13, 2010.
56. Attorney General Eric Holder Remarks to American Bar Association's Annual Convention in San Francisco, CA August 12, 2013.
57. Carroll, David. "Gideon's Despair." The Marshall Project, 2 January 2015. Available https://www.themarshallproject.org/2015/01/02/four-things-the-next-attorney-general-needs-to-know-about-america-s-indigent-defense-crisis (last accessed Jan. 20, 2015).
58. 372 U.S. 335 (1963).
59. See, *Argersinger v. Hamilton*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367, 374 (1979) ("the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense").
60. Primus, EB. "The Illusory Right to Counsel." Pg. 600
61. *Rothgery v. Gillespie County*, 554 U.S. 191, No. 07-440 at 19 (June 23, 2008). See e.g., *Brewer v. Williams*, 430 U.S. 387, 388-899 (1977); *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986).
62. *Id.* (internal quotes omitted) (citing *United States v. Ash*, 413 U. S. 300, 312-313 (1973); see also *Massiah v. United States*, 377 U. S. 201 (1964).).
63. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
64. *Rivera v. Rowland*, 1998 WL 96407 (Conn. Super. Ct. Feb. 20, 1998) (No. CV 9505456292).
65. See *Doyle v. Allegheny County Salary Board*, No. GD-96-13606 (Penn. Ct. Com. Pl. 1997); *White v. Martz*, No. C DV-2002-133 (Mont. Dist. Ct. 2002); *Best v. Grant County*, No. 04-2-00189-0 (Wash. Super. Ct. 2004) ; *Wilbur v. City of Mount Vernon*, Dist. Court No. C11-1100RSL (W.D. Wash. 2013); *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895 (Mass. 7/28/2004).
66. Dist. Court No. C11-1100RSL (W.D. Wash. 2013).
67. *Id.* at 3.
68. *Id.* at 3.
69. Nos. SC09-1181, SC10-1349 (Fla. S.Ct. 2013).
70. *Id.*

71. See, e.g. American Civil Liberties Union, *The War on Marijuana In Black and White*, available at https://www.aclu.org/sites/default/files/assets/1114413-mj-report-rfs-rel1.pdf (June 2013) (last accessed Mar. 10, 2015); Pope, Michael, "Virginia Arrest Records Show Racial Disparities,WAMU 88.5 American University Radio, available http://wamu.org/news/15/03/10/virginia_arrest_data (Mar. 10, 2015); Washington Lawyers' Committee for Civil Rights and Urban Affairs, *Racial Disparities in Arrests in the District of Columbia, 2009-2011: Implications for Civil Rights and Criminal Justice in the Nation's Capital*, available http://www.washlaw.org/pdf/wlc_report_racial_disparities.pdf (July 2013) (last accessed Mar. 10, 2015).
72. 517 U.S. 806 (1996).
73. *Id.*
74. Laura and John Arnold Foundation, Press Release: Laura and John Arnold Foundation Partners with the International Association of Chiefs of Police on Citation Research, available at http://www.arnoldfoundation.org/laura-and-john-arnold-foundation-partners-international-association-chiefs-police-citation-research (Apr. 2, 2014).
75. National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences,* Washington, DC: The National Academies Press (2014) at 49.
76. *Id.*
77. It might be hypothesized that blacks may be arrested at higher rates for drug crimes due to higher drug use rates, but the best available research refutes this hypothesis. Self-reported drug use among blacks is consistently lower than among whites. Fewer data are available on drug selling, but self-reports show a higher level of sales among poor white than poor black youth. See National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington, DC: The National Academies Press (2014) at 50.
78. Heath, Brad, "Investigation: ATF drug stings targeted minorities," USA Today (July 20, 2014), available http://www.usatoday.com/story/news/nation/2014/07/20/atf-stash-house-stings-racial-profiling/12800195/.
79. U.S. Dept. of Justice Civil Rights Division, U.S. Attorney's Office District of New Jersey, *Investigation of the Newark Police Department* (July 22, 2014), available http://www.justice.gov/usao/nj/Press/files/pdffiles/2014/NPD%20Findings%20Report.pdf.
80. *Id.* at 20.
81. *Id.*
82. Lind, Dara, "What we know about who police kill in America," Vox (Aug. 21, 2014), available at http://www.vox.com/2014/8/21/6051043/how-many-people-killed-police-statistics-homicide-official-black.
83. Nat'l Police Misconduct Reporting Project, *2010 Annual Report*, available at http://www.policemisconduct.net/statistics/2010-annual-report/ (last accessed June 11, 2014) (hereinafter "NPMRP") (run by the Cato Institute, the NPMRP captures data that meet credibility criteria which have been gathered from multiple media sources throughout the United States).
84. *Id.*
85. Brian Bennet, *Border agency removes its own chief of internal affairs*, L.A. TIMES, June 6, 2014.
86. *Id.*
87. The Special Litigation Section can, for example, review the practices of law enforcement agencies that may be violating people's federal rights pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141. If a law enforcement agency receives federal funding, the Special Litigation Section can investigate pursuant to the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, and Title VI of the Civil Rights Act of 1964, which forbid discrimination on the basis of race, color, sex or national origin by agencies receiving federal funds. We may act if we find a pattern or practice by the law enforcement agency that systemically

violates people's rights. Harm to a single person, or isolated action, is usually not enough to show a pattern or practice that violates these laws. U.S. Dep't of Justice, Overview: Conduct of Law Enforcement Agencies, available at http://www.justice.gov/crt/about/spl/police.php.

88. U.S. Dept. of Justice, Cases and Matters, available at http://www.justice.gov/crt/about/spl/findsettle.php.
89. U.S. Commission on Civil Rights, "Revisiting Who Is Guarding the Guardians?" available at http://www.usccr.gov/pubs/guard/ch5.htm.
90. *Id.*
91. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).
92. State of Illinois Torture Inquiry and Relief Commission, Mission and Procedures Statement, available at https://www2.illinois.gov/itrc/Pages/default.aspx.
93. U.S. Dept. of Justice, Civil Rights Div., *Guidance on the Use of Race by Federal Law Enforcement Agencies* (June 2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.
94. S. 1038, 113th Cong., 1st Sess. (2013).
95. *Bearden v. Georgia*, 461 U.S. 660 (1983).
96. Stillman, Sarah, The New Yorker, "Get Out of Jail, Inc." June 23, 2014 Issue, available at http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc.
97. Bureau of Justice Statistics, National Prisoner Statistics, Prisoners at Yearend 2009 – Advance Counts http://bjs.ojp.usdoj.gov/index.cfm?ry=pbdetail&iid=2272 Brennan Center for Justice, Alicia Bannon, Mitalia Nagrecha & Rebekah Diller. *Criminal Justice Debt: A Barrier to Reentry*. Pg. 1 (2010) http://www.brennancenter.org/publication/criminal-justice-debt-barrier-reentry
98. Shapiro, Joseph, "As Court Fees Rise, The Poor Are Paying The Price," NPR (May 19, 2014), available at http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor. See also, "State-By-State Court Fees" NPR, available at http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees (May 19, 2014) (chart showing results of nationwide survey of common fees courts charge defendants and offenders).
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. Stillman, Sarah, The New Yorker, "Get Out of Jail, Inc." June 23, 2014 Issue, available at http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc.
104. *Id.*
105. ACLU *In for a Penny: The Rise of America's new Debtors' prisons.* (2010) https://www.aclu.org/files/assets/InForAPenny_web.pdf
106. See e.g. Balaban, Eric and Carl Takei, American Civil Liberties Union, "Debtors' prisons – part I" at 10-11, available at http://povertylaw.org/sites/default/files/files/webinars/criminaldebt/debtors-prisons-part-one.pdf.
107. 8 USC §1357(a).
108. 8 CFR §287.8(b)(2) (emphasis added).
109. 8 CFR §287.8(b)(2)(ii).
110. 8 U.S.C. §1229a(b)(4)(A).
111. See, e.g., 8 U.S.C. §1357(a).
112. 8 CFR §287.3(c).

113. U.S. Dept. of Justice Bureau of Prisons, "Inmate Statistics: Offenses," available at http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

114. *See, U.S. v. Blewett*, 746 F.3d 647 (6th Cir. 2013) (holding the Fair Sentencing Act, which reduced the sentencing disparity between crack and powder cocaine, does not retroactively undo final sentences, despite the fact that 80 percent of crack defendants prosecuted under the law were African American).

115. Pub. L. No. 111–220.

116. The Sentencing Project, "California Adopts Fair Sentencing Act (Sb 1010). Equalizes Penalties For Certain Crack And Powder Cocaine Offenses," available at http://www.sentencingproject.org/detail/news.cfm?news_id=1876.

117. National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington, DC: The National Academies Press (2014), 72.

118. *Id.* at 73.

119. 567 U.S. ___, 132 S. Ct. 2455 (2012).

120. MCL 769.25, 769.25a.

121. Starr, Sonya, "Sentencing, By the Numbers," New York Times, Aug. 11, 2014, available at http://www.nytimes.com/2014/08/11/opinion/sentencing-by-the-numbers.html.

122. *Id.*

123. See, Wegman, Jesse, "The Injustice of Marijuana Arrests," New York Times, July 28, 2014, available at http://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html?partner=rss&emc=rss&smid=tw-nytopinion&_r=0; Crowley, Mary, Besiki Kutateladze, and Whitney Tymas, *Race and Prosecution in Manhattan*, Vera Institute of Justice (July 2014), research summary available at http://www.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-summary.pdf.

124. In Bearden v. Georgia, the Supreme Court unanimously struck down a state's revocation of a defendant's probation due to a recent job loss that the state claimed increased his crime risk. The court found that "lumping him together with other poor persons and thereby classifying him as dangerous… would be little more than punishing a person for his poverty."

125. Remarks as Prepared for Delivery, Attorney General Eric Holder Speaks at the National Asscoiation of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference, Philadelphia, Aug. 1, 2014, available at http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140801.html.

126. Starr, Sonja, "Sentencing, by the Numbers," New York Times (Aug. 10, 2014), available at http://www.nytimes.com/2014/08/11/opinion/sentencing-by-the-numbers.html?_r=0.

127. S.B. 1410; H.R. 3382.

128. 559 U.S. 356 (2010).

129. *Fact Sheet: Felony Disenfranchisement Laws*, The Sentencing Project, 1-2, available at http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf.

130. Purtle, Jonathan, *The Link Between Felon Disenfranchisement, Politics, and Health*, The Philadelphia Inquirer, June 11, 2014, available at http://www.philly.com/philly/blogs/public_health/The-link-between-felon-disenfranchisement-politics-and-health.html.

131. *Fact Sheet: Felony Disenfranchisement Laws*, The Sentencing Project, 1-2, available at http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf.

132. *Id.*

133. Bloom, Rachel and Erika Wood, *De Facto Disenfranchisement*, American Civil Liberties Union, Brennan Center for Justice, available https://www.aclu.org/files/pdfs/racialjustice/defactodisenfranchisement_report.pdf (2008).
134. The Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility*, 21 (2010).
135. The Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility*, 11 (2010).
136. *Id.* at 4.
137. Maurer, Roy, "When Background Screens Turn Up Criminal Records," Society of Human Resource Management, available http://www.shrm.org/hrdisciplines/safetysecurity/articles/pages/background-screens-criminal-records.aspx (May 5, 2014).
138. *EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* as amended, *42 U.S.C. § 2000e* et seq., U.S. Equal Emp't Opportunity Comm'n, 6 (April 25, 2012).
139. Available online at http://www.abacollateralconsequences.org/.
140. S. 2235, H.R. 4459 (2014).
141. S. 2567 (2015).
142. *See,* e.g. Schmidle, Nicholas, "Crime Fiction: Did the Chicago police coerce witnesses into pinpointing the wrong man for murder?" The New Yorker (Aug. 4, 2014).
143. Baradara, Shima, "The State of Pretrial Detention," The State of Criminal Justice, 187, 190 (2011).
144. Pretrial Justice Institute, "Implementing the Recommendations of the National Symposium on Pretrial Justice: The 2013 Progress Report," 2, (2014), available at http://www.pretrial.org/download/infostop/Implementing%20the%20Recommendations%20of%20the%20National%20Symposium%20on%20Pretrial%20Justice-%20The%202013%20Progress%20Report.pdf.
145. The Eighth Amendment to the U.S. Constitution states, "Excessive bail shall not be required." Over the last sixty years, however, the Supreme Court has narrowed its interpretation of the Eighth Amendment to find that the Constitution does not give defendants a right to bail. See *Stack v. Boyle*, 342 U.S. 1 (1952); *Carlson v. Landon*, 342 U.S. 524 (1952); *Bell v. Wolfish*, 441 U.S. 520 (1979) (finding the presumption of innocence does not govern the treatment of pretrial detainees and that "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment,'" in violation of the Due Process Clause).
146. See generally, *Stack v. Boyle*, 342 U.S. 1 (1951).
147. Task Force on Race and Criminal Justice, Preliminary Report from Research Working Group, "Ethnic/Racial Disparity in Pretrial Release Decisions," available at http://www.law.seattleu.edu/Documents/korematsu/race%20and%20criminal%20justice/Handout,%20Bail.pdf (2011).
148. See 18 U.S. Code § 3142.
149. Human Rights Watch, "The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City," 29 (Dec. 2010), available http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf.
150. *Id.* at 31-32.
151. American Civil Liberties Union and Stop Solitary, "End the Overuse of Solitary Confinement," 1, available at https://www.aclu.org/files/assets/stop_solitary_-_two_pager.pdf.
152. *Id.*
153. *Id.*
154. Allen J. Beck et al, *Sexual Victimization in Prisons and Jails Reported by Inmates*, 2011–12 (Bureau of Justice Statistics, May 2013), available at www.bjs.gov/content/pub/pdf/svpjri1112.pdf (For comparison, the FBI reports that the rate of "forcible rape" against all women in the

United States was about .05 percent. See Federal Bureau of Investigation Uniform Crime Report 2011, available online at http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/violent-crime/forcible-rape).

155. Allen J. Beck and Candace Johnson, Sexual Victimization Reported by Former Prisoners, 2008 (Bureau of Justice Statistics, May 2012), 5, available at www.bjs.gov/content/pub/pdf/svrfsp08.pdf.
156. See Just Detention International, *Fact Sheet for Sexual Abuse Service Providers*, available at http://www.justdetention.org/en/factsheets/Basics_Fact_Sheet_FINAL.pdf (Aug. 2013) (last accessed Mar. 10, 2015).
157. P.L. 108-79.
158. 28 CFR Part 115
159. 18 U.S.C. § 3626(a)(1)(A)(a)
160. *Id.*
161. 42 U.S.C. § 1997e(a).
162. 42 U.S.C. § 1997e(e).
163. 131 S. Ct. 1910 (2010).
164. Gideon's Promise continues to train public defenders through its own program.
165. Rehavi, M. Marit and Sonja B. Starr, "Racial Disparity in Federal Criminal Charging and its Sentencing Consequences," University of Michigan Law School: Program in Law & Economics Working Paper Series, No. 12-002 (May 7, 2012). Available online at http://ssrn.com/abstract=1985377.
166. 517 U.S. 456 (1996).
167. *Id.* at 464.
168. "Similarly situated" means "the comparison has used statistical methods to account for the influence of other factors – including legal factors, such as type of counsel, charge seriousness, prior record, and offense type – to determine the independent effect of race on decision making." Crowley, Mary, Besiki Kutateladze, and Whitney Tymas, *Race and Prosecution in Manhattan*, Vera Institute of Justice (July 2014), research summary available at http://www.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-summary.pdf, at 3.
169. Crowley, Mary, Besiki Kutateladze, and Whitney Tymas, *Race and Prosecution in Manhattan*, Vera Institute of Justice (July 2014), research summary available at http://www.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-summary.pdf, at 3.
170. Kristof, Nicholas, "Inside a Mental Hospital Called Jail," New York Times, Feb. 8, 2014, available at http://www.nytimes.com/2014/02/09/opinion/sunday/inside-a-mental-hospital-called-jail.html (citing a 2010 study by the National Sheriffs' Association and the Treatment Advocacy Center).
171. *Id.*
172. Geller, Adam, "U.S. Jails Struggle With Role As Makeshift Asylums," Associated Press, July 14, 2014, available Huffington Post http://www.huffingtonpost.com/2014/07/14/jails-mentally-ill_n_5583379.html.
173. Bellware, Kim, "Patrick Kennedy Visits Mentally Ill Inmates of Cook County Jail, Largest Illinois Mental Health Facility," HuffingtonPost, available http://www.huffingtonpost.com/2013/09/20/patrick-kennedy-cook-county-jail_n_3964699.html (Sept. 20, 2013) (last accessed Mar. 11, 2015).
174. King, Ryan S. and Jill Pasquarella, *Drug Courts: A Review of the Evidence*, The Sentencing Project, 1 (Apr. 2009).
175. Christopher J. Mumola and Jennifer C. Karberg, *Drug Use and Dependence, State and Federal Prisoners, 2004*, Bureau of Justice Statistics,

NCJ 213530, 2006.

176. King, *supra*.

177. *Id.* at 3-5.

178. *Id.* at 5-6.

179. See Sentencing Project, "Policy Brief: Ending Mass Incarceration: Social Interventions That Work," available http://www.sentencingproject.org/doc/publications/publications/inc_Ending%20Mass%20Incarceration.pdf.

180. "Probation" is defined as a court-ordered period of correctional supervision in the community, generally as an alternative to incarceration. In some cases, probation can be a combined sentence of incarceration followed by a period of community supervision.

181. "Parole" is a period of conditional supervised release in the community following a prison term. It includes parolees released through discretionary or mandatory supervised release from prison, those released through other types of post-custody conditional supervision, and those sentenced to a term of supervised release.

182. U.S. Dept. of Justice, Bureau of Justice Statistics, *Probation and Parole in the United States, 2012,* (revised April 22, 2014), available at http://www.bjs.gov/content/pub/pdf/ppus12.pdf.

183. Pew Center on the States, *One in 31: The Long Reach of American Corrections* (Washington, DC: The Pew Charitable Trusts, March 2009), 5.

184. U.S. Dept. of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010,* 1 (April 2014), available at http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf.

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