

Unchaining Civil Rights: Overcoming Criminalized Inequality

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Introduction

Criminal justice policies across the United States (U.S.) have created a phenomenon of mass arrest and incarceration that has decimated African American and Latino communities. The War on Drugs and Tough on Crime policing practices are among the policy choices and practices that have resulted in the significantly disproportionate representation of people of color in the criminal justice system. Moreover, the punishment neither starts nor ends at the prison gates. The collateral consequences of a conviction - laws and regulations that bar people from jobs, education and voting - continue long after the sentence has been served. These structural and institutional barriers to education, employment and enfranchisement for people with criminal justice records raise more than social policy concerns; they are abrogations of civil rights. A criminal record has become a surrogate for race-based discrimination throughout the U.S., serving the same function as did the Black Codes and Jim Crow in earlier times. The collateral consequences result in the exclusion of large numbers of people from communities of color from opportunities that form the core of the "American Dream."

In 2006 the U.S. celebrated the 50th anniversary of the *Brown vs. Board of Education* decision which ended legal segregation. Just three years earlier, the U.S. Supreme Court in *Grutter vs. Bollinger*, upheld policies that are explicitly designed to promote diversity in higher education. Yet in 2006, there were more than 2.2 million people confined in U.S. jails in prisons, the majority of whom are people of color. The incarceration rate of black people here exceeds the rate of black incarceration in South Africa at the height of apartheid. If current trends continue, one in three black men born today will be incarcerated sometime during their lifetime.

There are clear parallels between the segregation of 1954 that was addressed in *Brown* and the "resegregation" of 2006, driven by the effects of racial and class disparities in the criminal justice system. Charles Ogletree, Jr., reflecting on *Brown*, noted the "Court's decision seemed to call for an era in which black children would have equal opportunities to achieve the proverbial American Dream." This dream was also alluded to in *Grutter*. "Effective participation by members of all racial and ethnic groups in the civil life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." Overcoming barriers to equal opportunity applies whether barriers to participation in "the Dream" are the result of Jim Crow "separate but equal" segregation or the resegregation caused by the collateral consequences of criminal convictions.

Federal and state laws and policies regarding employment, education and voting for people with criminal records may appear to be racially neutral. However, because of racial disparities in the criminal justice system, they have significant discriminatory effects. These exclusionary policies and practices not only perpetuate punishment, but are the catalysts for a new age of segregation, barring participation in civic life. While these barriers persist, no dream is left -- only the nightmare of marginalization and segregation. This was the devastation that *Brown* sought to eradicate: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." This is true whether the basis for exclusion is race itself, or a criminal

conviction that simply serves as a surrogate for race. The time is right for a civil rights agenda to end discrimination against people with criminal records. It is an agenda that demands equal opportunity in employment, education and enfranchisement. It is an agenda that demands equality.

The collateral consequences of conviction have become the means to repackage institutional racism in ways that impact entire communities. The sheer scale of arrest, prosecution and incarceration of people of color has resulted in the phenomena of mass conviction and mass incarceration (Garland 2001). Black males ages 20-30 have significantly higher rates of incarceration than other racial groups with an estimated 1 in 3 black men ages 16-34 having a criminal record. More than 10 percent of black men in that age group are incarcerated; roughly twice those numbers are on probation or parole (Harrison & Beck 2005). Blacks are imprisoned at a rate of 3,218 per 100,000, Hispanics at 1,220 per 100,000 and whites at 463 per 100,000 (Harrison & Beck 2005). So pervasive is the criminal justice system in the lives of black men that more of them have done prison time than have earned college degrees (Justice Policy Institute 2002).

The tremendous expansion of the criminal justice system over the last 20 years results principally from disparate enforcement of drug laws in communities of color. It is well known that use of drugs does not differ by race and ethnicity (SAMHSA2005). Yet, 55 percent of people incarcerated for drug crimes are black. Because so many people from communities of color are caught in the criminal justice system, institutional and structural barriers that attach to a criminal record, through rules and informal practices, constitute, in essence, discrimination in higher education, employment and voting.

The criminal justice system has created a new divide in the U.S. Prior to *Brown*, race was an instrument of social control. Today, the criminal justice system and its collateral consequences are the means by which racial discrimination and exclusion are perpetuated and justified through the back door. It is not just formerly incarcerated people who are affected. The presence of a criminal record, even without incarceration, closes doors to educational and employment opportunities. In 2002 alone, one million people were convicted of felony offenses in state courts. Forty percent were persons of color, far exceeding their representation in the U.S. population at large.

Without denying the progress since *Brown*, African Americans who have been convicted, served time and are now seeking reintegration through education, employment and enfranchisement are confronted by circumstances more analogous to the segregation faced by *Dred Scott* and *Plessy* than the diversity of *Grutter*. Like *Dred Scott*, they are stripped of the right to lay claim to the American Dream. For many, even the second class citizenship of "separate but equal" is out of reach. Criminal convictions have barred them from both educational and employment opportunities as well as voting rights. Collateral consequences have removed even the facade of equality, envisioned in the segregated society approved by the *Plessy* court. The U.S. is the only democracy that disenfranchises people who have completed their sentences. We must eliminate the "detrimental effects" of resegregation and embrace the concept that society as a whole benefits when equal opportunity is provided for all of its citizens, including the millions of people with criminal records, to fully participate in civic life and the "American Dream."

Examples of Discrimination and Structural Exclusion

More than half the states in the U.S. lack standards governing the relevance of convictions of applicants for occupational licenses, thus allowing professional licenses to be denied, regardless of the relevance of one's criminal history (Legal Action Center 2001). Only a few states have standards governing consideration of an applicant's criminal record in public or private employment. Until recently, people with drug convictions were denied opportunities to apply for federal financial aid (Mulligan, Dolber, Wibby & Borden 2006). Examples of discrimination association with a criminal record include:

- C Until 2006, Section 484 (r) of the Higher Education Act of 1965, as amended in the Higher Education Act of 1998 (HEA), denied or delayed eligibility for financial aid to people with

drug convictions. The GAO (2005) concluded that about 20,000 students each year were denied Pell Grants and 30,000- 40,000 lost out on student loans because of this federal law. New rules passed by Congress in January 2006 now allow students with past drug convictions to apply for federal financial aid, but the law continues to bar students convicted of drug offenses while in college from receiving federal financial aid.

C States have their own formal and informal ways of excluding people with criminal records from a college education. Texas bars state-based higher education financial aid to persons with felony convictions. Some community colleges in New York State deny admission to individuals with felony convictions.

C In New York (and other states), laws bar people with criminal justice histories from obtaining barbers' licenses, thus closing the door to entry-level employment and entrepreneurship for many people of color.

C Federal law makes prisoners ineligible to use Pell Grants resulting in the ending of many prison education programs despite clear evidence that participation in higher education significantly lowers recidivism rates (Vacca 2004).

A Civil Rights Agenda to End Discrimination Against People with Criminal Records

Increased access to and use of background checks, criminal record stigmatization, and explicit bans by employers and colleges translate into diminished employment and educational opportunities for minorities. Given the vast overrepresentation of people with color among those with criminal records, the stigma and disadvantage associated with a criminal history call for the same "affirmative action" approach developed to counter historic practices that countenanced segregation and discrimination. The following are key national and state-level activities that would go along way to ending the back door discrimination against people with criminal records.

AT THE FEDERAL LEVEL

C Encourage policymakers to enact the Second Chance Act which would eliminate certain bars and barriers facing people with criminal records and support community reintegration programs.

C Support a Federal standard based on Equal Employment Opportunity Commission guidance on use of background checks for employment purposes when screening people for arrest and conviction records.

C Strengthen Federal programs that encourage employers to hire people with criminal records such as the Federal Bonding Program and the Work Opportunity Tax Credit.

C Advocate for full reinstatement of Pell Grant eligibility for people who are currently incarcerated so that they can participate in higher education while incarcerated.

C Support further reform of the Higher Education Act to eliminate the remaining provisions that bar people convicted of drug offenses from access to federal financial aid.

AT THE STATE LEVEL

C Encourage legislators to restore eligibility for the state and private education programs and financial aid that allow people in prison to participate in higher education.

C Support effective programs that promote community reintegration and reentry.

C Advocate for legislation that prohibits employers, housing authorities and other non-law enforcement agencies from inquiring about or using information about arrests that did not lead to conviction.

C Advocate for legislation that automatically seals/expunges arrests that never led to conviction and minor convictions after a reasonable period of time.

C Advocate for legislation to lift automatic bars to employment, occupational licenses, public housing, and political enfranchisement.

C Advocate for legislation that prohibits across-the-board employment bans based on arrest or conviction records and require employers to assess applicants individually on their merits.

C Educate policymakers on the important role that voting rights play in reintegration.

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