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# Locking Down Civil Rights: Criminal Record-Based Discrimination

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*"Locking Down Civil Rights" is a brief discussion of the relationship between incarceration, collateral consequences, and the abrogation of civil rights in the United States. While professing high civil standards, the United States exhibits one of the most dilapidating criminal justice systems in the world. Topping the world charts for incarceration statistics while maintaining a clearly dysfunctional rehabilitation system, our nation races toward a civil rights catastrophe. Over the years, race- and class-biased policy making has successfully been hidden in the midst of a culture of low tolerance and fear of crime. The policies and biases that fuel the Prison Industrial Complex have had a disproportionate impact on colored and impoverished Americans, including the criminal record-based discrimination that affects millions of U.S. citizens each year. Before America holds itself out to the rest of the world as a pillar of democracy and freedom, we must first deal with the racism proxy we have created with our burgeoning criminal justice system and the invisible punishment that follows conviction and confinement.*

**T**he United States has the highest documented incarceration rate and total documented prison population in the world.<sup>1</sup> When race is considered, the rate by which the United States incarcerates its citizens is not proportionate with racial representation in its society, nor does it correlate with documented criminal behavior. There is an extraordinary magnitude of incarceration of low-income people of color, and the stark disparity in their rates of incarceration means that a black male has about a one in three chance of going to prison during his lifetime. For a Hispanic male, the chance is one in six; for a white male, one in seventeen.

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Nor does punishment end when people are released from custody or finish their maximum sentence. Each year, millions of Americans with criminal records face a maze of policies and regulations that keep them from accessing the necessities for rebuilding their lives and becoming functioning members of society. Legal restrictions, licensing requirements, occupational bars, inadvertent and deliberate discrimination practices, and the cultural stigma associated with having a criminal record prevent many people—especially those from economically distressed communities of color—from obtaining services or basic needs, such as voting, education, public housing, employment, public benefits, foster parenting, and so on. When these individuals inevitably fail to reintegrate and are reincarcerated, they are not the only ones who suffer. So do their families, communities and indeed the entire country; valuable lives are wasted, the public is less safe, and civil rights are diminished.

To understand the significance that criminal record-based discrimination holds as a civil rights issue, its history and societal interrelations have to be taken into consideration. Criminal record-based discrimination is a multifaceted issue because of its close relation to historical race-based discrimination and the swelling Prison Industrial Complex (PIC).

In his farewell speech in 1961, former President Dwight D. Eisenhower warned American citizens and the upcoming administration about the dangers of a swelling Military Industrial Complex (MIC)—the struggling U.S. economy had already begun to depend on the growing authority of U.S. military endeavors, technological industry, and public policy. He urged America to consider the dangerous potential of a new political culture that had already taken shape and gained ground:

This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence—economic, political, even spiritual—is felt in every city, every state house, every office of the Federal government. We recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society.

In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.<sup>2</sup>

The country's participation and victory in the world wars gave American politics a new attitude. Especially after World War II, the United States became engulfed in a culture of war—not only could problems be solved with war, but money could be made, and American hegemony could prosper. The technological advancements that came from the development of new weaponry and warfare strategies could be used at home and abroad. The emergence of the Department of Defense and the increase of government funding for military endeavors gave the military a new and powerful place in our government. Not

only was the military receiving a major portion of government funding, but it was also producing a major portion of the government's income. Policy making began to have more room for military interests. In short, the United States was getting comfortable with its dependency on the military for economic growth and national "safety." The Military Industrial Complex paved the way for increased policing at home, military activity and control abroad, and ultimately for the expansion of the vast Prison Industrial Complex.

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Since Eisenhower's warning, the growth of military "solutions" to the challenges that we faced as a nation rapidly led to the development of a war mentality that not only permeated our international politics but our domestic approach to social problems as well. Immediately following the civil rights movement of the 1960s and 1970s, the U.S. administration turned to punishment as a solution to the uproar of citizens who were uniting, organizing, and rebelling against the injustices of our nation, which, in the eyes of policy makers, amounted to committing "crimes." Sentencing became harsher and longer, policies became more encompassing, more people were being sent to prison, and the public was introduced to a racist and classist approach to understanding crime. Forty-seven years later, the United States is infamously recognized domestically and abroad as a rising police state.

Although overall crime rates (violent, misdemeanors, etc.) have fallen steadily since 1994, the construction and expansion of prisons has increased since the end of the civil rights era. Slightly more than two million Americans are incarcerated although violent crime decreased 43 percent from 1980 to 2000 and continues to fall. As the prison system expands, so do the number of policies and statutes that result in incarceration as a response to various forms of behavior. The tough-on-crime attitude that pervades our consciousness as a solution to crime allows U.S. citizens to overlook the multiple injustices and negative repercussions of such an encompassing mass incarceration project.

Beginning in the 1980s, the same decade of the appearance of mandatory minimum sentencing, the construction of new federal and state prisons took flight. By the early 1990s, America had topped the world in incarceration rates, imprisoning more black men than South Africa during the period of apartheid. Today, staying true to our historical lust for dominance, we rank highest in the world's incarceration rates and in having the highest numbers of an incarcerated population; more than 7.2 million people were on probation, in jail or prison, or on parole at the end of 2006—amounting to one out of every thirty U.S. adults incarcerated.<sup>3</sup>

Tough-on-crime political attitudes have played a fundamental role in keeping people flowing into the prisons. Mandatory

minimums and the three strikes laws mandate specific prison time for crimes committed regardless of the circumstances of an individual case. With these reigning policies, more people are entering our prisons than are being released—resulting in overcrowded prisons and the false notion that we need to build more prisons in order to incarcerate our way to public safety.

But building prisons is not the only aspect of the notorious Prison Industrial Complex. This massive project is also a booming billion-dollar industry. The Prison Industrial Complex, like its predecessor the MIC, is a network of government institutions, private corporations, policies, and cultural attitudes and stereotypes that all combine to then utilize prisons, policing, and the military to control and exploit American communities. It is both heavily commercialized and privatized, and its success is tightly connected with governmental decision making. Private corporations (such as the Corrections Corporation of America and the Wackenhut Corporation) function in close relation with the federal government and politicians—working with interest groups, policy makers, and the media to both create a culture of low tolerance for and fear of rising crime and to ensure a stream of policies and procedures that maintain a steady streams of bodies to fill prison cells.

The tremendous expansion of the criminal justice system over the last twenty years results principally from disparate enforcement of drug laws in communities of color. Although it is well known that use of drugs does not differ by race and ethnicity,<sup>4</sup> 55 percent of people incarcerated for drug crimes are black. The Rockefeller Drug Laws and the War on Drugs stand out among a multitude of policies that criminalize more people for victimless crimes while also promoting racial discrimination in sentencing patterns and societal assumptions. Developed in 1973, the Rockefeller Drug Laws alone violate multiple constitutional rights, such as the right to privacy, the right to be free of unreasonable searches and procedures, and the right to equal protection under the law.

Similarly the War on Drugs, with its “zero-tolerance” policies has become “a war on families, a war on public health, and a war on constitutional rights.”<sup>5</sup> Because so many people from

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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

more recent War on Terror has its own unique set of violations, as it has created policies that allow more people to be detained without trial, and has encouraged discrimination against Arab American and immigrant communities.) What all of these have in common is the disproportional tendency to incarcerate people of color for nonviolent crimes.

The growth of the Prison Industrial Complex in conjunction with discrimination through policy, policing and sentencing,

and biased cultural attitudes, combine to create the “perfect storm” for a repeal of civil rights. The exponential and unchecked growth of the Prison Industrial Complex and the “second-class citizenry” created as a result of the “invisible punishment” attached to a criminal conviction is closely interrelated with many other problems that we face in American society, such as racism, classism, growing inequality, slowing economic growth, and globalizing capital.<sup>6</sup> Civil rights are violated when a person or group of persons is discriminated against because of membership in a particular group or social class.

Criminal record-based discrimination serves as a way to deny an entire group of people (regardless of race, but very race-specific) their rights as citizens. The series of policies that comprise the criminal justice system and the collateral consequences tied to criminal records ensure that members of minority and impoverished communities cannot attain the resources or political power they need if they are to improve their lives or extricate their communities from the grip of the criminal justice system. For example, in many states, people who are convicted of felonies are forever denied the right to vote. This policy continues the legacy of racial oppression with which states such as Mississippi and Alabama are associated.

Criminal justice policies across the United States have created a phenomenon of mass arrest and incarceration that has decimated black and Hispanic 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 and the resulting abrogation of civil rights. A criminal record has become a surrogate for race-based discrimination throughout the United States, serving the same function as did the Black Codes and Jim Crow in earlier times. These 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.”

There are clear parallels between the segregation of 1954 that was addressed in *Brown* and the “re-segregation” of today, 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.” 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 also 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



*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 re-segregation caused by the collateral consequences of criminal convictions.*

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. 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 re-segregation caused by the collateral consequences of criminal convictions.

The collateral consequences of conviction have become the means to repackage institutional racism in ways that affect 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.<sup>7</sup> Black males aged twenty to thirty have significantly higher rates of incarceration than other racial groups with an estimated one in three black men between the ages of sixteen and thirty-four 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.<sup>8</sup> 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.<sup>9</sup>

The criminal justice system has created a new divide in the United States. Prior to *Brown*, race was an instrument of social control, but 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. Without denying the progress since *Brown*, blacks who have been convicted, served time, and are now seeking reintegration through education and employment are confronted by circumstances analogous to the segregation faced by *Dred Scott* and *Plessy*. As with *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 education, employment, and political opportunities. Collateral consequences have removed even the facade of equality, envisioned in the segregated society approved by the *Plessy* court. The United States is the only democracy that disenfranchises people who have completed their sentences. We must eliminate the "detrimental effects" of re-segregation 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."

## Endnotes

1. King's College of London, "Prison Brief."
2. Eisenhower, "Farewell Address."
3. U.S. Department of Justice. Bureau of Justice Statistics, *Corrections Statistics for 2006*.
4. Substance Abuse and Mental Health Services Administration, "National Survey."
5. Drug Policy Alliance, "What's Wrong."
6. Davis, "Masked Racism." Mauer and Chesney-Lind, *Invisible Punishment*.
7. Garland, *The Culture of Control*.
8. Harrison and Beck, "Prisoners in 2004."
9. Schiraldi and Ziedenberg, "Cellblocks or Classrooms?"

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