

INTENDED CONSEQUENCES?

HOW THE HISTORY OF POLICING AND PROSECUTING HAS  
LED TO PERPETUAL PUNISHMENT: ADVOCATING FOR  
STRUCTURAL CHANGE

NOFSW CONFERENCE  
JUNE 14<sup>TH</sup>, 2022

---

GEORGE S. LEIBOWITZ, PHD, LICSW

LIZ JUSTESEN, ESQ.; MSW

STONY BROOK UNIVERSITY

SUSAN P. ROBBINS, PHD, LCSW

UNIVERSITY OF HOUSTON



# OBJECTIVES

---

- **Collateral consequences** include laws that automatically ban court-involved populations from full participation in society, which is a human rights concern. At the state and local level, reforms are needed that promote community reintegration and effectively address community safety and recidivism concerns.
- This workshop will review and consider policy and programmatic efforts that promote structural change in unjust systems including relevant criminal and civil procedures, legislative reforms, and programs that advance restorative justice principles among diverse populations.
- Identify skills in oral and written advocacy including mitigation reports.

# DEFINITIONS

---

**COLLATERAL CONSEQUENCE.**—The term “collateral consequence” means a collateral sanction or a disqualification.

- **COLLATERAL SANCTION**

- (A) means a penalty, disability, or disadvantage, however denominated, that is imposed by law as a result of an individual’s conviction for a felony, misdemeanor, or other offense, but not as part of the judgment of the court; and
- (B) does not include a term of imprisonment, probation, parole, supervised release, fine, assessment, forfeiture, restitution, or the costs of prosecution.

- **DISQUALIFICATION.**—The term “disqualification” means a penalty, disability, or disadvantage, however denominated, that an administrative agency, official, or a court in a civil proceeding is authorized, but not required, to impose on an individual convicted of a felony, misdemeanor, or other offense on grounds relating to the conviction.

---

What are examples of collateral consequences from your practice experiences?

What makes individuals more likely to succeed upon reentry?





Trending Issues: COVID-19 Life Sentences Voting Rights



Issues

The Facts

Take Action

About Us

Search



SENTENCING POLICY  
INCARCERATION  
DRUG POLICY

RACIAL JUSTICE  
YOUTH JUSTICE  
GENDER JUSTICE

VOTING RIGHTS  
COLLATERAL CONSEQUENCES  
CAMPAIGN TO END LIFE IMPRISONMENT

ISSUES

# Collateral Consequences

**1.4 MILLION  
CHILDREN**  
in the United States  
has a  
**PARENT  
IN PRISON**



[Read More](#) ▶

**5.2  
MILLION**  
Americans  
**CANNOT  
VOTE**  
because of  
a felony conviction



[Read More](#) ▶

KEY PUBLICATIONS

Thinking About Prison and its Impact in the  
Twenty-First Century ▶

Poverty and Opportunity Profile: Eliminating  
Barriers to Reentry ▶

Voting Rights in the Era of Mass  
Incarceration: A Primer ▶

A Lifetime of Punishment: The Impact of the  
Felony Drug Ban on Welfare Benefits ▶

6 Million Lost Voters: State-Level Estimates  
of Felony Disenfranchisement, 2016 ▶

Invisible Punishment: The Collateral  
Consequences of Mass Imprisonment ▶



# PROTECTING PUBLIC SAFETY OR INCREASING STIGMA AND ENCOURAGING RECIDIVISM?

---

- **Hampers successful reentry into society**—including barriers to voting and other civic participation, education, employment, professional licensing, housing, and receipt of public benefits.
- **Stigmatizes individuals** with criminal records long after the completion of their sentences. BIPOC individuals and persons with disabilities are disproportionately impacted.

# CURRENT STATE OF AFFAIRS

---

- Over 70 million Americans have a criminal record
- 9 million have a felony conviction
- 113 million have an immediate family member who has spent time in jail or prison
- 1.9 million people currently detained (prison, involuntary commitment, youth, and immigration included)
- 10-11 million going through our local jails every year
- US incarcerates more people, particularly women and children, than any other country in the WORLD!

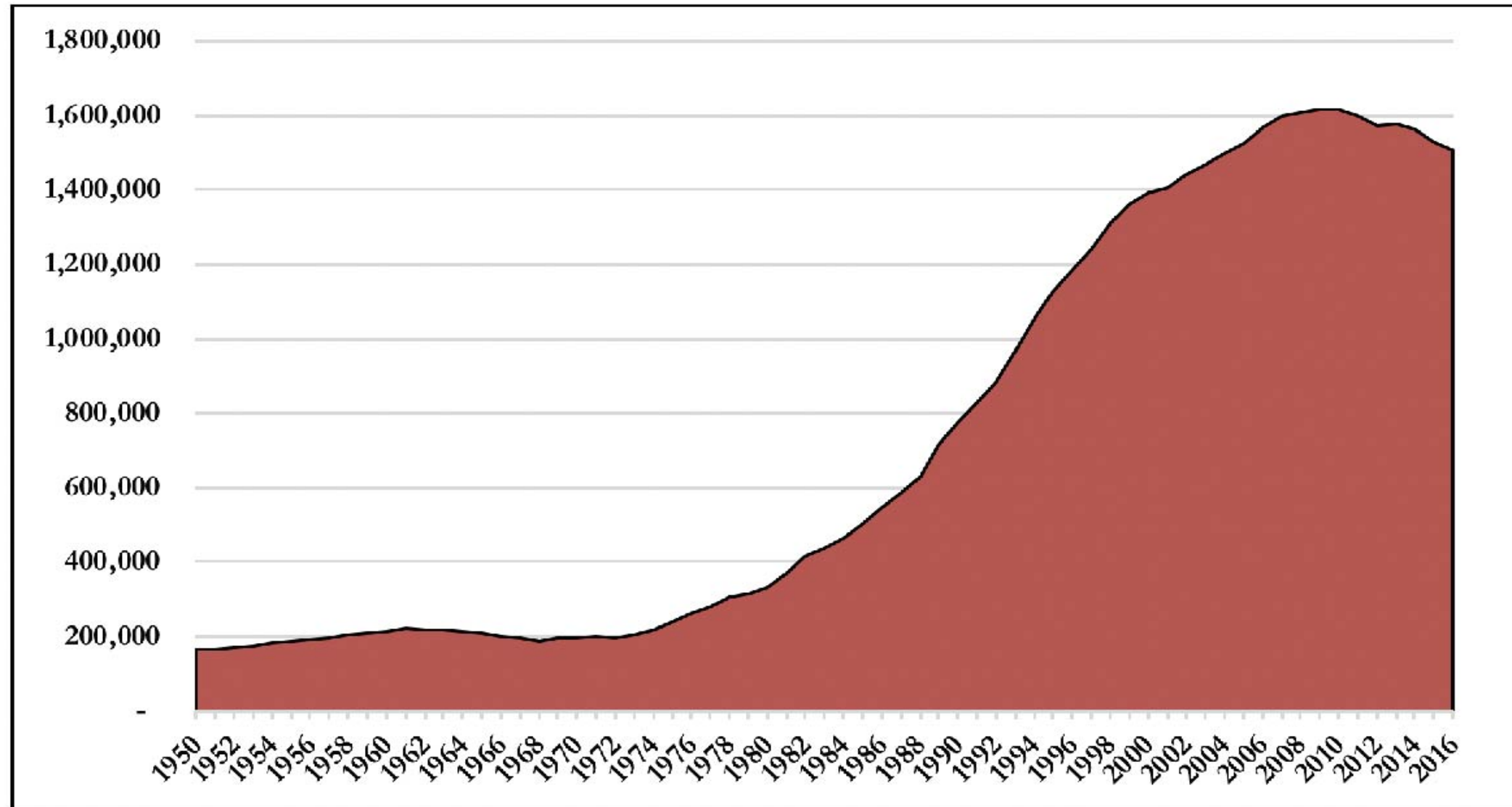
# THE ROAD TO MASS INCARCERATION

---

Following the gains achieved by the Civil Rights era, the United States embarked upon a crusade that swept up low-income people, minorities, drug users, and those with mental health issues into a system of supervision, jails, prison, and perpetual punishments



## Prison System Growth (1950-2016)



# TOUGH ON CRIME WITH THE WAR ON DRUGS

---

- Nixon officials now admit that their administration sought to target the anti-war left, and drug users, particularly African Americans who were far more likely to be arrested for selling or possessing drugs than whites, even though whites use drugs at the same rate and are more likely to sell drugs.
- Nixon's domestic policy chief, John Ehrlichman, admitted that the war on drugs was designed to have precisely this impact on the Black community.
- "...but by getting the public to associate the hippies with marijuana and Blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did."  
(<https://ejournal.org/news/nixon-war-on-drugs-designed-to-criminalize-black-people/>)

# RAMPED UP BY REAGAN POLICIES

---

- When Reagan took office in 1980, the total prison population was 329,000, and when he left office eight years later, the prison population had essentially doubled, to 627,000. (Brennan Justice Center, <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>)
- Sensationalist media accounts of “soaring” crime rates in the 1980s and early 1990s combined with extraordinary resentment about rehabilitation programs within prisons to create a political environment in which every elected official sought to be “tough on crime.” Decrying that “[g]angs and drugs have taken over our streets and undermined our schools,” (<https://ejournal.org/news/nixon-war-on-drugs-designed-to-criminalize-black-people/>)
- And let us not forget the “CRACK EPIDEMIC”, and the images of the crack babies on TV!
- “So far, these scientists say, the long-term effects of such exposure on children’s brain development and behavior appear relatively small.... Cocaine is undoubtedly bad for the fetus. But experts say its effects are less severe than those of alcohol and are comparable to those of tobacco — two legal substances that are used much more often by pregnant women, despite health warnings.” (<https://www.nytimes.com/2009/01/27/health/27coca.html>)

# BROKEN WINDOWS POLICING

---

- 1990's- NYPD begins tactical and organizational reforms under “Broken Windows”, order maintenance, or “quality-of-life policing”- then disseminated to cities around the country
- Resulted in mass misdemeanor charges and “marking” of people, which will influence future encounters with law enforcement
- Low-level enforcement allowed police to stop, summon, or arrest people; and then question them about unsolved crimes, check for outstanding warrants, and initiate records collection before any adjudication of guilt

( Kohler-Hausmann, Issa. Misdemeanorland 2018)



# THE 1994 CRIME BILL- NOT JUST REPUBLICAN POLICIES

---

- Although Bill Clinton advocated for treatment instead of incarceration during his 1992 presidential campaign, after his first few months in the White House he reverted to the drug war strategies of his Republican predecessors by continuing to escalate the drug war. Notoriously, Clinton rejected a U.S. Sentencing Commission recommendation to eliminate the disparity between crack and powder cocaine sentences. (<https://drugpolicy.org/issues/brief-history-drug-war>)
- President Bill Clinton in 1994 signed the Violent Crime Control and Law Enforcement Act, allotting \$12.5 billion to states to increase incarceration, enforce mandatory minimums, and ended Pell Grant eligibility for people in prison.
- By 1994, all states had passed at least one mandatory minimum law, but the 1994 crime bill encouraged even more punitive laws and harsher practices on the ground, including by prosecutors and police, to lock up more people and for longer periods of time. (<https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis>)

# SLOW POLICY CHANGES UNDER BUSH ON THE STATE LEVEL

---

- The era of George W. Bush also witnessed the rapid escalation of the militarization of domestic drug law enforcement. By the end of Bush's term, there were about 40,000 paramilitary-style SWAT raids on Americans every year – mostly for nonviolent drug law offenses, often misdemeanors. While federal reform mostly stalled under Bush, state-level reforms finally began to slow the growth of the drug war.

(<https://drugpolicy.org/issues/brief-history-drug-war>)

# DIGITIZING CRIME DATA OF THE PERSON

- 
- Digital criminal records are routinely posted online by governmental agencies, sold in bulk through public-private contracts to data brokers, and reposted by a variety of private websites (National Center for State Courts n.d.; Lageson 2020).
  - Mass dissemination of pre-conviction data: every year, over ten million arrests, 4.5 million mug shots, and 14.7 million criminal court proceedings are digitally released at no cost. Post-conviction, approximately 6.5 million current and former prisoners and 12.5 million people with a felony conviction have a record on the Internet.
  - Racial minorities who have a criminal record may also be more likely to be marked, marginalized, and disenfranchised by criminal record stigma (Pager 2007; Stoll and Bushway 2008). Further, poor people of color may be less likely to have the resources to curate and manage their digital reputation online (Marwick and Boyd 2018).
  - When criminal justice agencies provide agency-specific information online, records often fail to reflect updates to a criminal case, such as a dismissal or an expungement. According to a Bureau of Justice Statistics study, only thirty-one states can say that 60 percent of their records include final disposition information (US Department of Justice 2014).

(Retrieved from: Lageson, Sarah and Webster, Elizabeth and Sandoval, Juan, Digitizing and Disclosing Personal Data: The Proliferation of State Criminal Records on the Internet (October 25, 2020). Law and Social Inquiry, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=3718644> or <http://dx.doi.org/10.2139/ssrn.3718644> )



# THE PLEA-BARGAINING STATE OF AFFAIRS

---

- The overwhelming majority (90 to 95 percent) of cases result in plea bargaining.
- Prosecutorial discretion in plea bargaining is known to cause discrepancies in sentencing outcomes.
- Those who go to trial rather than accept a plea are more likely to receive harsher sentences.
- Legal variables, including the seriousness of the current offense and prior record, are important factors in determining whether a charge will be reduced and by how much.
- The majority of research on race and sentencing outcomes shows that blacks are less likely than whites to receive reduced pleas.
- Evidence concerning gender and age in this research has been inconclusive.
- Both legal and extralegal characteristics are heavily influenced by prosecutorial discretion and by the region where the case is processed.

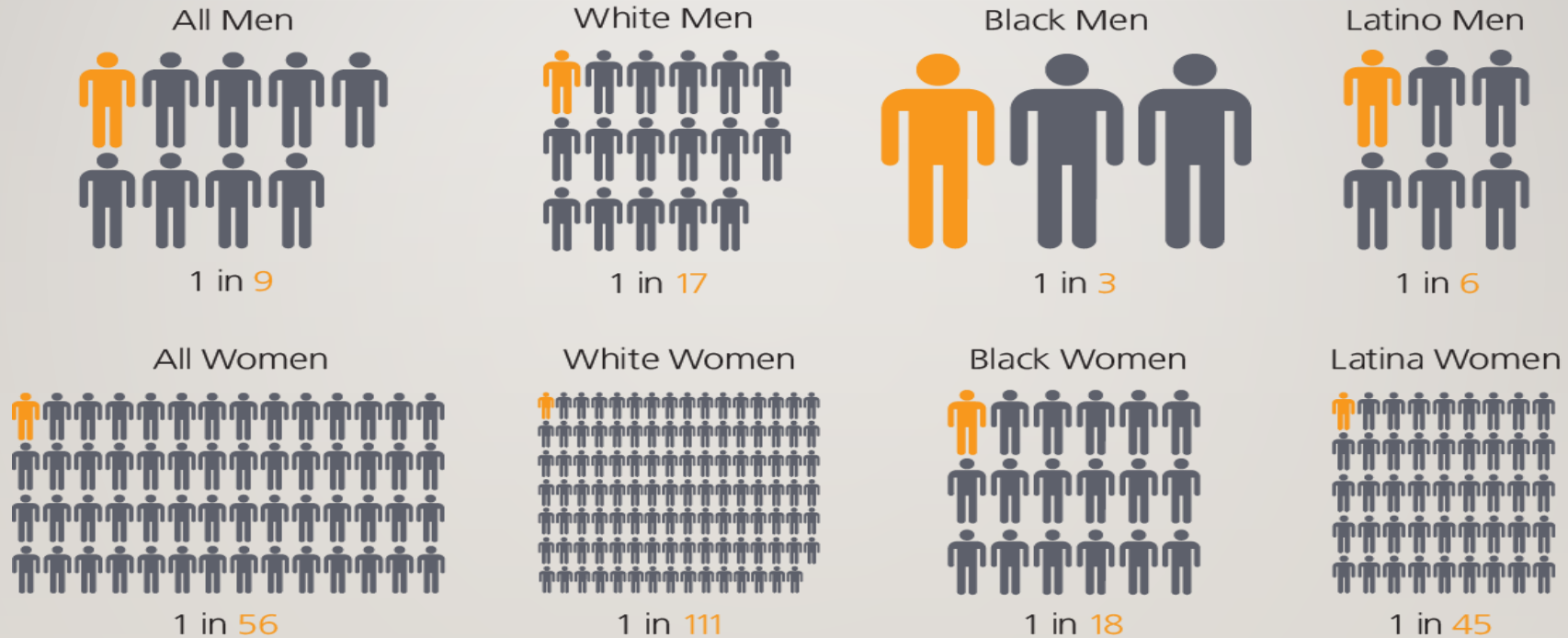
(Retrieved from:

<https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf>)



# RACIAL DISPARITIES

## Lifetime Likelihood of Imprisonment of U.S. Residents Born in 2001

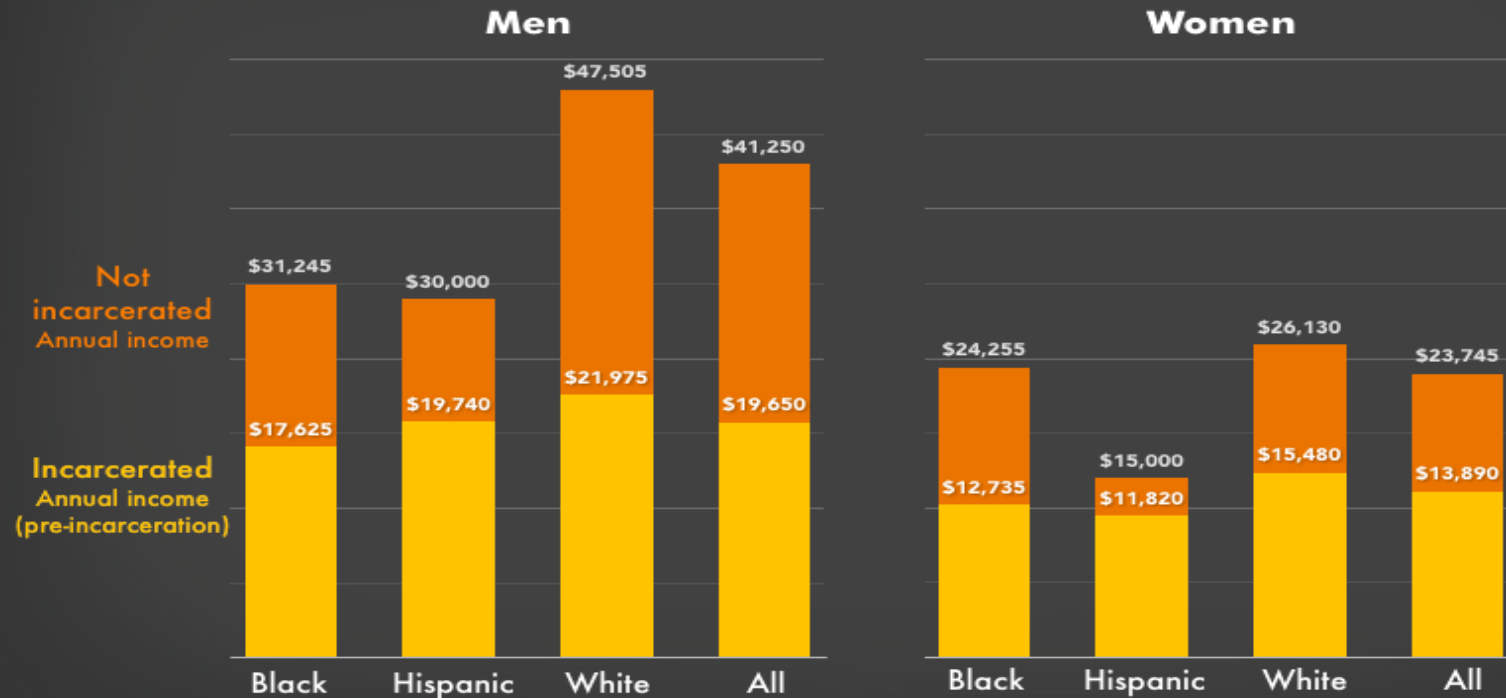


Source: Bonczar, T. (2003). *Prevalence of Imprisonment in the U.S. Population, 1974-2001*. Washington, DC: Bureau of Justice Statistics.

# INCOME DISPARITIES

## Most people in prison are poor, and the poorest are women and people of color

Median annual pre-incarceration incomes for people in state prisons ages 27-42, compared to incomes of same-age non-incarcerated people, by race/ethnicity and gender (in 2014 dollars)



Compiled by the Prison Policy Initiative. For detailed data notes, see [www.prisonpolicy.org/reports/income.html](http://www.prisonpolicy.org/reports/income.html)

**PRISON**  
POLICY INITIATIVE

AFTER THE CONVICTION.....

---

Are the Consequences Collateral?



# COLLATERAL CONSEQUENCES

---

- Laws that automatically ban some previously convicted from public benefits, housing, driving licenses, civic participation, education, and employment opportunities
- There are over 45,000 collateral consequences across the country
  - website: National Inventory of Collateral Consequences of Conviction (NICCC- <https://niccc.nationalreentryresourcecenter.org/>)
- 5.1 Million cannot vote across the country if a felon (1.3 Million just restored in Florida!- BUT all fines and fees on cases must be paid in full- “poll tax”)
  - SEE: <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>
- Families can become homeless when they are evicted due to the criminal convictions of one of the family members
- Many educational licenses have strict rules related to criminal convictions, particularly felonies
  - Check your State’s licensing guidelines



# PADILLA V. KENTUCKY 559 US 356 (2010)

- 
- Padilla, a 40-year permanent resident of the U.S., was charged with transporting a large amount of marijuana. Padilla's attorney said that he would not be deported as a result of pleading guilty to a drug charge because he was in the country for so long. In fact, deportation was virtually mandatory for the crime to which he pleaded.
  - When seeking post-conviction relief, Padilla argued that his counsel was ineffective. He indicated that he would not have pleaded guilty if he knew that deportation was likely.
  - The Kentucky Supreme Court rejected his petition, finding that deportation was only a collateral consequence of Padilla's conviction. Thus, the Sixth Amendment right to effective counsel did not include advice on immigration consequences.
  - The U.S. Supreme Court reversed and remanded. It held that a criminal defense attorney has the obligation to advise his client of the potential immigration consequences of pleading guilty to a criminal charge.

Source: <https://legaldictionary.net/padilla-v-kentucky/>

# SO, IS IT ONLY ABOUT IMMIGRATION?

---

- NO
- Using the Strickland analysis to other consequences, other states are finding for petitioners
  - New Mexico- Sex Offender registration; New York- Driver License privileges
- Padilla provides constitutional leverage to extend liability to any and all serious and likely penalties intimately related to criminal charges
  - We should know about collateral consequences, tell our clients, and work to avoid or mitigate
  - Consider using a list of the most common and pervasive to review with clients- Checklist in materials
  - Failure to do so.... 440 motion for “Ineffective assistance of counsel”?

# MORE AND MORE PENALTIES

---

- Accumulation of consequences over the years with the significant increase in arrest and incarceration rates, DESPITE reduction in crime rates
  - NOT only felonies – misdemeanors, violations, and petty offenses have penalties
  - Arrests alone can trigger ancillary civil proceedings- “proof of criminal activity”- housing, school discipline, employment actions
- Over policing, overcriminalization of offenses, racial and income bias- these penalties effect our clients the most
- Further culprit- the exponential increase in the availability of criminal history data at people’s fingertips
  - Many inaccuracies and inappropriate reporting of offenses on multiple background checks
- Lack of meaningful post-conviction relief acknowledging “rehabilitation” and lack of understanding by decisionmakers about what the post-conviction relief means (<https://restoration.ccresourcecenter.org/>)

# HOW CAN I KNOW ALL OF THEM?

---

- Maybe you cannot, BUT there several pervasive themes that characterize the true consequences of a criminal plea, and you can make inquiry and look them up
- Padilla mentioned guidance from the American Bar Association to assess where an attorney's competency should lie to this issue, drawing upon the knowledge of immigration law and its relevance for criminal conviction outcomes
- In 2015, ABA held the National Summit on Collateral Consequences and spoke about the National Inventory of the Collateral Consequences of Conviction (NICCC) database
  - Approximately 45,000 distinct consequences identified and catalogued
  - Can use the site, looking up consequences by State
- Is ABA guiding us to better understand that “collateral consequences” are something we are to be concerned about?



# ENMESHED PENALTIES

---

- It is suggested we need to change the words from “collateral consequences” to “enmeshed penalties” (*See* Smyth, McGregor. “Collateral No More”, <http://ssm.com/abstract=2132851>)
  - Collateral meaning: accompanying as secondary or subordinate – is housing, employment, attainment of a trade or educational license collateral?
- Hidden punishments – but are they hidden?
  - How many of you know there will be issues with housing, bank loans, employment, and educational licenses after a client takes a plea
- Failure to acknowledge and identify traps low-income clients in recurring encounters with criminal and family “justice” systems
- The “enmeshed penalties” become PERPETUAL PUNISHMENTS for our clients, many lasting a lifetime causing hardship and stigma, DRIVING RECIDIVISM

# FAILURE TO ADDRESS DENIES DUE PROCESS

---

- Ask your client if their inability to get gainful employment, housing, or a bank loan are collateral
- Due process is intertwined with this issue, and our failure to investigate and inform:
  - Ineffective assistance of counsel
  - Questions the voluntariness of pleas
  - Deals with the proportionality of punishment
  - Offends traditional notions of fairness – point out that which is “offensive”

# EMPLOYMENT- GENERAL

---

- Those entering prison generally have lower than average incomes, and the time spent in the system diminish their ability to continue school and attain job skills to help them in their return. (Lo 2020 retrieved from <https://www.americanprogress.org/issues/criminal-justice/news/2020/06/25/486864/>)
- Additionally, 9 out of 10 employers use background checks as part of their applicant hiring process. (Lo 2020)
- An applicant with a criminal record is 50 to 63% less likely to get called back or an actual offer as compared to those with no criminal record. (Lo 2020)
- In a 2018 article by Couloute and Kapf, formerly incarcerated people are unemployed at a rate of over 27%, rates mirroring those of the Great Depression. These rates are complicated with racial and ethnic biases that further the ability of some to get full-time work capable of providing a living wage. (<https://www.prisonpolicy.org/reports/outofwork.html>)

# FEDERAL AND STATE EMPLOYMENT

---

## ○ FEDERAL –

- Certain federal laws, like those prohibiting treason, carry with them a lifelong ban on federal employment.
- Other federal laws prohibit federal employment for a certain number of years.
- The Bond Amendment imposes restrictions related to national security positions.
- People convicted of misdemeanor domestic violence crimes under Federal or State law are “prohibited from employment in any position requiring the individual: to ship, transport, possess, or receive firearms or ammunition” (Public Law 1-4-208 Omnibus Consolidated Appropriations Act of 1997.)
- States vary on their laws – See <https://www.nolo.com/legal-encyclopedia/state-laws-use-arrests-convictions-employment.html>



# MILITARY SERVICE

---

- Persons entering the Armed Forces should be of good moral character. The underlying purpose of moral character enlistment standards is to minimize entrance of persons who are likely to become disciplinary cases or security risks or who disrupt good order, morale and discipline. Moral standards of acceptability for service are designed to disqualify the following kinds of persons:
  - Individuals under any form of judicial restraint (bond, probation, imprisonment or parole).
  - Those with significant criminal records.
  - Persons convicted of felonies may request a waiver to permit their enlistment. The waiver procedure is not automatic, and approval is based on each individual case. One of the considerations in determining whether a waiver will be granted is the individual's ability to adjust successfully to civilian life for a period of time after his or her release from judicial control.
  - In processing waiver requests, the military services shall require information about the "who, what, when, where and why" of the offense in question; and a number of letters of recommendation attesting to the applicant's character or suitability for enlistment. Such letters must be from responsible community leaders such as school officials, ministers and law enforcement officials.
  - Those who have been separated previously from the military under conditions other than honorable or for the good of the service.
  - Those who have exhibited antisocial behavior or other traits of character that would render them unfit to associate with military personnel.

Source: [military.com](http://military.com)



# LAW ENFORCEMENT JOBS

---

- Even an ACOD/ACD can disqualify a person from law enforcement positions
- Top disqualifiers include:
  - Felony
  - Serious misdemeanor
  - Unreported past crimes
  - Domestic violence
  - Past or current drug use
  - Dishonorable discharge from the military
  - Poor credit history
  - Poor driving record
  - Poor employment history

# OCCUPATIONAL LICENSING

- 
- Barred from Working- A National Study of Occupational Licensing Barriers for Ex-Offenders” is a comprehensive guide to how states address criminal convictions when addressing educational licenses and gives an overall grade on the legal protections for licensing applicants with criminal records. (See <https://ij.org/report/barred-from-working/>)
  - Another report by the Justice Center, Council of State Governments and the National Reentry Resource Center in January 2021 focused on the fields that are most affected by criminal convictions. At the top of the list are
    - health care
    - public employment
    - education and schools.(Umez 2021, retrieved from <https://csgjusticecenter.org/publications/after-the-sentence-more-consequences/national-report/>)
  - Nearly half of all employment-related collateral consequences are “mandatory,” meaning they prohibit the employment, retention, or licensing of a person with a conviction for a specified offense regardless of evidence of rehabilitation, the relationship between the person’s offense and the job, or other considerations.
  - The remaining “discretionary” consequences allow employers, licensing entities, and other decision-makers to impose a consequence, but do not require it. (Umez 2021)

# TRADE SCHOOLS

---

- Although trade school can offer excellent lifelong careers, those with criminal convictions can still face challenges when trying to participate in this arena. (See <https://www.trade-schools.net/articles/jobs-for-felons>)
- Additionally, although many trade unions do not bar those with criminal convictions, certain county, State, and Federal work sites conduct criminal background screenings of the labor teams for special projects, which can result in exclusion and work furloughs to those with criminal convictions.



# EDUCATION

- 
- Three national surveys of institutional admissions practices, conducted in 2009, 2010, and 2014 by separate research teams, indicate that 60 to 80 percent of private institutions and 55 percent of public institutions require undergraduate applicants to answer criminal history questions as part of the admissions process. While the practice is more common at four-year institutions, 40 percent of community colleges also report collecting such information. (Scott-Clayton 2017 retrieved from <https://www.brookings.edu/research/thinking-beyond-the-box-the-use-of-criminal-records-in-college-admissions/>)
  - FAFSA - Free Application for Federal Student Aid (“FAFSA”) asks questions about drug use and convictions. You will be banned from participating in the program if:
    - a. You were convicted as an adult for the possession or sale of illegal drugs while receiving federal student aid. (FAFSA, 1)
    - b. But, you can regain eligibility by successfully completing an *approved drug rehabilitation program*
      - i. OR passing two unannounced drug tests administered by an approved drug rehabilitation program. (FAFSA, 1) 20 U.S. C. 1091 (r)(2)(A)(i-ii)(West); 20 U.S. C. 1091 (r)(2)(B)(West).
      - ii. OR, if the conviction is reversed or set aside. 20 U.S. C. 1091 (r)(2)(C)(West).
  - Controlled substances **include marijuana**. 21 U.S.C.A. § 802 (6) (West); 21 U.S.C.A. § 802 (16)(A) (West). Individuals in states where marijuana is legalized should look to see if they can get their convictions expunged, sealed, or otherwise removed.

# FURTHER EDUCATIONAL DISADVANTAGES

---

- The American Opportunity Tax Credit allows families to get a tax credit for education expenses. However, this is denied to families if the student is convicted of a felony drug offense. *26 U.S.C.A. § 25A (b)(2)(D) (West)*. These felony offenses include both Federal and State offenses. *26 U.S.C.A. § 25A (b)(2)(D) (West)*.
- They also do not limit this to distribution or sale of drugs; it includes possession of a controlled substance. *26 U.S.C.A. § 25A (b)(2)(D) (West)*. Remember, marijuana is a federally controlled substance despite some states where it is legal.

# IMMIGRATION AND RIGHT TO TRAVEL

---

- Immigration- MUST CONSULT WITH ATTORNEY THAT SPECIALIZES IN IMMIGRATION TO EVALUATE DEPENDING ON STATUS
- TRAVEL- The US is not the only country trying to keep out people with criminal records, does your client like to travel abroad?
  - Canada – strict on any conviction, no matter how minor or how many years ago, particularly DUI/DWI offenses
  - EU – fairly lax except for crimes with more than 3 years imprisonment, or drug charge with more than 2 years imprisonment; Germany more strict than other members
  - Australia/New Zealand – strict for offenses within last 10 years
  - Japan – no admittance for crimes punishable for over year
  - Many other countries make inquiry during your VISA application, and will collect details about the record and seek rehabilitative info prior to approval



# CIVIC PARTICIPATION

---

- Voting – states vary on when those with felonies and/or misdemeanors can vote
  - <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>
- Public office restrictions
  - The Constitution allows a convicted felon to be a member of Congress, even if in prison.
    - It's up to the Senate or House to decide who may serve.
  - As for state offices, different laws apply in different places. Check the rules for your state
- Jury service
  - Under federal law, one is disqualified from serving on a federal jury, grand jury or petit jury if one was convicted of any crime punishable by imprisonment for one year or longer unless one's civil rights have been restored under federal law. The only way to have one's civil rights restored under federal law is through a presidential pardon.
  - Every state has some form of jury exclusion- *See* <https://www.prisonpolicy.org/reports/juryexclusion.html>



# GUN RIGHTS

---

- Under 18 U.S.C. § 922(g), federal firearms rights are lost upon conviction of a “crime punishable by a imprisonment for a term exceeding one year.” The statutory relief specified in 18 U.S.C. § 925(c) has not been funded by Congress since the early 1990s. *See United States v. Bean*, 537 U.S. 21 (2002).
- Under 18 U.S.C. § 921(a)(20), a disqualifying conviction does not include one that “has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored...unless such pardon, expungement, or restoration of rights expressly provides that the person may not ship, transport, possess, or receive firearms.” A similar loss and relief scheme is applicable to conviction of “a misdemeanor crime of domestic violence.” *See* 18 U.S.C. § 921(a)(33)(B).
- In general, state offenders who lost civil rights\* may avoid federal firearms restrictions if their rights were restored by whatever means, including by operation of law, and if they have no state law firearms disability. *See Caron v. United States*, 524 U.S. 308, 313 (1998).
- State rights vary - <https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/>

# HOUSING

---

- Section 8 - Two absolute bars:
  - 1. lifetime sex-offenders. If any member of the household is subject to a lifetime registration requirement under a State sex offender registration program. *24 C.F.R. § 982.553 (2)(i)*
  - 2. Meth convictions -“ Any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.” *24 C.F.R. § 982.553 (a)(1)(ii)(c)*
  - \*HUD regulations require **a preponderance of the evidence**.
  - <https://www.hud.gov/sites/documents/12-28PIHN12-11HSGN.PDF> (pg. 2)
- Will ask you if you have a criminal history or background.
- Any omission is grounds for terminating a voucher or application.
- HUD is **federal**, they do *federal background checks*.
  - It's important to be extremely honest, even if you have sealed cases. If you run into issues with this, contact my office.

# BUT..... PERMISSIVE PROHIBITIONS IN HOUSING

---

- The catch-all. Permissive prohibitions.
- (A) The PHA may prohibit admission of a household to the program if the PHA determines that any household member is currently engaged in, or has engaged in during a reasonable time before the admission:
  - (1) Drug-related criminal activity;
  - (2) Violent criminal activity;
  - (3) **Other criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity;** or
  - (4) Other criminal activity which may threaten the health or safety of the owner, property management staff, or persons performing a contract administration function or responsibility on behalf of the PHA (including a PHA employee or a PHA contractor, subcontractor or agent).

*24 C.F.R. § 982.553 (ii)(a)(3).*
- “PHA may terminate assistance for criminal activity....based on a preponderance of the evidence...regardless of whether the household member has been arrested or convicted for such activity.” *24 C.F.R. § 982.553 (c).*



# PUBLIC BENEFITS

---

- SNAP and TANF
  - Individuals convicted under federal or state law of any crime with a controlled substance is ineligible for SNAP or assistance for any State program funded under part a of title IV of the Social Security Act. 21 U.S.C.A. § 862a (a)(1-2)(West).
  - However, a State can opt out of this requirement. 21 U.S.C.A. § 862a (d)(1)(A) (West). Many states have opted out of this requirement. (*See* <https://www.clasp.org/publications/report/brief/no-more-double-punishments>)
  - Look here for your state's position - <https://www.sentencingproject.org/publications/a-lifetime-of-punishment-the-impact-of-the-felony-drug-ban-on-welfare-benefits/>



# FINES, SURCHARGES, AND RELEASE FEES

---

- Restitution, fees for incarceration, court fines and surcharges, as well as the fees to be on supervision, electronic monitoring, sex offender registration and mandated programs cause enormous burdens on people and their families. (See “The Debt Penalty- Exposing the Financial Barriers to Offender Reintegration”, Douglas E. Evans, 2014 retrieved from <https://jjrec.files.wordpress.com/2014/08/debtpenalty.pdf>)
- If an individual has not paid restitution, most courts consider this individual to not have completed their sentence.
  - In some states, like Florida, this renders these individuals' ineligible to vote.
  - Outstanding fees and fines can impair post-conviction relief
  - Criminal restitution is not dischargeable in bankruptcy. *11 U.S. Code § 523 (13); 11 U.S. Code § 523 (19)(B)(iii)*
  - When judgements are entered, they can affect the ability to get employment, loans, and housing.

# FAMILY ISSUES

---

- Custody in divorce/separation – convictions can be used against a parent, raise issues of fitness
  - Has your client been primary caretaker- how will this plea possibly affect that in your jurisdiction
- Child support – does not automatically stop if someone is jailed or imprisoned
  - If they do not file for a modification, arrears continue to increase, affecting commissary and the client comes home facing more consequences for the debt owed
- Inability to be a foster care parent – in certain jurisdictions, agencies can deny relatives to receive funding to care for children placed in their custody (kinship foster care)
- Removal of children- based on the allegations, concurrent proceedings in Family Court where the burden of proof for removal is lower
- Loss of parental rights- long term treatment placement or incarceration while a child is in foster care can result in the State terminating rights and adopting children out

# FAMILY MEMBERS SUFFERING

- 
- One research study found that the average amount of money spent on conviction-related costs, including restitution and attorney fees, was \$13,607. Commissary or court-related programs were additional expenses. (deVuono-powell et al 2015; retrieved from <http://whopaysreport.org/>)
  - Mitigation- describe the person's family, particularly children; their role in their life... and how a protracted absence may affect the child, relationships, and the child's future (using ACE's, stats on parental incarceration and its affects)
  - “Who Pays? The True Cost of Incarceration on Families” found 2 in 3 families had difficulty meeting basic needs during their loved one's incarceration and nearly one in 5 were unable to afford housing. (deVuono-powell et al 2015)
  - Then when the family member comes home, the family is in turmoil, faced with hardships further compounded by their loved one's reentry struggles.
  - Personalize these enmeshed penalties into your mitigation advocacy



# CIVIL FORFEITURE

---

- Federal and state asset forfeiture laws affect our clients
- Property seized during arrests, warrant execution, impounding of a car
  - Can be unrelated to the case
  - Can be property of someone else who lives with the client
- With civil asset forfeiture, our founding principle of “innocent until proven guilty” is flipped on its head. The burden rests on the property owner to prove their property is “innocent” of any crime
- A 2001 survey of 770 law enforcement agencies found that nearly 40 percent viewed forfeiture funds as “necessary” to their budgets- incentivizing the seizure of assets
- Advocate for the return of property as part of the agreement, demand hearing for the State to prove the assets are proceeds from the crime

Source: <https://americansforprosperity.org/civil-asset-forfeiture-unpopular-and-unjust/>



SOURCE: BRENNAN CENTER FOR JUSTICE “CONVICTION, IMPRISONMENT, AND LOST EARNINGS” (SEPT. 2020)

## Lost Earning Potential Due to Involvement in the Criminal Justice System (2017)

	NUMBER OF PEOPLE	ANNUAL AVERAGE EARNINGS LOSS	AVERAGE LIFETIME EARNINGS LOSS	AGGREGATE ANNUAL EARNINGS LOSS
<b>Formerly imprisoned people</b>	<b>7.7 million</b>	<b>52%</b>	<b>\$484,400</b>	<b>\$55.2 billion</b>
White	2.7 million	—	\$267,000	—
Black	2.7 million	—	\$358,900	—
Latino	2.3 million	—	\$511,500	—
<b>People convicted but not imprisoned</b>			<b>\$98,800*</b>	
Felonies	12.1 million	22%	—	\$77.1 billion
Misdemeanors	46.8 million	16%	—	\$240.0 billion
<b>Total</b>				<b>\$372.3 billion†</b>

\* In this table, \$98,800 represents lifetime earnings lost due to a conviction in general, whether for a felony, a misdemeanor, or another offense. Because of data limitations, this report is not able to offer a more precise estimate.

† Because of potential overlap between categories, the actual annual aggregate loss may be smaller than \$372.3 billion.

STRUCTURAL SOLUTIONS INCLUDING RESPONSIVE  
REGULATION (BRAITHWAITE, 2002, 2008, 2019)

---

There is a need for better  
advocacy prior to sentencing

# ORAL ADVOCACY

---

- Using research and the NICCC database- we should investigate the penalties for our clients whether they lose at trial on all counts or are taking a plea to a lesser charge
- Discuss what is revealed with the client – what are their priorities? Although we may not be able to eliminate, and informed plea must contemplate
- Develop a strategy to negotiate with the prosecutor or judge to advocate against the types of penalties that OFFEND the traditional notions of justice and fairness
- Ask how the current conviction and penalties will PROMOTE the client's reentry
  - Purpose of the penal law in your state – look it up!
  - NY- CPL 1.05(6)- To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, the promotion of their successful and productive reentry and reintegration into society, and their confinement when required in the interests of public protection.

# MITIGATION REPORTS

---

- Invaluable resource utilized by defense attorneys to better understand who are clients are and what has happened to them, rather than what is wrong with them
- Use enmeshed penalties in the report
  - Have previous convictions closed doors for the client, lost opportunities
  - How will a conviction or sentence affect THIS client's life?
  - Have a clients family members directly or indirectly been affected, and how has that impacted our current client
    - Themes of intergenerational poverty
    - Intergenerational incarceration
    - Intergenerational trauma
    - Community violence and/or economic distress



# PRESENTENCING REPORTS BY DEFENSE

---

- If allowed in your state – do not squander the opportunity to present your client from a strength's perspective
- Law enforcement reports traditionally highlight police contacts, family members court involvement
- Use the defense option to highlight our client as a person, AND highlight all the enmeshed consequences that will be placed upon them with certain sentences
- Then, offer alternatives that further the concept of “justice” and minimize the enmeshed penalties – present a viable plan

# CRIMINAL REFORM ADVOCACY: INCREMENTAL AND RADICAL STRUCTURAL CHANGE

---

- Incremental change: a process that modifies or refines the status quo with relatively minor changes in agency or organizational policy
- Radical structural change: major changes to the laws and policies that created inequality
- BOTH CAN OCCUR AT THE SAME TIME!



# INCREMENTAL CHANGE – MACRO LEVEL ADVOCACY

---

- Ban the Box - Nationwide, 37 states and over 150 cities and counties have adopted what is widely known as “ban the box” so that employers consider a job candidate’s qualifications first—without the stigma of a conviction or arrest record.
  - <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>
- Clean Slate - **Clean Slate Initiative** is working to fix this broken system in states across the country by advancing policies to automatically clear eligible criminal records. By sealing or expunging certain records after an individual remains crime free for a period of time we can remove these barriers, get people back to work and open the door to opportunity for them and their family. (<https://ccresourcecenter.org/2020/08/03/the-clean-slate-initiative-a-national-bipartisan-coalition/>)
- Need for more ATI’s and Diversion programs routing people away from the criminal system and more Deferred Prosecution and Deferred Sentencing options for those with mental health and substance abuse issues

# EXAMPLES OF INCREMENTAL CHANGE

---

- Promote Restorative Justice practices
- Promote true diversion programs for substance abuse, mental health, and youth
- Changes in policing policies to include social workers, mental health counselors, medical workers on staff



# EXAMPLES OF RADICAL CHANGE

---

- Legalize all drugs and engage in harm reduction
- Eliminate zero tolerance policies in schools
- End the school to prison pipeline
- Stop building new prisons and private prisons
  - In 2021, 1.4 million people were incarcerated in the US
  - 116,000 people have been incarcerated in private prisons since 2019
  - From 1990 – 2005 the U.S. built a new prison every 10 days

# INDIVIDUAL HUMANITY

---

- Mr. Padilla was a person
- Our clients are people
- It is our duty to bring humanity and dignity to each client
- The enmeshed penalties are drivers of recidivism

“NO ONE WILL DARE TRAMPLE THE RIGHTS OF THE POOR AND HELPLESS UNDER FOOT, AS LONG AS THE APPEARANCE OF THE SOCIETY’S ATTORNEY IN COURT DEMANDS RESPECT AND CAREFUL CONSIDERATION OF THE RIGHTS OF ITS CLIENTS.”

- Arthur von Briesen, NY Legal Aid Society



# VALUABLE WEBSITES AND ORGANIZATIONS

---

- Center for Community Alternatives – [www.communityalternatives.org](http://www.communityalternatives.org)
- Re-Entry.net – [www.reentry.net](http://www.reentry.net)
- Vera Institute
- Prison Policy Initiative
- The Sentencing Project
- The Exoneration Project
- National Inventory of Collateral Consequences
- ACLU