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What's a Civil Lawyer to Do?

THE SHADOW OF  
CRIMINAL RECORDS



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Sargent Shriver National Center on Poverty Law

# Chicago's Title VII Working Group

By Margaret Stapleton

**Margaret Stapleton**  
Senior Attorney

Sargent Shriver National Center on  
Poverty Law  
50 E. Washington St. Suite 500  
Chicago, IL 60602  
312.263.3830 ext. 234  
mstapleton@povertylaw.org

**T**he backstory: This special issue of CLEARINGHOUSE REVIEW is itself evidence of the complexity of the challenges facing individuals, families, and communities as a result of America's war on crime. Sometime in the past three decades, give or take a few years, America began charging, convicting, and imprisoning more and more Americans (of whom minorities were the great majority) for more and more kinds of offenses, for longer and longer periods. America also stopped rehabilitation programs for those it was imprisoning. And America sent prisoners far away from their home communities, often to rural and economically depressed areas of a state, where prisons became *the* local industry, or even to other states, which gladly received the exported prisoners to fill their own overbuilt prisons and get paid for doing so by the sending state.<sup>1</sup>

The magnitude of incarceration in the United States is staggering. According to the Bureau of Justice Statistics, as of December 31, 2001, an estimated 5.6 million adults had ever served time in state or federal prison; 4.3 million are former prisoners, and 1.3 million are adults in prison. Nearly a third of former prisoners (731,000 on parole, 437,000 on probation, and 166,000 in local jails) were still under correctional supervision. In 2001 an estimated 2.7 percent of adults in the United States had served time in prison, up from 1.8 percent in 1991 and 1.3 percent in 1974. The prevalence of imprisonment in 2001 was higher for black males (16.6 percent) and Hispanic males (7.7 percent) than for white males (2.6 percent) and higher for black females (1.7 percent) and Hispanic females (0.7 percent) than white females (0.3 percent).<sup>2</sup>

The likelihood of going to state or federal prison is rising. Again, according to the Bureau of Justice Statistics, if recent incarceration rates remain unchanged, an estimated one of every fifteen persons (6.6 percent) will serve time in a prison during one's lifetime. Lifetime chances of a person going to prison are higher for men (11.3 percent) than for women (1.8 percent) and higher for blacks (18.6 percent) and Hispanics (10 percent) than for whites (3.4 percent). Based on current rates of first incarceration, an estimated 32 percent of black males will enter state or federal prison during their lifetime, compared to 17 percent of Hispanic males and 5.9 percent of white males.<sup>3</sup>

At the same time that America was incarcerating more and more people, it was layering on postincarceration punishments and barriers such as barring people with criminal records from many professions and jobs, from some public benefits, from educational opportunities, from living with their families or in certain parts of their communities, and from visiting their children's schools. These new barriers joined historic ones such as restrictions on voting and holding public office. The existence of a person's criminal record became very, very public as computerized databases and the Internet made information about criminal charges and convictions, once stored as papers on shelves or in cabinets at courthouses or law enforcement agencies, available quickly and fairly cheaply to almost anyone interested.

<sup>1</sup>The Bureau of Justice Statistics of the U.S. Department of Justice is the premier source of statistical information on crime, victims, offenders, and the federal and state criminal justice systems. See [www.ojp.usdoj.gov/bjs](http://www.ojp.usdoj.gov/bjs).

<sup>2</sup>Bureau of Justice Statistics, U.S. Department of Justice, [www.ojp.usdoj.gov/bjs/crimoff.htm](http://www.ojp.usdoj.gov/bjs/crimoff.htm).

<sup>3</sup>*Id.*

From the perspective of the Sargent Shriver National Center on Poverty Law, where acting to end poverty is our day-in-and-day-out work, the convicting and incarcerating of hundreds of thousands of Americans was extremely troubling not only for its overall wrongheadedness and racism but also for its correlation to being poor. A criminal record often, usually in fact, means that the person with the record is poor, the person's family is poor, and the community is poor because of the legal and societal barriers people with records face as they struggle to become responsible, self-sufficient, and law-abiding members of civil society.

This viewpoint probably mirrors that of many legal services advocates. While advocates were working hard and smart on a wide array of legal problems of the people of their communities, an epidemic of a new cause of poverty (conviction records) was brewing. Clients coming to legal aid offices with problem X often revealed an overlay on problem X—the client or someone in the client's family had a conviction record, and the conviction record was permeating almost everything. In some ways the criminal-record overlay resembles other overlays with which legal aid lawyers have become very familiar, such as domestic violence or undocumented-person status. Unless they are peeled off, these overlays change, constrict, complicate, and cast a shadow over so many aspects of the client's life that things will just not work out very well over time. However, lawyers may hesitate to act because this is such unfamiliar ground for civil legal aid advocates. After all, it is all entwined in criminal law, and most civil legal aid advocates simply do not practice criminal law. A growing "reentry" social services industry (led by community organizations and employment and training service providers) works with people with records to help prepare them for jobs.

These reentry groups appear to be experts in what they are doing. States and cities are themselves recognizing the problem and issuing reports and recommendations. So what is there for a civil law attorney to do? The answer to that question is "plenty."

The story: Hoping to add legal muscle and a variety of legal perspectives to the growing efforts to help people with criminal conviction records "reenter" society successfully, a small and evolving group of advocates in Chicago (mostly lawyers but community organizers and reentry service providers, too) began to meet in June 2006. In recognition that the federal Equal Employment Opportunity Commission's guidance issued under Title VII of the Civil Rights Act on the legality or illegality of employers' blanket no-hire policies for persons with criminal conviction records was likely to be the best authority (at least in Illinois which has neither state constitutional nor state human rights act protections for persons with conviction records) for challenging employment denials, we called ourselves the "Title VII Working Group."<sup>4</sup>

A few weeks earlier, a few dozen advocates from around the country met in Philadelphia for a meeting organized by Community Legal Services and the National Employment Law Project and entitled "Forging a Legal Strategy to Remove Barriers to Employment of People with Criminal Records."<sup>5</sup> I attended that conference and used its materials as the draw for the first meeting of our working group. I invited a small number of colleagues to my office to "brief" them on the Philadelphia conference materials and to consider whether an ongoing meeting might be valuable. The people who came and who have kept coming are, by and large but by no means all, lawyers and paralegals. The starting and ongoing focus of the group has been what lawyers can do.

<sup>4</sup>Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, prohibits employment discrimination based on race, color, religion, sex, and national origin. The statute does not, on its face, bar discrimination based on conviction records. However, the U.S. Equal Employment Opportunity Commission has taken the position that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population, and therefore, in the absence of a justifying business necessity, such a policy or practice is unlawful under Title VII. See CCH EEOC COMPLIANCE MANUAL § 604, ¶ 2088 (2007).

<sup>5</sup>Forging a Legal Strategy to Remove Barriers to Employment of People with Criminal Records, Philadelphia, Pa. (June 1–2, 2006), conference materials, [www.reentry.net/library.cfm?fa=detail&id=125383&appView=folder](http://www.reentry.net/library.cfm?fa=detail&id=125383&appView=folder).

As a work in progress, the Title VII Working Group may not exactly be a “model” for groups elsewhere. Nevertheless, articulating some of its features and describing some of its work so far may be useful for advocates who recognize the need for a broader view of the barriers that people with records face and the need for examples of efforts to overcome them.

The most remarkable (in the sense of “worth remarking on”) feature of the Title VII Working Group is that it is eclectic. Its members are not only people engaged in the reentry business. Rather its evolving membership includes employment lawyers, civil rights and civil liberties lawyers, public and private criminal defense lawyers, general practice poverty lawyers, an occasional state or local government attorney, community groups, as well as the more expected “reentry” providers. Fairly recently we recognized the need to bring in immigration and consumer lawyers and advocates.

Another remarkable feature is that we have no clear experts. Instead we all learn from one another. We share and work together on research. We have no hesitancy about being redundant when we e-mail an article that has come to our attention—even when everyone else likely saw it, too. We try out ideas on one another when they are just that, ideas. In short, we are good colleagues to one another. We also recognize that there is a lot that we do not know: none of us is a criminologist, corrections expert, or statistician, and we need the wisdom of such experts to improve our work.

The group is also increasingly aware of the ease with which one can do harm when advocating about criminal records. This is due to the strong temptation to draw lines (for example, felonies versus misdemeanors, recent convictions versus older ones), which help some people but leave others on the wrong side of the dividing line.

The working group works in three sub-committees—litigation, legislation, and community—with considerable overlap in

membership. The full group meets every month or six weeks. Between meetings we share information, ideas, and questions by e-mail, and we collaborate. For example, we developed a form for gathering information from people with conviction records about their experiences in applying for jobs and are using that document at several sites where people with records come for legal assistance—legal aid offices, the Help Desk at the county courthouse, and community meetings. Many working group members had a hand in drafting the form and are helping distribute it in the community. Two employment discrimination lawyers will collect and analyze the survey.

During our first year, we focused on legislative work in the Illinois General Assembly. Working group members drafted, lobbied, testified, or otherwise worked on bills that award ninety days of early release from parole for convicted persons who pass the GED (general educational development) test while on parole; lower barriers to employment by state agencies for persons with nonviolent criminal conviction records by delaying agencies’ access to some applicants’ conviction information until the agencies consider the applicants’ suitability for the job without taking into account nonviolent criminal history; expand the categories of offenses eligible for expungement or sealing of criminal records; and authorize state-funded drug school programs for nonviolent drug offenders. Some, but not all, of these bills are likely to be passed by the General Assembly and become law. Members also worked on establishing an Illinois Legislative Taskforce on Employment of Persons with Past Criminal Convictions which will hold hearings, examine the employment barriers faced by persons with conviction records, and recommend to the legislature and the governor by December 2008 legislative changes to lower these barriers. Working group members will work closely with the task force chairperson on the structure and scope of these hearings.

That is the story so far. Stay tuned.

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