

Practicing With Conviction: Race, Reentry, and the Legal Profession

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INTRODUCTION

Within recent years, different areas of the legal community have publicly addressed the need for racial justice. The killing of George Floyd and the reckoning with race that followed prompted law schools, bar associations, and court systems, as well as government, private, and non-profit legal organizations, to publicly acknowledge that racial disparities continue to persist in our society.¹ While most of these legal institutions have made some recognition of the fact that the legal system has played a role in perpetuating systemic racism, they have essentially failed to address how discrimination against system-impacted individuals² continues to deepen racial and socioeconomic inequities within the legal profession itself.

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¹ *State Court Statements on Racial Justice*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice> [https://perma.cc/B29D-MMT8]; *ABA President Judy Perry Martinez Statement Re: Events in Minneapolis, Elsewhere and Equal Justice*, A.B.A. (May 29, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/05/aba-president-judy-perry-martinez-statement-re--events-in-minnea/> [https://perma.cc/YF6V-JHWK]; *NLADA Statement on the Killing of George Floyd and Standing Up with Communities to Defeat Racist Violence*, NAT'L LEGAL AID & DEF. ASS'N (June 1, 2020), <https://www.nlada.org/node/32531> [https://perma.cc/8DAP-Q7HV]; *Open Letter From Leaders of the Partnership for New York City*, P'SHIP FOR N.Y.C. (June 2, 2020), <https://pfny.org/news/open-letter-from-leaders-of-the-partnership-for-new-york-city/> [https://perma.cc/9E8C-QN3F]; Trevor Morrison, *A Message from Dean Trevor Morrison to the Law School Community on Recent Events*, N.Y.U. (June 1, 2020), <https://www.law.nyu.edu/news/trevor-morrison-message-recent-events> [https://perma.cc/S2GH-4DGB]).

² In this Essay, I used the term system-impacted, as defined by the Berkeley Underground Scholars Initiative, to refer to those "who have been incarcerated, those with arrests/convictions but no incarceration and those who have been directly impacted by a loved one being incarcerated." Michael Cerda-Jara, Steven Cifra, Abel Galindo, Joshua Mason, Christina Ricks & Azadeh Zohrabi, *Language Guide for Communicating About Those Involved in the Carceral System*, BERKELEY UNDERGROUND SCHOLARS (March 6, 2019), <https://undergroundscholars.berkeley.edu/blog/2019/3/6/language-guide-for-communicating-about-those-involved-in-the-carceral-system> [https://perma.cc/5JMZ-MH6Y].

It is well documented that racial bias is particularly pervasive in the criminal legal system.³ People of color are stopped, arrested, and sentenced at rates that are disproportionate to their representation in the population.⁴ In New York, for example, Black people make up fifteen percent of the state's population, yet they account for thirty-eight percent of arrests.⁵ Across the United States, people of color are overrepresented in the legal system but underrepresented in the legal profession. According to recent statistics that have not changed in over a decade, only five percent of lawyers identify as Black and Latinx respectively.⁶ The legal profession is not representative of the people it serves in part because of the criminal records that result from law enforcement interactions. Criminal records, whether a conviction occurs or not, serve as barriers to important educational and employment opportunities in the law for many people of color and their families over multiple generations.

While certainly the backgrounds of people seeking to enter the legal field should be considered, the overbroad and stigmatizing factors that are currently used by law schools and state bar admissions administrators serve to gatekeep the profession and exacerbate existing inequities. The legal profession would benefit from the diversity of experience that people of color impacted by the system bring, and yet these are the very people the profession excludes. Rather than embracing the experience of system-involved people, the legal profession utilizes arbitrary evaluations of character and risk to bar system-impacted people from accessing vital social welfare goods, such as education, licensure and employment. This disconnect provides the legal profession from what could otherwise be an opportunity to confront its own role in perpetuating racial marginalization. To repair some of the harms caused by racial bias in the law, the legal profession could serve as its own conduit to a reimagined form of reentry. Reentry in this context would not narrowly focus on individual rehabilitation and treatment interventions, but rather would encourage institutions that have deepened social and racial inequities to take proactive steps to provide access to educational and employment opportunities.⁷

³ Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. JUST. (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/KQ7X-LG6J>].

⁴ *Id.*

⁵ DAVID R. MARSHALL, REPORT AND RECOMMENDATIONS OF THE WORKING GROUP ON QUESTION 26 OF THE NEW YORK BAR APPLICATION I (2022).

⁶ *Lawyers by Race & Ethnicity*, A.B.A., https://www.americanbar.org/groups/young_lawyers/projects/men-of-color/lawyer-demographics/ [<https://perma.cc/S26B-HYZ4>].

⁷ JP Morgan Chase has spearheaded one example of a proactive approach bringing businesses into a public policy agenda that increases employment opportunities for people with criminal histories. JP MORGAN CHASE & CO. POL'Y CTR., GIVING PEOPLE WITH CRIMINAL BACKGROUNDS A SECOND CHANCE, <https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/documents/jpmc-policycenter-overview-v1-ada.pdf> [<https://perma.cc/J53F-7MLE>]; Jamie Dimon, Opinion, *If You Paid Your Debt to Society, You Should Be Allowed to Work*, N.Y. TIMES, Aug. 4, 2021.

This Essay, which grows from ongoing research highlighted in my symposium remarks, argues that the legal profession, with its history of racial exclusion and active participation in furthering mass incarceration, has both an obligation and an opportunity to adopt a proactive racial equity reentry agenda. Such an agenda would redistribute economic and social resources by creating intentional professional pathways for people with the lived experience of criminalization. An equity-oriented reentry agenda would not only help system-impacted people in rebuilding their lives, but it would also help to reshape a legal profession that has historically reinforced social and racial marginalization.

I. THE LEGAL PROFESSION'S ROLE IN MASS INCARCERATION

Mass incarceration has affected Black and Latinx people in the United States at significantly disproportionate rates in comparison to White people. In 2016, Black males accounted for 41.3% of incarcerated people in state and federal prisons.⁸ “The imprisonment rate for Black males 18 years of age or older was 1,609 per 100,000, compared with 857 per 100,000 for Hispanics and 274 per 100,000 for Whites.”⁹ Racial bias in the development and administration of criminal law and public policy, work dominated by lawyers, is a significant cause of these disparities. Yet the legal profession frequently fails to recognize and respond to the structural barriers it creates. Assisting individuals who are reentering society and are poised to advance the profession presents a necessary and appropriate response for the legal community's role in perpetuating mass incarceration.

While a full discussion of how and why the era of mass incarceration came to be in the United States is beyond the scope of this Essay, some of the macro drivers of mass incarceration relate to structural influences such as capitalism and racism.¹⁰ An interdisciplinary view of cultural history in the United States deems the social unrest of the 1960s as a particularly meaningful moment in the development of criminal justice policy. The civil rights movement disrupted the social and racial

⁸ Jason M. Williams et al., “*It’s Hard Out Here if You’re a Black Felon*”: A Critical Examination of Black Male Reentry, 99 PRISON J. 437, 438 (2019).

⁹ *Id.*

¹⁰ Marsha Weissman & Norman Brown, *Half Stepping Criminal Justice Reform: Reentry and the Experience of Formerly Incarcerated People*, PUBLIC (Feb. 19, 2019), <https://public.imaginingamerica.org/blog/article/half-stepping-criminal-justice-reform-reentry-and-the-experience-of-formerly-incarcerated-people/> [https://perma.cc/QNH2-92U8] (“The US carceral state has subsumed the welfare state as a response to the social and economic needs of its most marginalized population, a population that is excluded from an ever-shrinking job market. It is the mechanism to contain and disenfranchise communities of color, the latest in a long line of venal racism that includes slavery, the Black Codes, and Jim Crow. It has become the dog whistle of American politics reminding (white) voters what is at stake in elections.”) (citations omitted); see generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010); see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

hierarchy of the country, which in turn spurred a renewed reliance on punitiveness.¹¹ “[F]ear of crime, the values of exclusion rather than inclusion, and the need for social control, all of which continued to target minorities” have since remained the dominant approach to justice within the criminal legal system.¹² Carceral controls, the micro causes of mass incarceration, such as the “War on Drugs,” mandatory minimums, and harsh sentencing policies helped to ensure that the American prison population swelled with people of color.¹³

Lawyers were seated at the head of the table as the United States criminal legal system evolved into a system of mass incarceration. This is not to suggest that there were not valiant efforts by defense, civil liberties, and civil rights attorneys and groups to push back on over-criminalization. Yet, lawyers in policy, legislative, government, prosecutorial, corporate, and judicial positions frequently employed, and continue to employ, their power in ways that contribute to the excesses of mass incarceration.¹⁴ Further still, legal education plays a central role in rearing new lawyers who fail to interrogate, and worse yet, actively assist in, the caging and othering of disempowered populations in our society.¹⁵ Indeed, “[l]awyers and the schools that produce them must begin thinking through this challenge of redistributing legal labor so that law schools and lawyers are not mere tools for the mass human caging bureaucracy.”¹⁶ The legal profession has largely worked in service of mass incarceration. To reduce some of the inequity that has been and continues to be produced, an affirmative racial equity reentry agenda for the legal profession is needed.

¹¹ Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 308 (2017).

¹² *Id.* at 309.

¹³ Weissman & Brown, *supra* note 10.

¹⁴ “First, lawyers have failed properly to catalog, appreciate, and interrogate the negative costs of how our society polices and how it cages. We have not meaningfully confronted the brutality, torture, and indifference that our legal system inflicts every day (because we do it mostly to people who have no power).” Interview by Robert Costello with Alec Karakatsanis, Author (2020). ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM (2019).

¹⁵ ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM (2019).

¹⁶ Interview by Robert Costello with Alec Karakatsanis, Author (2020). ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM (2019). *See also* #DefundthePolice Solidarity, *A Time for Solidarity: An Open Letter to Our Colleagues*, MEDIUM (Aug. 24, 2020), <https://medium.com/@solidarityinthemoment/a-time-for-solidarity-8a1ce0e52210> [<https://perma.cc/C5L7-Q6NR>].

II. THE NEED FOR A RACIAL EQUITY REENTRY AGENDA IN THE LEGAL PROFESSION

Several barriers and gatekeeping measures both directly and indirectly prevent people with criminal records from obtaining jobs as legal professionals. These obstacles, some of which ostensibly exist to protect potential clients and maintain the integrity of the profession, frustrate the reentry efforts of system-impacted individuals, many of them Black or Latinx, who are seeking to put their valuable lived experience to productive use. While guardrails in the profession are needed, the current approach is overbroad, arbitrary, and exclusionary, therefore barring many promising candidates from contributing meaningfully to the legal profession. This is a disservice not only to system-impacted individuals and their families, who are seeking economic and social stability, but also to a profession that claims to be committed to diversifying its ranks and advancing a more equitable society.

A. Reentry as Racial Equity

According to estimates, over four million adults were on probation and parole in 2020, and nearly 650,000 people are released from prisons back into their communities each year.¹⁷ While people of different racial and economic statuses are among those on community supervision, the overrepresentation of Black people in incarceration, poverty, and recidivism statistics strongly suggests that race and reentry are “inextricably linked.”¹⁸ Black men with criminal records face compounded challenges of “disenfranchisement, public service ineligibility, student loan restrictions, child custody restrictions, employment restrictions, housing restrictions, and felon registration laws.”¹⁹ Those reentering from prison also find themselves returning to impoverished communities and disrupted families that remain in crisis with over-policing and a lack of educational and health resources. Furthermore, reentering people of color often lack social capital, or the value of social networks that help to create economic and political access. The existence of a social connection between formerly incarcerated people and supportive

¹⁷ Danielle Kaeble, *Probation and Parole in the United States, 2020*, U.S. DEP’T. JUST. (Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf> [<https://perma.cc/CMH5-5US8>]. Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 266 (2009).

¹⁸ Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 266 (2009). (“Given that (1) black Americans today constitute 900,000 of the total 2.2 million incarcerated persons, (2) black men have the highest chance of being incarcerated out of any other racial group in the country, (3) black offenders are most likely to recidivate, (4) ex-offenders return to the communities they lived in prior to incarceration and (5) ex-offender reentry is geographically concentrated in America’s poorest black neighborhoods, reentry is inextricably linked with race.”).

¹⁹ *Id.* at 292; Jason M. Williams et al., *supra* note 8, at 438 (2019).

communities is essential for successful reentry.²⁰ Social capital can be developed through educational and employment programming that facilitates system-impacted people engaging in activities that benefit society. Further, research suggests that reentry efforts and initiatives that enable formerly incarcerated people to develop social capital through purposeful work and supportive community with people of similar experience tend to lead to the best outcomes in terms of reintegration and lack of recidivism.²¹

This kind of approach has not historically been the norm for reentry efforts. Indeed, many scholars increasingly argue that it is time to evolve our concept of reentry.²² Reentry, a term popularized in the late 1990s, refers to a community-based approach which “involves new entities such as intermediaries or courts in reentry management, and explicitly uses social service agencies as boundary-spanning institutions that reach behind the prison walls and work together to ease the difficulties of the transition to community.”²³ Reentry mainly focuses on the individual ending a period of incarceration and their need to obtain services to support employment, substance issues, and to some extent housing and health needs so as not to recidivate.

While traditional reentry programs may be a needed and practical response to the immediate effects of mass incarceration, they usually do nothing to acknowledge or confront the decimated neighborhoods or “punitive crime control policies that push people into prisons in the first place.”²⁴ Many of these programs, especially the ones run by governmental entities, such as reentry courts, often serve to extend the reach of the carceral state.²⁵ Newer and promising reentry initiatives, many of them led by system-impacted and formerly incarcerated people, are moving away from a central focus on “the risks and needs of a reentering individual” and more on “strengths-based approaches [which] highlight the attributes of reentering individuals and draw on the experiences of former offenders who have successfully navigated their own reentry and best understand the pitfalls of the process.”²⁶

²⁰ Nancy Wolff & Jeffrey Draine, *Dynamics of Social Capital of Prisoners and Community Reentry: Ties that Bind?*, 10 J. CORR. HEALTH CARE 457 (2004).

²¹ James M. Binnall & Maryanne Alderson, *Reentry Processes in the United States*, in OXFORD RES. ENCYCLOPEDIAS (2019).

²² Lyles-Chockley, *supra* note 18.

²³ Jeremy Travis, *Reflections on the Reentry Movement*, 20 FED. SENT’G REP. 84, 84–87 (2007).

²⁴ Weissman & Brown, *supra* note 10 (“Loïc Wacquant challenges the reentry movement for failing to capture the reality that ‘... the vast majority of former convicts experience not reentry but ongoing circulation between the two poles of a continuum of forced confinement formed by the prison and the dilapidated districts of the dualizing metropolis. ...’”).

²⁵ Jennifer M. Ortiz & Hayley Jackey, *The System Is Not Broken, It Is Intentional: The Prisoner Reentry Industry as Deliberate Structural Violence*, 99 PRISON J. 484 (2019).

²⁶ Binnall & Alderson, *supra* note 21; Hadar Aviram, *Moral Character: Making Sense of the Experiences of Bar Applicants with Criminal Records*, 43 MANTIOPA L.J. 1, 23 (2020) (expanding the framework of reentry through an examination of the personal experiences of multiple bar takers seeking admission to the bar).

Additionally, what is missing from reentry initiatives are efforts to have social institutions acknowledge and be held to account for furthering excessive criminalization and continuing to exclude many system-impacted people from full and productive engagement in society. Reentry strategies in the legal profession should prioritize guidance from system-impacted people and institutional accountability for repairing harm.

B. Barriers to the Legal Profession as a Reentry Issue

My own exposure to this issue comes from the work of CUNY Law's Defenders Clinic, where we represent clients serving extremely long sentences for serious felony offenses.²⁷ For some of our clients, studying in the law library to better understand their case, the legal process, and even to help other incarcerated people has served as a lifeline. Incarcerated people often need legal representation but lack the resources to obtain a lawyer, particularly after they have exhausted all their legal claims and appeals. Incarcerated law clerks and jailhouse lawyers help other people who are incarcerated with legal issues ranging from criminal cases appeals to civil matters related to divorce or child support.²⁸ Despite limited access to educational and legal resources, many incarcerated advocates find a sense of purpose in learning the law and using it to advocate for themselves and others.

While perhaps not the case for all people leaving prison, many of these imprisoned legal advocates have an exposure, interest, and knowledge of the law that could easily transition into employable skills as a paralegal, legal worker, or lawyer. Yet, when trying to reenter and secure employment, despite all the personal and practical experience with the law, a criminal record frustrates their ability to formally enter the legal profession.²⁹

The legal discipline continues to exclude and stigmatize people with criminal histories through numerous barriers. First, because of their lack of access to

²⁷ The Defenders Clinic represents clients in parole, clemency, wrongful conviction and with legal issues after they are released. For more about our clinic and the clients we have served, see <https://www.law.cuny.edu/academics/clinics/defenders/> [https://perma.cc/46EM-76TZ]; <https://www.law.cuny.edu/slp/our-clients/> [https://perma.cc/RGS9-WLUE]. CUNY Law also has a very active Formerly Incarcerated Law Students Association, which has provided outstanding advocacy and leadership on this issue. See Chrissy Holman, *Formerly Incarcerated Law Students Advocacy Organization (FILSAA) and their Path to the Legal Workplace*, CUNY L. (Dec. 3, 2020), https://www.law.cuny.edu/newsroom_post/formerly-incarcerated-law-students-advocacy-organization-filsaa-and-their-path-to-the-legal-workplace/ [https://perma.cc/S94Q-9NDZ].

²⁸ Jennifer Gonnerman, *Home Free: How a New York State Prisoner Became a Jailhouse Lawyer, and Changed the System*, NEW YORKER (June 13, 2016), <https://www.newyorker.com/magazine/2016/06/20/derrick-hamilton-jailhouse-lawyer> [https://perma.cc/2KG9-F4CU].

²⁹ Michael Saavedra, *Bound by Law, Freed by Solidarity: Navigating California Prisons and Universities as a Jailhouse Lawyer*, 68 UCLA L. REV. DISCOURSE 36 (2021) (discussing his experience of being fired from his job as a paralegal at a law firm once his employer learned about his criminal record).

educational opportunities before their criminal contact, many system-impacted people may need to obtain high school and undergraduate degrees before they can consider formal legal education. Even for those who would like to work in the legal field as paralegals, obtaining formal paralegal certification can be costly and difficult to access while in prison or upon release. Likewise, the ability to take the Law School Admission Test (LSAT) in prison historically has not existed,³⁰ and test taking can be fraught with challenge for the recently released. For individuals who can clear all those hurdles, the cost of law school proves prohibitive and the application questions about prior convictions can also screen out candidates or discourage them from applying all together. Likewise, the character and fitness process, perhaps the most rigid and decisive of all the barriers, puts applicants who are at the tail end of an improbable journey through another series of nebulous assessments about their morals and character.³¹ It is an arduous, risky, and expensive process, with no guarantees.³²

C. The Benefits of Supporting System-Impacted People in the Legal Profession

1. Lived Experience Enriches the Law and Lawyering

As a first measure, the profession needs to better understand the value that comes from embracing the experience of system-involved people. The experience of being arrested, prosecuted, or incarcerated can provide a perspective about the legal system that has value for the system-impacted person and for others. Those who have been through the criminal legal system understand freedom, justice, and

³⁰ Noah Austin, *Bringing Legal Education to Those Most Affected by the Law*, LSAC (July 12, 2021), <https://www.lsac.org/blog/bringing-legal-education-those-most-affected-law> [https://perma.cc/UB59-6H4X].

³¹ Elizabeth Bodamer & Debra Langer, *Justice-Impacted Individuals in the Pipeline: A National Exploration of Law School Policies and Practices*, LSAC (Feb. 3, 2021), <https://www.cga.ct.gov/2021/heddata/tmy/2021HB-06228-R000302-Tejada,%20Dieter,%20Executive%20Director%20-%20Founder-NJIBA-TMY.PDF> [https://perma.cc/DWW9-RJNE]; Saavedra, *supra* note 29 (“For example, people convicted of a “violent felony” are presumed to not have good moral character, despite that term having no formal definition or fixed legal meaning.”); see Tarra Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations*, 128 YALE L.J. FORUM 759, 770–71 (2019). For more on the role of the character and fitness process in regulating the profession, see generally Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985); Carol M. Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1193 (2008); Leslie C. Levin, Christine Zozula & Peter Siegelman, *The Questionable Character of the Bar’s Character and Fitness Inquiry*, 40 L. & SOC. INQUIRY 51, 51 (2015).

³² Reginald Dwayne Betts, *Could an Ex-Convict Become an Attorney? I Intended to Find Out*, N.Y. TIMES (Oct. 16, 2018), <https://www.nytimes.com/2018/10/16/magazine/felon-attorney-crime-yale-law.html> [https://perma.cc/G58B-6YEE]; Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1667-1673 (2019).

fairness as more than simply abstract concepts. As observed by Elizer Darris, co-executive director of the Minnesota Freedom Fund,

From an absence of liberty comes an interest in mastering the law not out of curiosity, or as an academic exercise, or strictly in pursuit of a career. For those who have had their liberty stripped as a result of legal instruments being filed and a legal process carried out to conclusion: learning the rudiments of law is a vital vehicle for freedom.³³

Indeed, many system-impacted and formerly incarcerated people have had to learn and live with the scope and influence of the law from a deeply personal position. This lived experience of both studying the substance of the law and being subjected to it in its most extreme form has the potential to make these individuals insightful legal practitioners.

When those with firsthand experience of these legal processes are denied formal on-ramps into the legal field by virtue of morality clauses that make judgment calls on their character and fitness, they are simultaneously denied the opportunity to shape the contours of the legal discipline. This is, most importantly, a social and economic disservice to thousands of individuals who would otherwise be qualified to study and practice law. It is also a grave disservice to the legal discipline as it is not benefiting from—and laws are not advancing with—the wealth of generational legal knowledge and expertise held by currently and formerly incarcerated legal scholars and those whose lives have, in many cases, been upended by the legal system.³⁴

Lived experience or “expertise by experience” refers to the distinct, personalized knowledge and insight gained from being directly impacted by social conditions, systems, or situations that typically involve oppression, marginalization, or discrimination. Recognizing the value of the lived experience of criminalization should not be viewed as an attempt to essentialize criminal legal involvement to a singular type of experience or insight. It is without question that criminalization and incarceration affect every individual differently and the ability to make meaning out of direct, personal experience with the law and legal systems does not happen in one standard way. In addition to lived experience, system-impacted people, like all other candidates to the profession, should demonstrate aptitude for acquiring necessary core competencies, such as analytical and research skills and the ability to

³³ Elizer Darris et al., *The Prison-to-Law Pipeline Can Transform the Legal Discipline*, HENNEPIN LAW. (Apr. 2, 2021), <https://www.mnbar.org/hennepin-county-bar-association/resources/hennepin-lawyer/articles/2021/04/30/the-prison-to-law-pipeline-can-transform-the-legal-discipline> [https://perma.cc/SA29-SKF6].

³⁴ *Id.*

communicate effectively. Yet, strong reason exists to believe that integrating individuals with lived experience into helping professions, such as the legal profession, can be a powerful reentry priority.

The role of lived experience has been examined in social service professions involving mental health, substance abuse and disability. In social work, for example, credit is given to the idea that “people who have similar experiences can better relate and offer empathetic support.”³⁵ The value of having people with criminal records in professional helping roles for other system-impacted people is an emerging area of study. Formerly incarcerated people have been noted to serve in positions “such as youth worker, community volunteer, paraprofessional, lay therapist, or counselor to criminal-justice-involved individuals—namely, positions in which they feel their life experiences are both valuable to and valued by others.”³⁶ For some system-impacted people, pursuing work as a lawyer on the outside is motivated by the desire to be the type of lawyer they would have wanted for themselves. In addition to providing necessary empathetic support for other system-impacted people, being able to work in helping professions also benefits the individual providing the service. Studies demonstrate that so called “wounded healers” receive meaningful social and psychological benefits through their work, such as “reduced recidivism, sustained sobriety, and enhanced self-efficacy and self-esteem.”³⁷

The lived experience of criminalization and incarceration can be an asset to the legal profession and in other spaces that advance the common good.³⁸ Social justice and public interest legal organizations are increasingly recognizing that meaningful participation and leadership by system-impacted people can help to align an organization’s advocacy efforts and practices with the actual priorities and experiences of the populations they serve. From helping other system-impacted people with their legal issues, to founding non-profit organizations, and running for elected office, there are many noteworthy examples of the powerful contributions

³⁵ Angella Duvnjak et al., *How Does Lived Experience of Incarceration Impact Upon the Helping Process in Social Work Practice?: A Scoping Review*, 52 BRITISH J. SOC. WORK 354, 356 (2021).

³⁶ Caroline Cohn et al., *Unlocking the Bar: Expanding Access to the Legal Profession for People with Criminal Records in California*, STAN. L. SCH. CTR. LEGAL PRO. (July 2019), <https://www-cdn.law.stanford.edu/wp-content/uploads/2019/07/Unlocking-the-Bar-July-2019.pdf> [<https://perma.cc/8KV8-HQZP>]; Simmons, *supra* note 31, at 770-71 (“If we are to become a profession that reflects the values of inclusion and justice, we must start our efforts by looking in the mirror. We must value the lived experiences and professional insight of the diverse communities we serve . . . The single best way to balance the scales of justice is to empower individuals who have seen both sides of the law to reach out into our own communities and help other individuals climb up with us.”).

³⁷ Cohn et al., *supra* note 36, at 20.

³⁸ *Id.*; There is also established supported for “lived experience practitioners in the fields of mental health, disabilities, substance use and sex worker advocacy.” Angella Duvnjak et al., *supra* note 35, at 356.

that formerly incarcerated people make to other system-impacted people and to society.³⁹

Supporting the reentry efforts of system-impacted people seeking to work within the legal profession should be regarded as an important part of the racial justice strategies and initiatives of legal institutions, especially ones that have taken up the cause of racial equity and inclusion. Thoughtfully increasing pathways for the formerly incarcerated to engage in legal work would not only contribute to successful reentry efforts for impacted individuals; it would help to diversify the demographics of race, economic status and lived experience in the profession and move us closer to dismantling some of the racial and social biases within legal practice.

2. Another Way to Diversify the Profession

It is true that “[w]hen the legal community does not reflect the community it serves, lawyers will invariably make strategic errors and replicate the social and racial hierarchies they claim to be opposing.”⁴⁰ By all available measures, the profession is not representative of the people it serves. According to the American Bar Association, there are more than 1.3 million attorneys in the United States.⁴¹ White attorneys are “still overrepresented in the legal profession compared with their presence in the overall U.S. population.”⁴² Lawyers of color make up approximately 14.1% of all lawyers.⁴³ While Black people are about 13% of the U.S. population, Black attorneys amount to nearly 5% of all total lawyers.⁴⁴ Likewise, Latinx people make up 18.5% of the U.S. population, but only 5% of all lawyers.⁴⁵

In addition, available indicators suggest economic factors also compound the challenges of accessing legal education for students of color. Black students, for example, take on more financial debt than their peers.⁴⁶ Black law students have almost \$100,000 more average cumulative law school debt than white law

³⁹ Christopher Zoukis, *Former Prisoners Become Attorneys: From Breaking the Law to Practicing Law*, PRISON LEGAL NEWS (Feb. 4, 2019), <https://www.prisonlegalnews.org/news/2019/feb/4/former-prisoners-become-attorneys-breaking-law-practicing-law/> [https://perma.cc/JTR8-Q7Q3]; Caroline Cohn et al., *supra* note 36; Adam Liptak, *A Relentless Jailhouse Lawyer Propels a Case to the Supreme Court*, N.Y. TIMES, Aug. 6, 2019, at A9.

⁴⁰ Saavedra, *supra* note 29.

⁴¹ A.B.A., ABA PROFILE OF THE LEGAL PROFESSION 2 (2020).

⁴² *Lawyers by Race & Ethnicity*, A.B.A., https://www.americanbar.org/groups/young_lawyers/projects/men-of-color/lawyer-demographics/ [https://perma.cc/S26B-HYZ4] (“In 2020, 86% of all lawyers were non-Hispanic whites . . . By comparison, 60% of all U.S. residents were non-Hispanic whites in 2019.”).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ ABA Profile of the Legal Profession, *supra* note 41, at 28.

students.⁴⁷ Many states do not gather data on the racial, socioeconomic and criminal history backgrounds of students entering law school or for licensed lawyers, which limits the accessible information on different indicators of diversity in the profession.

III. STRATEGIES FOR REENTRY EQUITY IN THE LEGAL PROFESSION

Modest interventions can be taken by different actors within the legal profession to redistribute access to education and employment for system-impacted people marginalized by criminal record and racial bias.

All parts of the legal profession should both invest in and promote investment in prison education. Programs that allow incarcerated people to obtain secondary and post-secondary degrees provide an important foundation for anyone reentering after incarceration. Access to education has been shown to have a meaningful impact on reducing recidivism.⁴⁸ Law schools can offer courses on legal research, lawyering skills, and discrete aspects of the legal process, which can be made available to people while in prison as well as upon release. To the extent possible, support for already existing programs that are conceived of and facilitated or co-facilitated by system-impacted people should be prioritized. The potential for innovative collaborations with law school clinical programs can be explored. The overall objective of these programs should be to provide important spaces for learning and to provide opportunities for incarcerated and formerly incarcerated people to secure valuable credentials that can advance employment prospects.⁴⁹

For individuals who are focused on pursuing a legal degree, the LSAT can prove to be a significant hurdle. Standardized tests, including the LSAT, have been criticized as being skewed by racial bias.⁵⁰ Many law schools have expanded to accepting alternatives to the LSAT, such as the Graduate Record Exam (GRE) in an effort to diversify the applicant pools.⁵¹ However, recent efforts have signaled a shift toward doing away with reliance on the LSAT and standardized test scores

⁴⁷ *Id.*

⁴⁸ Lois M. Davis et al., *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults*, RAND CORP., https://www.rand.org/pubs/research_reports/RR266.html [<https://perma.cc/S8BE-PB4V>].

⁴⁹ Programs at John Jay, Columbia University and Mitchell Hamline and All Square in Minneapolis, among others, provide excellent examples.

⁵⁰ David M. White, *The Requirement of Race-Conscious Evaluation of LSAT Scores for Equitable Law School Admissions*, 12 BERKELEY LA RAZA L.J. 399, 404 (2001); Deseriee A. Kennedy, *Access Law Schools & Diversifying the Profession*, 92 TEMP. L. REV. 799 (2020) (arguing in favor of more open and inclusive law schools that are not reliant on standardize test scores).

⁵¹ Stephanie Francis Ward, *With GRE Restrictions Lifted for Law Schools, Some Urge Caution*, A.B.A. J. (Dec. 16, 2021, 11:56 AM), <https://www.abajournal.com/web/article/with-gre-restrictions-lifted-for-law-schools-some-urge-caution> [<https://perma.cc/8MXE-Y3B2>]; Deseriee A. Kennedy, *Access Law Schools & Diversifying the Profession*, 92 TEMP. L. REV. 799 (2020) (arguing in favor of more open and inclusive law schools that are not reliant on standardize test scores).

generally. During the midst of the COVID pandemic at least one law school allowed students to use the first semester of their 1L year as their admissions test to law school.⁵² The American Bar Association (ABA), which accredits U.S. law schools, has moved closer to eliminating a standardized test requirement in law school admissions altogether by 2025.⁵³ However, even without an ABA requirement, many law schools may still opt to require a standardized test for admission to their program.⁵⁴ In order to provide meaningful legal educational access to incarcerated and formerly incarcerated people, law schools can adopt greater flexibility in admissions requirements for people whose depth of non-traditional legal experience displays the likelihood for success in the profession.

While a standardized exam remains the likely norm, prep courses for these exams are often costly and difficult to access. Providing prep classes and materials to incarcerated people, formerly incarcerated people, and their system-impacted family members, would be one way of expanding access to the legal profession. Innovative ways of expanding opportunities to sit for the GRE and LSAT while incarcerated are starting to emerge and more development of testing access would signal meaningful support for assisting the entry of system-impacted people into the profession.⁵⁵

Law school applications frequently ask about criminal histories, presumably in anticipation of the questions that are asked in the character and fitness process that will take place upon graduation and application to the state bar.⁵⁶ Law schools can take the approach of not asking about criminal history, which a small number of law schools have already shifted to.⁵⁷ An application might ask generally about lived experience and the competencies necessary to be a legal professional and list being

⁵² Nicole Anderson, *As Pandemic Creates Admissions Barriers, ASU Law Opens Its Doors Even Wider*, ARIZ. STATE U. (Apr. 22, 2020), <https://news.asu.edu/20200422-pandemic-creates-admissions-barriers-asu-law-opens-its-doors-even-wider> [https://perma.cc/6BLU-UXZ3].

⁵³ Michael T. Nietzel, *Test-Optional Momentum Grows As ABA Panel Votes To No Longer Require Law Schools To Use LSAT*, Forbes, Nov 21, 2022, <https://www.forbes.com/sites/michaelt Nietzel/2022/11/21/test-optional-momentum-grows-as-aba-panel-votes-to-no-longer-require-law-schools-to-use-lsat/?sh=16a2ae2f4d22> [https://perma.cc/L52E-Y3HP]; Even with the ABA's vote to change the standardized test requirement, many administrators remain concerned about negative, unintended effects on law school diversity.

⁵⁴ *Id.*

⁵⁵ Noah Austin, *supra* note 30.

⁵⁶ James M. Binnall & Lauren M. Davis, *Do They Really Ask That? A National Survey of Criminal History Inquiries on Law School Applications*, 32 STAN. L. & POL'Y REV. ONLINE (Sept. 8, 2021) (provides a comprehensive examination of the variety of criminal history admissions inquiries made at all 196 ABA approved law schools).

⁵⁷ In New York State, for example, CUNY Law School and University at Buffalo School of Law have removed questions about criminal history from their admissions applications. For a comprehensive examination of the impact of criminal history questions on higher education admissions, see, *Boxed Out: Criminal History Screening and College Application Attrition*, Center for Community Alternatives (2015), <https://communityalternatives.org/wp-content/uploads/2019/11/boxed-out.pdf>.

system-impacted as one factor that contributes to lived experience. Such an approach would be one meaningful step in removing the stigma of a criminal record.

Additionally, to support formerly incarcerated students who are entering the profession, the need for financial assistance while in school cannot be overstated. According to the U.S. Department of Education's National Center for Education Statistics, the average law school graduate had \$145,500 in cumulative student loan debt in 2016.⁵⁸ At least one law school explicitly provides scholarships for students who are formerly incarcerated or have a parent who is incarcerated.⁵⁹ Financial support of this nature is critical to providing meaningful pathways to the legal profession.

The individual character and fitness determination that every applicant to the bar must submit to remains one of the most significant barriers to having system-impacted people enter the profession. Licensing authorities typically do not share data on moral character evaluations, which means there is little to no accessible information on how many applicants are being denied admission to the bar or what convictions or circumstances tend to result in exclusion from the profession.⁶⁰ Increased transparency about such data would benefit individuals considering the profession and assist advocates who are trying to create a more inclusive bar. Beyond transparency issues, some advocates argue that the character and fitness process is overbroad, personally intrusive, and fails to actually protect the public from unscrupulous lawyers. In New York State, the Unlock the Bar coalition is pushing for the removal of character and fitness questions that seek prejudicial details about past behavior.⁶¹ Unlock the Bar points out that questions about prior arrests, sealed proceedings, and the use of substances defy New York State laws and public policy which seek to prohibit criminal record discrimination in employment.⁶² Reasonable interventions will allow for an attorney admission process that is transparent, lawful, effective, and inclusive.

CONCLUSION

The profession has a long way to go to diversify its ranks and redress the harms of mass incarceration. Proactively embracing strategies that engage system-

⁵⁸ *ABA Profile of the Legal Profession*, *supra* note 41, at 27.

⁵⁹ *Lawyers Who Went from Prison to Law School Share Their Stories at PREP Scholarship Launch*, N.Y.U. L. NEWS, <https://www.law.nyu.edu/news/prep-scholarship-fund-joel-rudin-incarceration-bar%20admission-shon-hopwood-tarra-simmons> [<https://perma.cc/X6XC-2SCK>]. (“ . . . PREP Scholarship Fund provides support for NYU Law students who were previously incarcerated or have a parent who was incarcerated. It takes its name from the Prison Reform and Education Project (PREP), an NYU Law student organization that teaches legal research skills to prisoners.”).

⁶⁰ *The Case for Abolishing the Character and Fitness Process*, UNLOCK THE BAR 22 (Feb. 2022), <https://drive.google.com/file/d/1rsolmrgtckGcHKrsYglT0DwwYGt9Mahj/view> [<https://perma.cc/Q8VX-UADB>]; Aviram, *supra* note 26; Simmons, *supra* note 31.

⁶¹ *The Case for Abolishing the Character and Fitness Process*, *supra* note 60.

⁶² *Id.* at 18.

impacted people is a powerful way to support a new approach to reentry and bring greater equity to the law.