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LAWYERING AT THE MARGINS

MICHAEL BARBOSA*

Hello everyone! Let me first say that it is an absolute honor to be able to come back home to WCL and see familiar faces and also so many new ones. I graduated from WCL in May of 1999 and as many already know, Peter Cicchino was and continues to be one of my greatest idols and mentors. Peter's commitment to public interest law is a model for all of us to follow. Peter would always say to me, "Michael you are going to be very happy because you are going to always be able to do exactly what you want to do." In one of his many articles, *Defending Humanity*,¹ Peter states that "defending the human rights of others is itself a constituent part of leading a good and happy human life."² I didn't believe him at first, but Peter was absolutely right because my legal career has been extremely fulfilling, not only professionally, but also personally, intellectually and spiritually.³

The clients I represent are our most vulnerable New Yorkers: domestic violence survivors, unemployed workers, disabled persons, senior citizens, homeless children and their families, families and individuals facing eviction, indigent immigrants and persons with AIDS, who to no surprise, also have a prior criminal conviction. All of the clients I see feel oppressed not only by the very restrictive laws placed upon those with prior criminal convictions, but also by their perception that they are very alone in the world. I'm very fortunate to have been able to follow in the wonderful tradition of those who

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1. Peter M. Cicchino, *Defending Humanity*, 9 AM. U. J. GENDER SOC. POL'Y & L. 1 (2001).

2. *Id.* at 3.

3. At the Legal Aid Society's Harlem Neighborhood Office, I designed a project as a Skadden Fellow to deal with the vast numbers of people, disproportionately poor men and women, who had been convicted of crimes, paid their debt to society and are now trying to live law abiding lives, but who face an assortment of legal barriers to successful re-integration.

use their talents, skills and gifts to further the cause of justice for the poor, voiceless, helpless, needy and downtrodden to help them understand that they are not alone. Clients who come to the Legal Aid Society want very basic things: food, shelter, education, and employment. Peter once stated, "Whenever human beings are denied the things they need for flourishing—food, shelter, work, education, liberty or dignity— they *will* act out."⁴ That is exactly what has happened: The Department of Justice estimates that more than six million people are under criminal justice supervision.⁵ On any given day, roughly one-third of African-American men aged eighteen to twenty-nine are either in prison, on probation, or parole.⁶ In fact, the percentage of African-American men in prison is disproportionate to the African-American population at large.⁷ The situation for Latinos reflects a similar growing and disturbing trend.⁸ It should be noted that nonviolent offenses, as opposed to violent offenses, make up a significant majority of criminal convictions of those incarcerated.⁹ Additionally, in New York, nearly 95% of those in prison for nonviolent drug offenses are people of color.¹⁰ Furthermore, more than 500,000 ex-offenders are released from federal and state prisons each year and returned to communities without the necessary resources for successful rehabilitation.¹¹

4. Cicchino, *supra* note 1, at 4.

5. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONS STATISTICS (last revised Sept. 4, 2002) (noting that, in 2001, a total of almost 6.6 million people were in federal prisons and jails, on probation, or on parole), available at www.ojp.usdoj.gov/bjs/correct.htm.

6. See MARC MAUER, SENTENCING PROJECT, THE CRISIS OF THE YOUNG AFRICAN AMERICAN MALE AND THE CRIMINAL JUSTICE SYSTEM 3 (1999) (indicating that thirty-two percent of black males in the twenty to twenty-nine age group are under some form of supervision), available at www.sentencingproject.org/pubs/civilrights.pdf.

7. See SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (last visited Sept. 27, 2002) (stating that although African-American males make up 12% of the nation's population and 13% of its drug users, they comprise almost half of the prison and jail population), available at <http://www.sentencingproject.org/brief/pub1035.pdf>.

8. See CORRECTIONAL ASS'N OF N.Y., REFORM THE ROCKEFELLER DRUG LAWS (May 2000) (discussing the disproportionate presence of minorities involved in the criminal justice system as compared to the population as a whole), available at www.correctionalassociation.org/policy_fact.html.

9. See SENTENCING PROJECT, *supra* note 7 (explaining that 70% of state prisoners were convicted of non-violent offenses in 1998).

10. See CORRECTIONAL ASS'N OF N.Y., *supra* note 8 (segmenting the specific ethnic groups as 50.3% African-American, 43.8% Latino, and 5.1% white).

11. See ALLEN J. BECK, U.S. DEP'T OF JUSTICE, STATE AND FEDERAL PRISONERS RETURNING TO THE COMMUNITY: FINDINGS FROM THE BUREAU OF JUSTICE STATISTICS (Apr. 13, 2000) (showing that although approximately 14% of inmates are identified as mentally ill and almost three-quarters of inmates identified drugs or alcohol as factors, roughly one-half of prisoners awaiting release have received treatment for

Under the U.S. Constitution, a criminal defendant is presumed innocent until the government proves that he or she is guilty.¹² Under the law, a person who is arrested has several rights: the right to remain silent;¹³ the right to request to speak to an attorney before answering questions to the police or a prosecuting attorney;¹⁴ the right to an attorney where the penalty imposed is six months of imprisonment or longer, and if the person cannot afford to pay the services of an attorney, the right to be appointed a public defender at no cost;¹⁵ the right to decide to enter into a plea bargain or to take the case to trial, the right to have a jury trial;¹⁶ and the right to an appeal after a jury verdict of guilty or a decision by a judge.¹⁷ However, without a lawyer willing to zealously represent clients in the best possible way and with the every possible resource, these rights are often very hollow for poor people.

In New York, substantial cuts in funding for civil and criminal legal services have resulted in an unfortunate reduction in the quantity and quality of legal services provided for the poor. As you may very well know, there is no constitutional right to civil legal services and because of this lack of resources, the Legal Aid Society's Civil Division is forced to turn away at least six eligible potential clients for every client it can assist.¹⁸ Since the tragic events of September 11, 2001, the gap between the need for legal services and available services has become even more extreme because of the loss of over 100,000 jobs in New York City.¹⁹ Through my work, I meet with people every day

substance abuse or mental illness), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/sfprc.pdf>.

12. See U.S. CONST. amends. V, VI (establishing a criminal defendant's rights against testimonial self-incrimination and for securing assistance of counsel).

13. See *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966) (" [I]f a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. ").

14. See *id.* at 472 (" [A]n individual held for interrogation must be clearly informed that he has the right to consult with an attorney ").

15. See *id.* at 473 (" [I]f he is indigent a lawyer will be appointed to represent him. ").

16. See U.S. CONST. amend. VI (establishing a criminal defendant's right to a trial by jury).

17. See *Abney v. United States*, 431 U.S. 651, 656 & n.3 (1977) (indicating that while there is no constitutional right to an appeal, a general statutory right to appeal criminal cases was established in 1911).

18. See N.Y. STATE UNIFIED CT. SYS., PRO BONO CONVOCATION: WORKING TO DESIGN A PRO BONO SYSTEM FOR NEW YORK n.3 (last visited Oct. 1, 2002) (referring to a Legal Aid Society of New York internal review conducted in spring 2001), *available at* <http://www.courts.state.ny.us/pbconvocation/probonopaper.pdf>.

19. See LEGAL AID SOC. OF N.Y., LEGAL AID SOCIETY DISASTER RECOVERY (last updated Feb. 14, 2002), *available at* http://www.legal-aid.org/disaster_recovery_new.htm.

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who recount being arrested and convicted of a misdemeanor or felony discussing how he or she quickly decided to waive his/her right to a trial to end the criminal proceedings because of the fear of bearing the consequences of being convicted after a trial that would impose higher substantial penalties. When pleading, many people do not realize or understand the many collateral civil consequences in housing, employment, immigration or education that can haunt them for the rest of their lives.

When released, many formerly incarcerated men and women continue to suffer from substance abuse and addiction,²⁰ mental and physical health problems,²¹ poverty and homelessness, and low-level job skills and education.²² Due to their prior criminal records, access to vital subsistence programs in housing, public benefits, education and health care may be restricted, creating even more obstacles.²³ Within the Legal Aid Society, and many other legal service institutions that represent the poor, clients' recount that they are constantly overlooked and ignored, viewed as invisible, undeserving of services and easily dismissed. All come to the Legal Aid Society with the same basic question after the traumatic experience of being denied or losing employment or housing: "How much longer do I have to suffer the effects of my conviction and what can I do to stop this from happening?" A common message from my clients is that they are "human beings and can be rehabilitated if given a chance." Unfortunately, there is no simple answer.

I would like to take this time to give you a brief overview of a few of the collateral consequences of a criminal conviction.²⁴

20. See CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SUBSTANCE ABUSE AND TREATMENT, STATE AND FEDERAL PRISONERS, 1997 3 (Jan. 1999) (indicating that over 80% of state prisoners reported a history of drug and/or alcohol use), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/satsfp97.pdf>.

21. See CRIMINAL JUSTICE REFORM, CITIZENS UNITED FOR THE REHABILITATION OF ERRANTS, POST RELEASE TRANSITION (Aug. 10, 2001) (testimony of Rudy J. Cypser, Chairman, CURE-NY, at the Public Hearing on Parole and Post Release Supervision held in New York City), available at <http://users.bestweb.net/~cureny/transit.htm>; see also JEREMY TRAVIS ET AL., URBAN INSTITUTE, FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 27-30 (2001) (describing physical and mental health problems faced by prison populations).

22. CORRECTIONAL ASS'N OF N.Y., PRISONER PROFILE (Feb. 2000) ("[b]etween 50 and 70% of the City's adult inmate population reads below the sixth grade level in English.").

23. See TRAVIS ET AL., *supra* note 21, at 19 (noting that many prisoners are released without the information necessary for them to get a job, substance abuse treatment or public assistance); see also *id.* at 35 (stating that federal law prevents former prisoners from public housing and federally assisted housing programs).

24. Other restrictions resulting from a criminal record not discussed during my presentation include immigration consequences, such as mandatory deportation

1. *Housing*

The City of New York has very few units to accommodate all financially eligible applicants. Housing assistance is a vital necessity for poor individuals with prior criminal records who suffer the effects of substance abuse. In addition, many people being evicted or restricted from obtaining public housing under New York State's Welfare Reform Act of 1997,²⁵ which restricts eligibility on the basis of a criminal record,²⁶ are people who may have prior criminal records, but no longer pose a threat to their communities and are being penalized for past mistakes. In New York City, with its limited amount of low-income housing, such an order by the housing authority is equivalent to a sentence of homelessness.²⁷ In addition, the unanimous U.S. Supreme Court decision in *Department of Housing & Urban Development v. Rucker*,²⁸ which upheld lease provisions allowing public housing tenants to be evicted from their homes as the result of actions by family members, guests or visitors, even if the tenants do not have any knowledge or have taken all steps to prevent the problem,²⁹ is the most disturbing opinion thus far, as the number of homeless families and individuals in our community continues to rise.

2. *Employment*

Individuals with prior criminal records experience great obstacles to gaining viable employment.³⁰ People who have the greatest difficulty in the job market include the very poorly educated, the unmarried, the very young, older men and African Americans.³¹

proceedings; family law restrictions, such as termination of parental rights; registration as a sex offender, voting rights and restrictions on serving as juror.

25. 1997 N.Y. Laws 436, pt. B.

26. See 42 U.S.C. § 1437d(l)(6) (1994 & Supp. 2001). The Act states that leases utilized by a public housing agency shall:

provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

Id.

27. See *id.*

28. 122 S. Ct. 1230 (2002).

29. See *id.* at 1233 (stating that local public housing authorities may evict tenants "for the drug related activity of household members" regardless of whether the tenant knew or should have known about the activity).

30. See Peter T. Kilborn, *Flood of Ex-Convicts Find Job Market Tight*, N.Y. TIMES, Mar. 15, 2001, at A16 (discussing the obstacles facing ex-convicts seeking employment).

31. See DAVID RUDENSTINE, *THE RIGHTS OF EX-OFFENDERS* 72 (Norman Dorsen ed.,

Prior criminal records frequently result in legal restrictions for certain employment opportunities and occupations.³² In many cases, even when there are no employment restrictions due to a prior criminal record, employers frequently refuse to hire or retain men and women with a criminal record.³³ Under New York law a prior conviction is not supposed to be used as grounds for denying employment unless the offense is directly related to the job in question or there is a reason to believe that employing the person would pose an unreasonable risk to persons or property.³⁴ However, without advocates to represent and assist men and women with criminal records, these rights are often very hollow and rarely enforced.

3. Government benefits

The most difficult period for formerly incarcerated men and women is the first six months after release since many have few resources.³⁵ For example, people who were homeless before their arrests and incarcerations are still homeless upon release. For the many who went to jail with substance abuse problems and may have had a chance to get clean, there is no one to help them stay that way upon release. Therefore, eligibility to receive public assistance is critical since many people recently released may need substance abuse treatment, job training, or educational training in addition to necessary food and housing assistance. However, in 1996, the federal welfare law created a specific provision to restrict access to public benefits for individuals with drug-related convictions.³⁶ Without

1979); see also Kilborn, *supra* note 30 ("Half a million people are being released from prison over the next several years. Many of these guys come out with almost every characteristic that makes employers reluctant to hire. They're ex-offenders. They're high school dropouts. They have poor skills and substance-abuse problems.").

32. See Kilborn, *supra* note 30.

33. See *id.*

34. See N.Y. CORRECT. LAW § 752 (McKinney 2002) (prohibiting unfair discrimination against people previously convicted of crimes).

35. See RUDENSTINE, *supra* note 31, at 73 (discussing the legal status of ex-convicts in the United States).

36. See 21 U.S.C. § 862(a) (1994 & Supp. 2001) (codifying § 115 of the Personal Responsibility and Work Opportunity Reconciliation Act, which prohibits anyone with a drug-related felony conviction from receiving assistance from a State program funded under the Social Security Act or food stamp assistance provided under the Food Stamp Act of 1977). New York State opted out of this automatic bar to assistance. See 1997 N.Y. Laws 436, pt. B, § 121 (exercising New York's ability to opt out of the application of § 115 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996); see also 21 U.S.C. § 862(d)(1)(A) (authorizing a state to opt out of the application of section 862(a) to individuals domiciled within the State).

access to necessary services, many ex-offenders are at an even greater risk of re-offending and going back to jail.³⁷ Fortunately, New York opted out of some of the harsher proposed provisions, but many people with prior criminal records continue to experience a host of problems gaining access to necessary benefits.

4. Education

A 1998 federal law changed the Higher Education Act (“HEA”) to prohibit federal financial aid to students convicted of drug-related offenses.³⁸ No other class of offense, including violent offenses such as murder, carries with it this automatic denial. This law threatens to disproportionately affect African-Americans and Latinos, who are arrested and convicted of drug offenses at a much higher rate than whites.³⁹ In addition, many students may not know the degree or ultimate disposition of their convictions in order to accurately answer the prior drug-related conviction question. For example, a student may have been arrested for a drug-related crime that was not ultimately disposed of by a criminal conviction.⁴⁰ During the 2001-2002 academic year, over 47,000 individuals were formally denied student financial aid under this law.⁴¹

I know it seems pretty bad, but I keep Peter’s wonderful spirit of hope in me and try to follow the philosophy of Supreme Court Justice Thurgood Marshall who would always say, “It’s my job to do what is

37. See Fox Butterfield, *Often, Parole is One Stop On the Way Back to Prison*, N.Y. TIMES, Nov. 29, 2000, at A1 (discussing whether lawyers should be provided for inmates in parole revocation hearings).

38. See 20 U.S.C. § 1091(r)(1) (1994 & Supp. 2001) (requiring that students convicted for possession of controlled substances are automatically ineligible for aid for one year from the date of the first offense, two years from the date of the second offense, and indefinitely if convicted three or more times). Additionally, students convicted for sale are automatically ineligible for aid for two years from the date of a first offense, and indefinitely if convicted two or more times. *Id.*

39. See Diana J. Schemo, *Students find Drug Law has Big Price: College Aid*, N.Y. TIMES, May 3, 2001, at A12 (quoting New Mexico Governor Gary E. Johnson, who complained about the new law stating, “You can rob a bank, you can commit murder, just about any other crime and not be denied student aid, but a drug charge would deny you student aid.”).

40. See N.Y. CRIM. PROC. § 160.50 (1998) (explaining how arrests that ended in acquittals, dismissals, declined prosecutions or adjournments in contemplation of dismissal (“ACD”) are not convictions and are required to be sealed).

41. See RAISE YOUR VOICE, FREQUENTLY ASKED QUESTIONS ABOUT THE HIGHER EDUCATION ACT DRUG PROVISION (last visited Oct. 1, 2002) (indicating that a record number of individuals were denied aid during 2001-2002 and suggesting that many other individuals were deterred from applying for aid through their belief that a past conviction would make them ineligible to receive aid), available at <http://www.raiseyourvoice.com/heainfo.html>. Raise Your Voice is a coalition of the Drug Reform Coordination Network and student groups that works to raise awareness of the Higher Education Act and calls for its repeal. *Id.*

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right and wait for the law to catch up with me.” Also, in my work, I have been forced to be really creative in order to help my clients, and this only exemplifies the great need for more advocates to join the good fight.

To conclude, I would like to reiterate a fact that may be all too obvious: ex-offenders are overwhelmingly drawn from the ranks of poor people, and disproportionately represented among people of color. The combination of those realities may partly explain the extreme distrust and lack of compassion—by elected officials, government agencies, and the public itself—for this population. That very fact, however, testifies to the desperate need to help break the cycle of homelessness and recidivism in order to offer people a way to reclaim their place in the world, gain skills to secure meaningful work and rejoin and contribute to our society in the great tradition of Peter Cicchino.