

July / August 2019 Volume 88 Issue 4

Official Publication of the Hennepin County Bar Association

# HENNEPIN LAWYER







## Count the Ways Your District Bar Adds Value to Your Career

# 75 FREE CLES

Members can attend most HCBA 1.0 credit CLE programs at the association office for no charge. Non-members pay \$40 or more for each seminar. Attend just 6 CLEs during the 2019-20 bar year, and membership can save you \$240. HCBA members also receive registration discounts on most HCBA webcasts, OnDemand CLEs, Law and Literature seminars, and multi-session leadership programs. Your membership keeps you up to date with the latest professional developments and practice updates.

These active groups provide: leadership opportunities and development, skills training, a forum to exchange ideas, and mentoring. Improve your practice and help shape the legal profession—one meeting at a time. Plus, there is no extra fee to join HCBA sections.

# 20 COMMITTEES & SECTIONS

# 50 SOCIAL EVENTS

Socials, networking events, club meetups, and happy hours help you catch up with colleagues, create new connections, and add balance to your work life. The HCBA provides activities all year long to help you expand your professional network, social circles, and referral base the best way: in person.

## 6 ISSUES OF THE HENNEPIN LAWYER

HCBA's membership publication features substantive law articles, practice tips, profiles, and news that local lawyers rely on. Subscription is included with your membership.



Numbers represent planned programming for the 2019-2020 bar year.

Make the Most of  
Your Membership at  
[www.hcba.org](http://www.hcba.org)

Serving Local Attorneys, Representing  
the Profession, and Working to Ensure  
the Fairness and Accessibility of the  
Legal System Since 1919.

Your Membership Makes It Happen.



Serving as the charitable arm of the HCBA, the Hennepin County Bar Foundation promotes access to justice within our community through its annual distribution of grants to local legal services organizations.

Thanks to the dedicated commitment and contributions of HCBA members like you, the foundation has been making a positive impact in Hennepin County since 1968, giving over \$2.5 million in grants to law-related nonprofits.

The HCBA's Lawyer Referral program has been serving the profession and the public for over 60 years, by helping individuals connect with and hire attorneys. Lawyer Referral is the best place to direct callers and clients with legal matters outside your practice area.

**Lawyer  
Referral**  
and Information Service

In addition to helping 10,000+ callers each year, HCBA's Lawyer Referral service coordinates with District Court to ensure that attorneys are available to assist the public at the court's Legal Access Point and at Misdemeanor Court arraignments. Your bar membership supports this valued public service.

The Volunteer Lawyers Network is the pro bono arm of the HCBA and provides civil legal services to low-income people in our community.



In its commitment to access to justice, the HCBA provides a variety of services for the public through its own programs and by significant financial support of VLN—made possible by your bar membership.

### YOUR CONNECTION TO:

Local Lawyers • The Fourth District Bench • New Clients & Contacts • Practice Management Resources • Community Outreach and Pro Bono

- 75 FREE 1.0 credit CLE programs are planned for the 2019-20 year. Plus, additional training sessions and webcasts, with discounted registrations for members.
- Plug in to mentoring and networking opportunities for every stage of your career.
- Gain management and leadership experience through committee work and projects, including diversity initiatives, programs supporting professionalism, and access to justice.
- Events and socials connect you with attorneys (from within and outside your areas of practice), members of the bench, and others in community. Expand your contacts and referral networks.
- Members interact with the Fourth District Court Bench through events, training, and advocacy efforts.
- Member clubs let you connect to attorneys with shared interests (such as yoga, biking, and photography).
- The *Hennepin Lawyer* magazine keeps you in the know about the law and local legal community and more, and gives you an opportunity to showcase your expertise.
- Legal education and outreach programs, such as our speakers bureau, support the Hennepin County community and provide you with ways to give back.
- A weekly e-newsletter provides you with updates and an events calendar so you will always be tuned in to what's happening in the local legal community.
- The HCBA website provides even more opportunities to create connections and maximize your membership. Create networking groups, start a blog, update your profile page, and more.

# HENNEPIN LAWYER

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**Hennepin Lawyer**  
July/August 2019  
Volume 88, Number 4  
[www.hcba.org](http://www.hcba.org)

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The Hennepin Lawyer is published by the Hennepin County Bar Association to educate and inform lawyers about the current issues and events relating to the law and the profession. It allows for the free expression and exchange of ideas. Articles do not necessarily represent the opinions of any person other than their writers. Copies of the editorial policy statement are available upon request or online at [www.hcba.org](http://www.hcba.org).

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**02** | Examining Mass Incarceration *by Judge JaPaul Harris*

**03** | We've Been Everywhere, Man *by Adine S. Momoh*

**06** | 2019 Excellence Awards

**10** | HCBA History: Looking Back on CLE

**12** | 1L Minority Clerkship Program

**15** | Grantee Spotlight: Minnesota Elder Justice Center



## FOCUS ON MASS INCARCERATION

**16** | The Impact of Incarceration

**17** | Mass Incarceration: America's True Exceptionalism  
*by Judge Bridget A. Sullivan*

**24** | When Jail Doors Open and Rental Doors Close:  
Housing Stability After Conviction  
*by Referee Melissa Houghtaling*

**28** | The Intersection of Mass Incarceration and Families: The Justice  
System as It Operates Outside the Vacuum of the Courtroom  
*by Maria S. Mitchell*

**31** | Changing Charging Practices  
*by Anna Gusaas*

**32** | One Piece at a Time: Strategically Disrupting the  
Mass Incarceration Pipeline  
*by Elizer E. Darris*

**35** | How to Draft a Conflicts Waiver *by Eric T. Cooperstein*

**36** | Community Connections: LawHelpMN 2.0 *by Tom Walsh*

**39** | Fillable Forms Can Transform Your Practice *by Jess Birken*

**42** | Lens View: HCBA Presidents

**43** | Member News

**44** | 10 Questions with Josh Williams

# Examining Mass Incarceration

In the book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, author Michelle Alexander lays out the connective tissue between slavery, Jim Crow, and mass incarceration. However, the majority of people who go into prison will leave those walls at some point.

Many people in the criminal justice system have identified mass incarceration as an issue that needs to be addressed because the incarceration rate in America has become untenable. However, it was not until August 9, 2014, that this issue exploded into the public consciousness. That was when Ferguson, Missouri police officer Darren Wilson shot 18-year-old Michael Brown, Jr. There were police shootings before Michael Brown, and many after, but in the aftermath of this one, the issues of fines, fees, and incarceration exploded into the public consciousness. The public was no longer willing to accept the status quo.

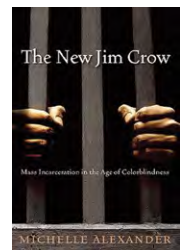
Here in Minnesota and in Hennepin County the issue of mass incarceration and how we address it is ever-present. According to the Minnesota Department of Corrections Adult Prison Population Summary, as of January 1, 2019, there were 9,479 people in prison in Minnesota. The average age of this population is 37 years old, and this population is disproportionately African American. Over 27.3 percent of this population comes from Hennepin County. Of the 9,479 inmates in Minnesota prisons, 610 are serving a life sentence. What this means is that of the current prison population 93.6 percent will be released back into the community. We cannot ignore local incarceration when addressing this issue. In 2017, there were 32,132 new bookings into the Hennepin County Adult Detention Center, many of whom will be released into the community. According

to a Minnesota Department of Corrections Study, in 2018, Hennepin County had 20,277 people on probation, the most in Minnesota. As of December 31, 2018, Hennepin County had 1,727 people on supervised Release, Parole, and Intensive Supervised Release with the Minnesota Department of Corrections, again the most in the state.

There are many issues connected to mass incarceration. Mass incarceration is how economic status steers a class of people toward the criminal justice system. Mass incarceration is how a school creates a prison pipeline through its policies and procedure. Mass incarceration is the corrosive effect of the incarceration on the family of the incarcerated. Mass incarceration is the barriers formerly incarcerated people face that inhibit their ability to flourish. This edition of the *Hennepin Lawyer* endeavors to examine mass incarceration from its many lenses.

Elizer (Eli) Darris, Smart Justice Organizer for the American Civil Liberties Union of Minnesota, writes a wonderful piece on the work going on in the state of Minnesota to disrupt the mass incarceration pipeline. Eli provides a unique perspective not only as a dynamic organizer but also as a formerly incarcerated individual. Referee Melissa Houghtaling writes a thoughtful article on the housing consequences of mass incarceration and examines the barriers faced by formerly incarcerated people integrating back into society. Judge Bridget Sullivan writes an article that provides the historical context to understand how we have arrived to the current state of mass incarceration, and the current reform efforts taking place. Attorney Maria Mitchell writes a thought provoking article about the intersection of mass incarceration and families, examining the impact of mass incarceration on family members and loved

**The New Jim Crow:  
Mass Incarceration in the  
Age of Colorblindness**  
by Michelle Alexander



ones who are serving the sentence alongside the incarcerated person.

These articles dare you to think about the issue of mass incarceration and its effect on our profession, and more importantly, on our community. These articles push you to challenge the notion that mass incarceration is a “criminal law” issue, because whether you are a partner or associate at a large law firm, a small or solo practitioner, a legal aid attorney, a prosecutor, a public defender or defense attorney, or in a corporate setting, the collateral issues of mass incarceration can manifest in your practice.



**Judge  
JaPaul  
Harris**

July/ August  
Issue Editor

Judge JaPaul J. Harris was appointed to the Second Judicial District by Gov. Mark Dayton in June 2018. He previously served as a judicial referee in Hennepin County from 2012 to 2018. Judge Harris serves as a member of the Minnesota Supreme Court Committee for Equality and Justice, where he serves as the chair of the education committee. In addition to his bar activity, Harris coaches youth sports at Jimmy Lee recreation center in Saint Paul.



# We've Been Everywhere, Man

If we could have a theme song for this bar term, it would be Johnny Cash's *I've Been Everywhere* because the HCBA and I have been everywhere, man, this year.

The theme of my presidency has been "Championing the Profession, Championing the Community." It has been my goal this year as president to remind us all of the HCBA's roots and to challenge people to stretch their imaginations and to realize that sponsors and champions—the ones you may think of as advancing your career and providing you with opportunities—do not only have to be individuals. The HCBA, as an organization, can be a champion. And indeed, the HCBA was created for this very purpose. That is why I challenged all of us to commit to being a champion of someone else in our community. So what did we do this year to meet that challenge? We focused our attention on diverse attorneys, newer attorneys, and attorneys who have been practicing 7 to 15 years.

## Diversity & Inclusion

Turning to diverse attorneys –

- We were at galas for the Minnesota Association of Black Lawyers, Minnesota Asian Pacific American Bar Association, and Minnesota Hispanic Bar Association.
- We attended the Celebration Honoring Minnesota's Asian-American judges, in partnership with MNAPABA and the Minnesota Hmong American Bar Association.
- We attended the Minnesota American Indian Bar Association's Annual Indian Law Conference.

- We attended and spoke at the National Association of Women Lawyers Annual Conference.

- We were well-represented at the MSBA's annual Diversity & Inclusion Conference, where HCBA bar leaders (such as myself and Esteban Rivera) spoke on the topics of toxic resiliency and increasing the diversity pipeline of our future attorneys.

- We partnered with the Fourth Judicial District to celebrate the 25th Anniversary of the Minnesota Supreme Court's Racial Bias in the Courts Task Force Report.

Aside from attending and sponsoring events, we also reviewed some of our policies and governing documents to make sure they reflect the HCBA's mission of advancing diversity and inclusion.

For example –

- We instituted a subcommittee to evaluate our current bylaws to see if we can improve our governance process in order to allow more affinity bars to have a voice on our board given the growing number of affinity bars in Minnesota.
- We have a new rapid response policy to help us decide when and how to weigh in on issues of the day more effectively and to make the HCBA's public advocacy decision-making process more transparent to our members and the public.
- We have a new governance tool to help us recruit and retain a board of directors that reflects the diverse characteristics of our membership, in age, gender, race, years of practice, and practice settings.

- And this summer, I will be speaking with the MSBA's Counsel to see if the HCBA can have a seat on the MSBA's Diversity and Inclusion Council, which should help the associations collaborate more on D&I issues that affect all of our members, instead of trying to tackle these issues alone.

And of course, we have had our A Table for 10™ events this year. I am so incredibly proud of this presidential initiative that was designed to address the "I" of D&I: inclusion. These meals, held over breakfast, lunch or dinner, allowed ten HCBA members at a time to connect at minority-owned restaurants with no agenda, other than to get to know each other and have a nice meal. Simply put, we worked to break down barriers, one meal at a time.

(continued on next page)



**Adine S. Momoh**

2018-2019  
HCBA President

[adine.momoh@stinson.com](mailto:adine.momoh@stinson.com)

Ms. Momoh is a partner in the Minneapolis office of Stinson where she represents clients in matters involving banking litigation, estates and trusts litigation and creditors' rights and bankruptcy before state and federal courts across the country. As a trusted advisor, she helps clients navigate the entire lifecycle of a case, from case development and strategy, to discovery, to motion practice, to trial, to appeal.

**"Let us channel the  
HCBA's roots, let us  
champion others,  
let us serve our  
community, let us  
commit to increasing  
access to justice,  
let us do good, and  
let us inspire good  
actions in others."**

The first A Table for 10™ was on Wednesday, January 30—many of you may remember that day because it was part of the Polar Vortex. Several offices, including my own, were closed that day, and parking meters were nonfunctioning because of this historic cold. Josh Franklin, Ben Gisselman, Isabelle Chammas, and Judge Bill Koch were the brave souls who joined me that day.

Since the first meal, our tables have been full. We have had representatives from diverse and non-diverse attorneys alike and have had participation from each of our affinity bars. We have had newer attorneys, vintage attorneys, law students, judges, big law attorneys, government attorneys, and solo and small firm practitioners. This is exactly what I had envisioned. Thank you to them and thank you to everyone who has supported A Table for 10.™

## Newer Attorneys

Turning to newer attorneys, the HCBA has a very strong and impressive New Lawyers Section (led by Stephanie Willing this year) with over 3000 attorney and law student members. The newer attorney voice is well represented on our board, executive committee, Finance and Planning Committee, Bylaws subcommittee, A Table for 10™, Law Firm Leadership, Attorney Wellness and Well-being Task Force, among other sections, committees, programs, and initiatives. And while we encourage newer attorneys to participate at all levels of the HCBA, they need our continued support. The HCBA officers and sections continue our outreach to newer attorneys through programming. Brandon Vaughn, Esteban and I spoke at the New Lawyer Experience Program in partnership with MNCLE in January. Sections are encouraged to organize at least one CLE a year focused on issues affecting newer attorneys.

And this year, I required the HCBA's officers, including myself, to attend at least two of the New Lawyers Sections meetings a year. This was a small change, with a large impact. It is important that newer attorneys know that we value their contributions, we value their voice, we want them to have a seat at the table and climb up the HCBA's leadership ladder. By showing up and attending the New Lawyers Section meetings, the officers and I have in turn learned so much from these emerging leaders.

## Attorneys with 7 to 15 Years of Experience

And for our last group of attorneys, those who have been practicing 7 to 15 years, the HCBA has regularly focused on newer lawyers and those we call "vintage" or "seasoned" lawyers, but not a lot of attention has been paid to those who fall in the gap. This year, the HCBA has taken a more focused, career-staged approach to member programming. For example, the HCBA currently offers an assortment of soft skills programming. Several sections have also moved the start time of their programs to accommodate the schedules of attorneys who have childcare obligations or other after-work commitments typical of those who have been practicing 7 to 15 years.

## Attorney Wellness & Wellbeing

With these three initiatives underway, you may think that the HCBA's work was complete for the year. But, not true. On February 28, I had the distinct honor to attend the Minnesota Supreme Court's Summit on Attorney Wellness and Well-being, which was a call to action to stakeholders in the legal profession across the state to discuss ways to improve and promote attorney well-being and mental health. The numbers do not lie. As a profession, attorneys experience depression, alcohol-use problems, anxiety, chronic stress, divorce, suicide, and suicide ideation at significantly higher rates than the general public. The numbers for law students fare no better.

It is about time that we end the stigma and get comfortable talking about mental health. Mental health is a diversity and inclusion issue. Mental health is pervasive. Mental health affects all of us. And I'm proud to say that the HCBA is answering the Supreme Court's call-to-action with a two-prong approach (one immediate, the other long term), which I detailed in the March/April issue of the *Hennepin Lawyer*.

As you can see, we have been here, we have been there, we have been everywhere, man. With that, I leave you with these words from Plato, "Good actions give strength to ourselves and inspire good actions in others." With Jeff Baill, Esteban Rivera, Brandon Vaughn, Landon Ascherman, and Dan Willing, we have an outstanding upcoming leadership team who understands that our work is not done. Let us channel the HCBA's roots, let us champion others, let us serve our community, let us commit to increasing access to justice, let us do good, and let us inspire good actions in others. Thank you for letting me serve you. Here's to another 100 years!



# Digital Evidence: The Impartial Witness

Within the past decade, the landscape of consumer technologies has changed drastically. Thanks to rapid development and innovation, computers as powerful as those that took us to the moon are now kept in our pockets. With such potential, electronic devices are now sources of useful information.

In response, Computer Forensic Services analyzes digital evidence within the contexts of e-discovery, incident response and litigation support. CFS has an unmatched background in the examination of electronic evidence. Our expert forensic examiners have many years of professional experience in both law enforcement and information technology. We assemble narratives and construct timelines of computer activity. We are known for our ability to relay complex technical findings in a manner that can be easily understood, which has proven useful in litigation. We act as a conduit for electronic evidence to speak for itself.

601 Carlson Parkway, Suite 1250  
Minnetonka, MN 55305

952-924-9920

[www.compforensics.com](http://www.compforensics.com)



## Career Contributions to the Profession

### PAMELA HOOPES

*Mid-Minnesota Legal Aid/  
Minnesota Disability Law Center*

Ms. Hoopes was given the Career Contributions to the Profession Award for nearly three decades of service through her leadership at the Mid-Minnesota Legal Aid's Minnesota Disability Law Center.





# Excellence Awards

The HCBA recognizes ten attorney members this year with its HCBA Excellence Awards. The awards honor members for their service to the legal profession, the community, and the association. The HCBA selected nine members for their work from among six different categories and one member for career contributions to the profession.

## Advancing Diversity & Inclusion

**LISA LODIN PERALTA**

*Peralta Appellate Law*

Ms. Peralta founded the Barristers Breakfast, which raises funds for the students of Joyce Preschool, which provides English and Spanish-speaking students a high-quality education and family support, and she has successfully brought in other community stakeholders as part of the event.



## Service to the Association/ Foundation

**KENDRA BRODIN**

*Briggs and Morgan*

Ms. Brodin has served as chair of the HCBA Law Firm Leadership Program, which has developed into one of the most popular programs the HCBA offers.



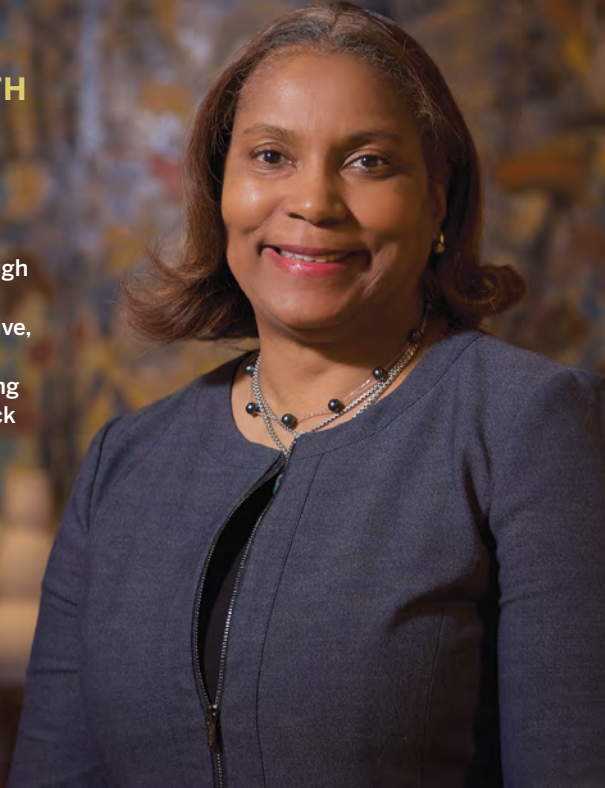


## Mentoring in the Profession

### GLORIA STAMPS-SMITH

*Hennepin County Attorney's Office*

Ms. Stamps-Smith mentors members of the community at all levels, whether it's visiting local high schools through the Minneapolis Public School's 100 Strong initiative, connecting with students at the University of St. Thomas, or leading the Minnesota Association of Black Lawyers' Judicial Workshop.



## Providing Pro Bono Service

### MICHAEL BOULETTE

*Barnes & Thornburg*

Mr. Boulette provides numerous pro bono services for family law clients through Tubman and Children's Law Center.



## Advancing Innovation in the Profession

### JESS BIRKEN

*Birken Law*

Ms. Birken has led the HCBA Tech Practice series, which helps lawyers integrate technology into their practice management.



### CYNTHIA Y. LEE

*Faegre Baker Daniels*

Ms. Lee and Ms. Huynh co-founded the annual Women of Color in the Law Forum, which has developed into one of the prominent career development and networking opportunities for female attorneys of color.







## Advancing Diversity & Inclusion

**SYBIL L. DUNLOP**

*Greene Espel*

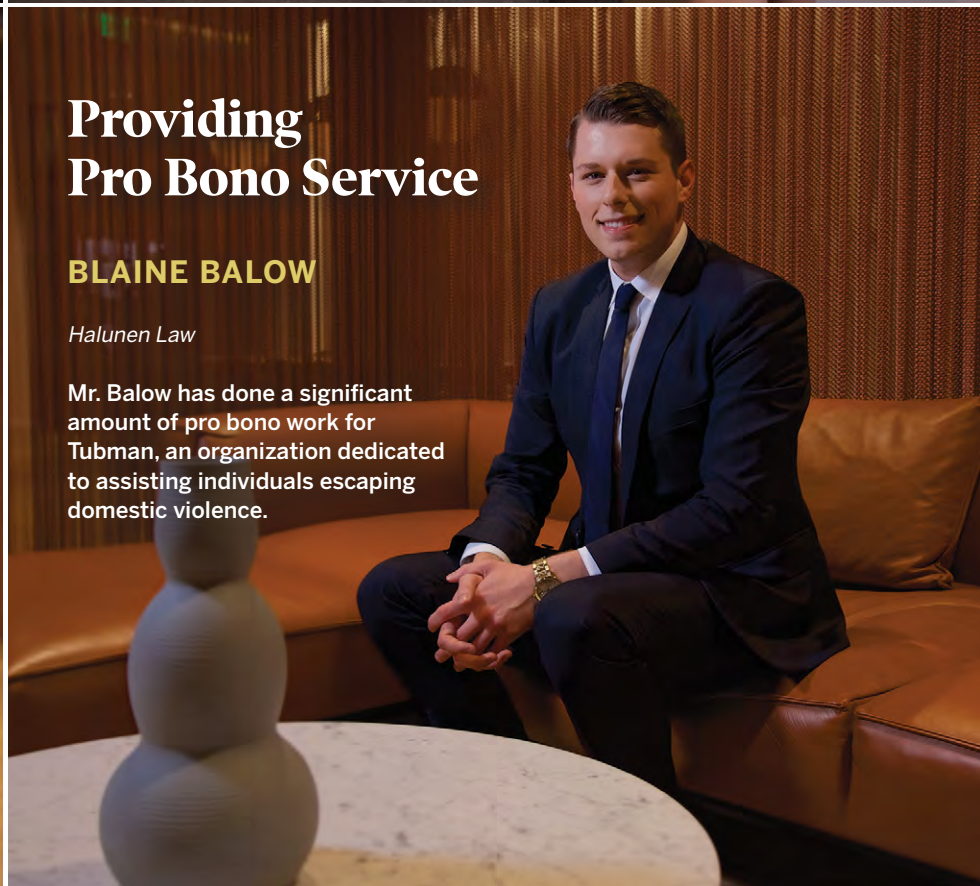
Ms. Dunlop created a popular CLE course educating lawyers and community leaders on implicit bias and its negative effects.



## Advancing Diversity & Inclusion

**LOAN T. HUYNH**

*Fredrikson & Byron*



## Providing Pro Bono Service

**BLAINE BALOW**

*Halunen Law*

Mr. Balow has done a significant amount of pro bono work for Tubman, an organization dedicated to assisting individuals escaping domestic violence.



# Looking Back on CLE

This year the HCBA is celebrating its centennial with special programming and a look back through our history. On April 3, 1975, Minnesota became the first state to mandate continuing legal education for licensed attorneys. Legal education has always been a core part of the HCBA, whether it was through the pre-mandatory CLE continuing education committee, or up to today with HCBA sections organizing over 75 CLE seminars a year. In addition, the HCBA provides its signature CLEs: the Law & Lit program, Leaders Impacting the Nonprofit Community, and Law Firm Leadership series. Here's a look back at some notable CLEs over the years.

## STUDY SUGGESTIONS ARE REQUESTED

By Fremont Fletcher and James L. Hetland, Co-Chairmen  
Continuation Studies Committee

The Continuation Studies Committee expresses its appreciation for the many fine programs of a clinical and educational nature that have been presented at the weekly meetings of the Hennepin County Bar Association and also for the institutes and meetings which have been sponsored by the State Bar Association and by the University of Minnesota. The Committee welcomes and solicits the suggestions from the members of the Association for topics and matters that should be included in the Hennepin County Continuation Studies activities.

### < 1959

One of the first calls for CLE topics in the *Hennepin Lawyer*.

WEDNESDAY, OCTOBER 10  
Minneapolis Plaza-Hotel

12 NOON  
Nicollet Room

## FAMILY LAW SECTION

"Brain Surgery with a Meat Cleaver"

By Charles A. Flynn, Ramsey County Family Court Judge

**CLE**

Kathleen Picotte  
Nancy Kay Jones  
Co-Chairpersons

### ^ OCTOBER 1984

We're just glad this was training for lawyers, and not surgeons.

Wednesday, May 18  
Omni Northstar

12 Noon

## Criminal Law Committee

"Satanic Cults and Homicides"

Speaker: John Hinchliff  
Mpls Police Dept Organized Crime Unit

Lunch Reservation Required  
Judge LaJune Lange  
Chair

### ^ MAY 1988

CLEs reflect the news and headlines of the times.

### SEPTEMBER 1983 >

If members had missed the blockbuster movie in theaters, we're relieved to know they could experience it in CLE form.

## "WAR GAMES"

TUESDAY, SEPTEMBER 27, 1983  
MINNESOTA CLE CENTER  
\$4.50 PER PERSON

12 NOON  
402 POWERS BUILDING  
CLE APPLIED FOR

Will The New Wave Of Computer Crimes  
Hit Your Law Firm Or Your Clients?

John P. O'Connor, White Collar Crime Supervisor at the FBI, will discuss recent incidents and what you should know to prevent their occurrence. Join us for our first 1983-1984 Association Meeting to hear about this timely issue.

Judge Robert Forsythe  
Co-Chairperson

Janice M. Symchych  
Co-Chairperson

Program and Continuation Studies Committee

(Reservation form inside.)

\$4.50 Per Person





**JANUARY 1990 >**

And you learned  
how to do it all in  
an hour!

Wed., Jan. 17 12:00 Noon  
Board Room 1.0 CLE  
**Young Lawyers Section**  
*Baseball Arbitrations or  
How to Win a Quarter of a Million  
Dollars in Three Hours*  
Speaker: Clark Griffith, J.D.,  
Former Executive Vice President  
of the MN Twins  
Sonja Peterson Chair  
Bag Lunch Res. Req'd.  
• • • • •

**✓ APRIL 1990**

Even though it was a Real Property CLE, we're hoping the future  
Minneapolis mayor mentioned wearing Zubaz or watching *Seinfeld*.

Thursday, April 27 12 Noon  
Mpls. Athletic Club 1 Hr. CLE Appl.  
**Real Property Section**  
"Minneapolis In The 1990's"  
Speaker: R.T. Ryback  
Reserv. Req'd. Chuck Parsons  
\$9.50 Chair

**ENVIRONMENTAL LAW**

*Garbage Wars: Legal Problems of  
Municipal Solid Wastes (1.0 CLE)*

Thurs., February 15, 12:00 noon  
Goodfellows

Speaker: Charles Nauen,  
Schatz, Paquin, Lockridge,  
Grindal & Holstein

\$13/18 (reservations requested)

Chairs: Chuck Dayton &  
William R. Howard  
♦ ♦ ♦

**▲ FEBRUARY 1996**

We're not afraid to put on trashy programming.

**✓ JUNE 2004**

Rapidly evolving feels like an understatement these days.

**How to Really Use the Web – A Rapidly Evolving  
Research Tool (Back by Popular Demand!)**

**Thursday, June 17**

8:30 a.m. to 11:45 a.m.

3.0 CLE credits applied for.

HCBA member: \$95 Non-member: \$115  
CLE ONE CARD holders: No charge.\*

Minnesota has the most powerful, easiest-to-use Web resources of any state in the U.S.  
This is the best presentation you will find on Web research anywhere!

**TOPICS COVERED TO INCLUDE:** The first places to go when you don't know where to go.  
• The best sites for legal and factual research. • The Minnesota Legal Periodical Index and  
the Minnesota Judges' Directory. • The most valuable undiscovered new state and federal  
legal web resources. • How search engines really work. • How to take advantage of the  
gateway to Minnesota's Legal Web: LawMoose. • Where to go when the Web is not enough.  
• Do lawyers have a duty to use the Internet?

**FEATURING:**

• Barbara Golden, Minnesota State Law Librarian, Minnesota State Law Library  
• Bill Jack, Reference Librarian, Legal Research Instructor, William Mitchell College of Law  
• LeVern Pritchard (course chair), Pritchard Law Webs, publisher of LawMoose

**Don't Go to Work Unless It's Fun!: How Lawyers Can  
Become Happier and More Productive**

**Friday, Feb. 25**

8:30 a.m. to 4:30 p.m.

6.0 CLE credits applied for, including  
6.0 Professional Growth credits.

**THIS WORKSHOP WILL ENABLE YOU TO:** Understand and overcome the barriers to fully enjoying your  
work. • Become more productive in your work. • Create an organization where everyone looks forward to  
coming to work. • Have some fun.

**TOPICS COVERED TO INCLUDE:** How to change the negatives about work. • Moving from "victim" to  
"master" mentality. • Creating the path to having work be fun. • How to deal with "not enough time." • Become  
the master of technology, not the servant. • Five satisfaction principles. • Creating clear communication and  
getting what you want. • How to say that little word, "no." • Three simple staff motivation techniques. • Creating  
a satisfaction policy.

**▲ FEBRUARY 2006**

We're not afraid to have fun either.

**CLE 3:00 PM WED., 1/19**  
**FREE MEMBER CLE**  
*Getting Paid—It's a Good Thing!*  
1.0 (Law Office Management) CLE \*

**▲ JANUARY 2011**

We agree.

**▲ JANUARY 2015**

Thank you to the members of the bench  
who have been part of Bench & Bar  
Candid Conversation CLEs over the years.







Ryan Todd

Jemel  
Green-  
Harris

Fuyan Jin

Max  
Tsai

Han Li

Shaina  
Rud Aga

DeAijha Perry

Souvan Lee

# 1L Minority Clerkship Program

**T**he HCBA IL Minority Clerkship Program first began in the fall of 2005. The program places first-year minority law students with Minnesota legal employers for a summer associate experience. Ultimately, the program hopes to find its participants becoming future partners and leaders in Minnesota's legal community.

The 2019 summer session is the program's 13th year, and more than 50 students applied and 17 students (pictured above) were placed with well-respected legal employers. The program has served hundreds of law students from underrepresented backgrounds since its inception.

**Calling all employers:** The Hennepin County Bar Association seeks employers to participate in the HCBA's 1L Minority Clerkship Program for the summer of 2020. Past and current employers have included large and mid-sized firms, government agencies, and the County Attorney, Public Defender's office, and the Fourth District Judicial Court.

For more information on the program, contact Dana Miner at [dminer@mnbars.org](mailto:dminer@mnbars.org) or 612-752-6627.





Mackenzie  
Wieburg

Michael  
Pfau

Dan  
Otsuki

Yongxian  
Wang

Jamesetta  
Collins

Dolapo Oshin

Bernice Hodge

Sandy Xiong

Annali Cler

## Five Reason Why Your Office Should Participate in the 1L Minority Clerkship Program:

1. Clerks go through a three-part interview process that is designed to offer you a highly qualified law student
2. Expand your talent pipeline by introducing diverse perspectives into your practice
3. Obtain quality assistance on legal projects for a lower cost to your clients
4. Provide professional development opportunities not only for your summer clerk, but also for your attorneys and staff who supervise the clerk
5. Invest in the legal community at large by providing opportunities for diverse students

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# Grantee Spotlight:

## MINNESOTA ELDER JUSTICE CENTER

The Minnesota Elder Justice Center emerged from collaborations within the Minnesota elder law community. In the early 2000s, the Vulnerable Adult Justice Project was formed to address the policy needs of older or vulnerable adults. In 2012, the Minnesota S.A.F.E. Elders Initiative was created in partnership with the Anoka County Attorney's Office and the Vulnerable Adult Justice Project to create a public awareness campaign about elder abuse. But it wasn't until October 2014, that the Minnesota Elder Justice Center opened its doors. Stemming from the aforementioned projects, the organization looks at elder abuse from all lenses by impacting systems change, providing direct services for victims, and training law enforcement, the bar, and the general public.

"If we see trends, we know there's a problem that needs to be addressed," says Amanda Vickstrom, Executive Director of the Minnesota Elder Justice Center. One of the current trends is the issue of eviction. In many cases, elderly persons have a tenant living at their home who does not contribute to the household monetarily or otherwise. These can turn into manipulative, abusive relationships, with the tenant acting as the perpetrator. About 65 percent of the time, the perpetrator is a family member, abusing a vulnerable adult through financial exploitation.

Unfortunately, legal services organizations often do not represent landlords, and financial exploitation is not enough to attain an order for protection. This is where the Minnesota Elder Justice Center comes in.

The Minnesota Elder Justice Center's mission is to alleviate abuse, neglect, and financial exploitation of older and vulnerable adults. Staff helps vulnerable adults, their family members, and caretakers navigate a complicated legal system, which many people are unfamiliar with. Abuse can be sexual, financial, emotional, or physical. Sorting out the legal needs of clients can be especially challenging when a vulnerable adult is experiencing multiple forms of abuse, or polyvictimization.

In May 2019, the Hennepin County Bar Foundation provided the Minnesota Elder Justice Center with a grant to support the work of their victim services staff. This includes the costs necessary to provide advocacy to victims, technical assistance to others, and trainings to people in Hennepin County.

Victim services staff build relationships with the victims and offer support. Their goal is to empower these adults to remove abusers or minimize their risk of abuse. "It's really a lot of issue spotting and listening. It's a one-stop shop

of figuring out what's going on," says Vickstrom. In 2018, the Center served 600 victims.

Victim services staff include an attorney, who is able to offer assistance in Orders for Protection, power of attorney documentation, and other limited legal services. Often times, the staff, who also serve as advocates, can provide options and support, and then refer the victim to an attorney through Hennepin County's Lawyer Referral and Information Service or to a pool of elder law attorneys in their network.

Attorneys that need technical assistance can work with Minnesota Elder Justice Center to attain free, confidential information and even refer their clients to the organization for additional support. Staff also travels to law firms and organizations across the state, providing free trainings. "A way to stop elder abuse is to talk about it, to know about it," says Vickstrom.

If you would like to learn more about or take part in the important work done at the Minnesota Elder Justice Center, please contact program director, Marit Peterson, at (651) 440-9303 or [marit.peterson@elderjusticemn.org](mailto:marit.peterson@elderjusticemn.org).

### 2019 HCBF Grantees

Cancer Legal Care  
Children's Law Center of Minnesota  
Community Mediation and Restorative Services  
Conflict Resolution Center  
Discapitados Abriendo Caminos  
Division of Indian Work  
Domestic Abuse Project

Global Rights for Women  
HOME Line  
Immigrant Law Center of Minnesota  
JustUs Health  
Lawyers Concerned for Lawyers  
LegalCORPS  
Legal Rights Center  
Loan Repayment Assistance Program of Minnesota  
Minnesota Assistance Council for Veterans

Minnesota Elder Justice Center  
Minnesota Justice Foundation  
Minnesota Wills for Heroes  
Missions Inc. Program  
Seward Longfellow Restorative Justice  
Sojourner Project  
Standpoint  
The Advocates for Human Rights  
Volunteer Lawyers Network

# THE IMPACT OF INCARCERATION

“Those of us who hope to be their allies should not be surprised, if and when this day comes, that when those who have been locked up and locked out finally have to chance to speak and truly be heard, what we hear is rage. The rage may frighten us; it may remind us of riots, uprisings and buildings aflame. We may be tempted to control it or douse it with buckets of doubt, dismay or disbelief. But we should do no such thing. Instead, when a young man who was born in the ghetto and who knows little of life beyond the walls of his prison cell and the invisible cage that has become his life, turns to us in bewilderment and rage, we should do nothing more than look him in the eye and tell him the truth.”

– Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*

- 17** **Mass Incarceration: America's True Exceptionalism**  
*By Judge Bridget A. Sullivan*
- 24** **When Jail Doors Open and Rental Doors Close: Housing Stability After Conviction**  
*By Referee Melissa Houghtaling*
- 28** **The Intersection of Mass Incarceration and Families**  
*By Maria S. Mitchell*
- 31** **Changing Charging Practices**  
*By Anna Gusaas*
- 32** **Strategically Disrupting the Mass Incarceration Pipeline**  
*By Elizer E. Darris*



# Mass Incarceration: America's True Exceptionalism

*By Judge Bridget A. Sullivan*



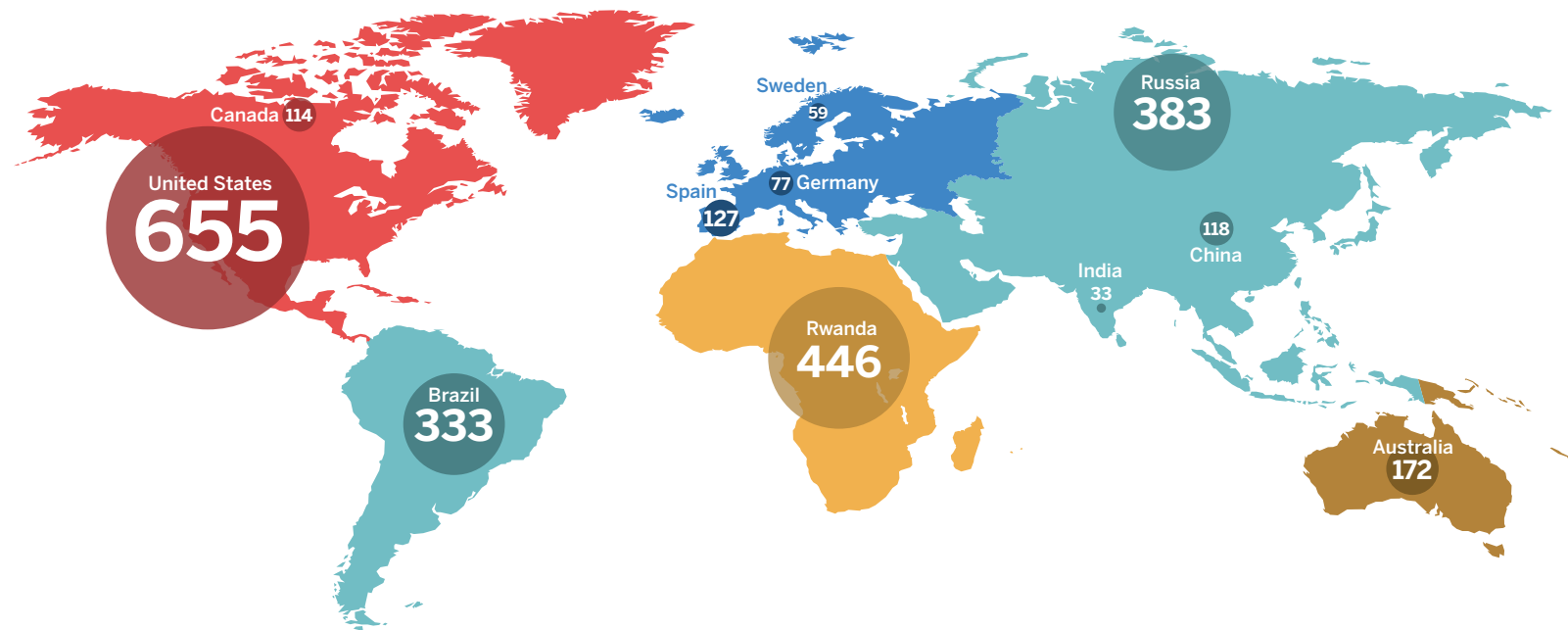
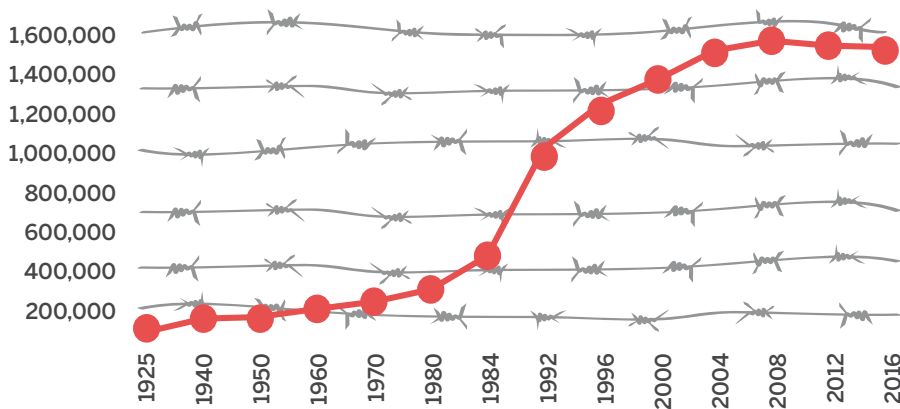
## Why Call It “Mass” Incarceration?

Over the past four decades, the United States has built the largest prison population in the entire world, second only to one small African country in its rate of incarceration.<sup>1</sup> Currently, nearly 2 million Americans are incarcerated, and over 6 million Americans are under correctional supervision,<sup>2</sup> all at an annual cost of \$80 billion. Some reports indicate that there are more people imprisoned in the United States than are estimated to have been imprisoned in the Soviet Gulags.<sup>3</sup> In this regard, the United States is a world leader in incarceration of its citizens, and the word “mass” is used to refer to the extreme rate of imprisonment or “hyper-incarceration” in the United States, which is unprecedented, both comparatively and historically. The word also is used to refer to the concentration of imprisonment among young, African American men in areas of concentrated economic disadvantage.<sup>4</sup> In this article, the stark statistics are illustrated, the causes of mass incarceration surveyed, and recent reform efforts briefly discussed.

The charts on the following page show the stark reality of mass incarceration. The U.S. prison population has had unparalleled growth over the last 35 years. (Almost 76 percent of incarcerated people have not been convicted of a crime, but are waiting for a trial or hearing.<sup>7</sup>) The U.S. also incarcerates its population at a much higher rate than almost every country in the world. Perhaps most devastating is the figure that shows the racial disparities in incarcerations rate. (See the following page.)

To counter those who think this is not concerning because this data may reflect racial disparities in the commission of a crime, numerous studies, including those from the American Civil Liberties Union,<sup>9</sup> demonstrate that African Americans are stopped by police at a rate much higher than whites for the same conduct, receive longer sentences than whites for committing the same crimes,<sup>10</sup> are prey to the cash bail system at a higher rate than whites,<sup>11</sup> and in a variety of other ways are discriminated against all along the “preschool to prison pipeline.”

Recent data suggest that racial disparities in incarceration are slowing.<sup>12</sup> While some attribute this to more classification of Hispanics as “whites,” others attribute it to a greater number of whites being arrested for use of methamphetamines and opioids.<sup>13</sup>

International Rates of Incarceration per 100,000<sup>6</sup>U.S. Prison Population<sup>5</sup>U.S. Incarceration Rates by Race and Ethnicity per 100,000<sup>8</sup>

## What's Wrong with Mass Incarceration?

First, it's a civil rights crisis. African Americans are incarcerated at a rate of roughly six times the rate of whites, and this, combined with the collateral consequences of imprisonment, which are severe and long-lasting, perpetuate racial inequality in direct and insidious ways.<sup>14</sup> Certainly, as *The New Jim Crow* sets forth, policing and imprisonment policies in the United States have, with devastating effectiveness, created a disenfranchised caste of people cut off from the rights of citizenship and the means to succeed. The Pew Charitable Trusts also exhaustively demonstrated in its report "Collateral Consequences: Incarceration's Effect on Economic Mobility" the short- and long-term economic losses that mass incarceration has caused in the African American population.<sup>15</sup>

Second, incarcerating almost 2 million Americans a year comes at terrible cost to those individuals incarcerated, their families, and their communities. Aside from the more common collateral consequences are those that involve denial of employment or occupational licensing and those that affect benefits, such as education, housing, public assistance, and property rights. Other consequences include ineligibility for government contracts and debarment from program participation, exclusion from management and operation of regulated businesses, and restrictions on family relationships such as child custody.



Working together, the effects of incarceration create insurmountable challenges to the fundamentals of creating a stable life after release. People who serve time miss out on educational opportunities and lack basic educational credentials essential for employment. For example, only 25 percent of formerly convicted people completed high school and almost 60 percent of formerly incarcerated people have only a high school diploma or GED, at a time when this level of education is of decreasing value in the labor market. Criminal background checks are now required by almost 90 percent of employers, and most of these employers will not hire those with convictions. Thus, it is not surprising that one year after release, over 60 percent of the formerly incarcerated remain unemployed; yet most are required by the terms of their parole to find employment.

Housing is also a difficult challenge for the formerly incarcerated. Most are banned from public housing, and entire households may be banned from public housing based upon the arrest or pending charges against one household member. People are required to sign agreements that state that they will not allow family members with felony convictions in their public housing units. And, of course, many private landlords refuse to rent to those with felony convictions or charges. Thus, over one-third of people released end up in housing shelters, and it is estimated that over 60 percent of the homeless population has a criminal record.

As is the case with public housing, a majority of states place a lifetime ban on receiving public assistance on people with felony drug convictions. This includes food assistance, as well as access to mental health and substance abuse treatment.

There are also permanent psychological wounds to both the individuals and their families.<sup>16</sup> Mass incarceration has long-term physiological effects that contribute to a range of health issues, including mental health disorders, diabetes, asthma, hypertension, HIV, and hepatitis C. Although not as well-studied, mass incarceration can also directly and indirectly affect infant mortality.<sup>17</sup> While its direct effects are well-documented, its indirect effects are pervasive and damaging but largely unrecognized. When incarcerated, an individual can face increased risk of sexual violence and infectious illness; loss of connection with family and friends; as well as trauma resulting from draconian prison policies and practices. Furthermore, the incarceration of a loved one or breadwinner can cause families and friends significant emotional distress, loss of income and property, and residential instability. These experiences put affected individuals at a heightened risk of post-traumatic stress disorder (PTSD), anxiety, and depression.

Third, longer sentences and mandatory minimum sentences have little effect on the rate of crime and may be counterproductive to public safety<sup>18</sup> and, therefore, mass incarceration cannot be justified from a financial, policy, or moral perspective.

## The Causes Of Mass Incarceration

### The Current Literature

In her searing work, *The New Jim Crow*, Michelle Alexander identifies the “war on drugs” as a major cause for the increase in the incarcerated population in the United States from 300,000 to over 2 million during its 30-year duration.<sup>19</sup> But in his work, *Locked In*, John Pfaff points out that drug offenses account for only 16 percent to 18 percent of the incarcerated population. Pfaff attributes the drastic increase in the incarcerated population to a doubling of the number of prosecutors in the 1990s. According to Pfaff, this huge increase resulted in a major shift toward bringing felony charges against twice as many arrestees as before at a time when crime

rates were falling.<sup>20</sup> In *Charged*, Emily Bazelon echoes Pfaff’s indictment of what she calls “prosecutorial excess,” and blames the attorneys in the more than 2,000 prosecutors’ offices in the United States, who wield the blunt weapon of mandatory minimum sentences to force plea bargains from poorly represented people, many of whom in former times would never have been charged.<sup>21</sup> Peter Edelman, in *NOT a Crime to Be Poor*, argues that the cash bail system, the fees and fines levied on arrestees, strict enforcement of the crimes of the poor and homeless, and the use of jails for managing the mentally ill have criminalized poverty. In short, he argues that what the Department of Justice found at work in Ferguson, Missouri, is happening everywhere in the United States.<sup>22</sup>

Mass incarceration is a complex problem with multiple causes. The subject is rich with statistical analyses, academic and philosophical debates, controversies, and misconceptions about its causes. To understand how to fix the problem, it is important to learn the history of how we got here.



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### The Historical Context: The “Politics of Crime” Pre-1960

In 2014, the National Academy of Sciences published an exhaustive report entitled “The Growth of Incarceration in the United States, Exploring Causes and Consequences.”<sup>23</sup> The report notes that racism, ethnic hatred, and fear have long driven American penal policy and cites the national campaigns that identified specific groups as “criminal,” including the Irish, Mexicans, African Americans, and single women.<sup>24</sup> But the report argues that a shift in penal policy began after World War II that was distinctive, both historically and comparatively. The most significant element of this shift was the emergence of the role of the federal government, which, along with changes in policing, prosecution, and sentencing, resulted in “major increases in the government’s capacity to pursue and punish lawbreakers.”<sup>25</sup> The report charts the extent to which “law and order” rhetoric and policies were deployed by politicians of both parties for expressively political purposes in reaction to the social and political turmoil beginning in the 1940s and extending into the 1970s.

### The Emergence of the “War on Crime”

In the two decades before the dramatic election of 1964, efforts to address issues of race and civil rights raised by racial confrontations—including the lynching of black veterans, the “Zoot suit” riots in Los Angeles in 1942, and the riots in Detroit in 1943—did not gain much traction. But while President Harry Truman’s “law and order” legislation was not enacted, his efforts broke ground for establishing the federal role in law enforcement.

In 1964, Barry Goldwater ran on a fierce law-and-order campaign that used both explicit and implicit racial appeals to white voters. Since then, politicians of every stripe have used the “get tough on crime” message to sell increasingly punitive policies, expansion of law enforcement agencies, and greater resources for these agencies.

Although Lyndon B. Johnson won the 1964 election in a landslide, he still faced pressure from conservative politicians demanding a response to rising crime rates and civil rights

protests. Much as he tried to reformulate the law-and-order issue within his “war on poverty” and the need to address the underlying causes of crime, this approach lost out to the “tough on crime” lobby. Also at work was the fact that many liberals were advocating for greater federal involvement in local and state law enforcement in order to create more professionalism in police forces, create more neutral processes, reduce police brutality, and combat white violence against civil rights activists.

The 1965 Law Enforcement Assistance Act awarded grants and ran programs to improve and expand police operations, courts, and prisons in states and localities. The law, the National Research Council states: “engaged the federal government in criminal justice and law enforcement, theoretically and substantively, to an unprecedented degree.”<sup>26</sup> A second law, The Omnibus Crime Control and Safe Street Acts of 1968, provided federal grants to police for equipment and training, and also greater federal spending on rehabilitation, crime prevention, and diversion programs.



## MEDIATOR.

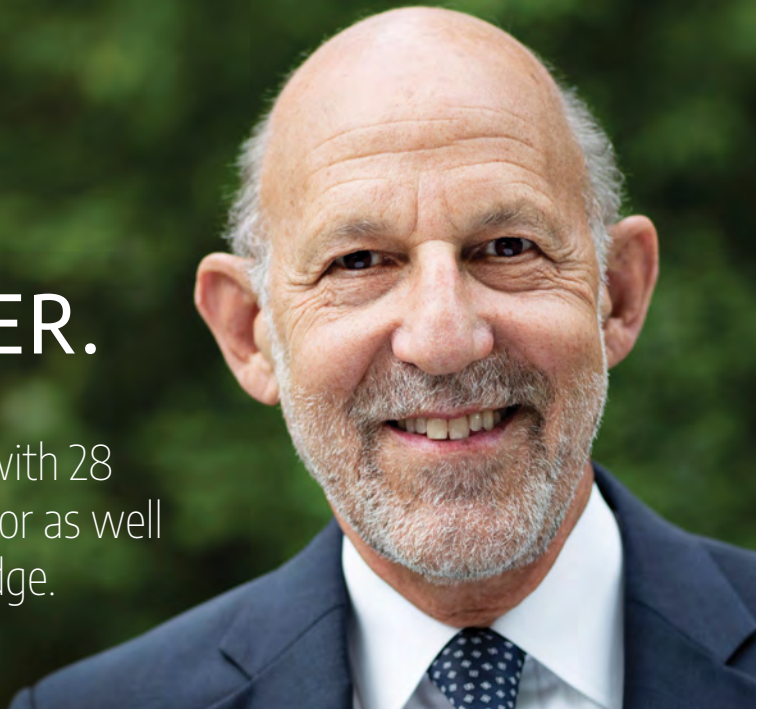


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In 1968, Nixon officially declared a “war on drugs” and stated that drug abuse was “public enemy number one.”



Under Reagan’s 1986 Anti-Drug Abuse Act, mandatory minimum sentences were established for certain drug offenses.



Ronald and Nancy Reagan, launched the “Just Say No” to drugs campaign.



Clinton’s 1994 crime bill included punitive sentencing policies, \$9 billion for new prisons, and \$8 billion for 100,000 additional police officers.

### Law-and-Order Politics

Following widespread urban rioting, the rise of black militant groups, the assassinations of Robert F. Kennedy, Martin Luther King Jr., and Malcom X, the emergence of the drug culture, the spectacle of Chicago police beating protesters at the 1968 Democratic National Convention, many Republicans realized that law and order was a potent political message that would resonate with conservative whites. But they learned from the mistakes of the Goldwater campaign, that overtly racial appeals turned off the “silent majority.”

While Nixon did talk about treatment for drug addiction, some have blamed him for normalizing the association of drug use with black people and crime.<sup>27</sup> John Ehrlichman, Nixon’s domestic policy chief, was quoted to have said: “We knew we couldn’t make it illegal to be either against war or blacks, 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.”<sup>28</sup>

Republican candidates followed Nixon’s lead and made what were barely covert racial appeals to conservative whites nationwide, but again, especially to conservative Southern whites. In his speech opening his 1980 presidential campaign, Ronald Reagan emphasized “states’ rights” in Philadelphia, Mississippi, of all places.<sup>29</sup> In 1988, George H.W. Bush portrayed his opponent Michael Dukakis as “soft” on violent crime in what became a racially charged campaign. The

Bush campaign ran the infamous Willie Horton<sup>30</sup> commercial. Lee Atwater, Bush’s campaign advisor, promised that “by the time this election is over, Willie Horton will be a household name.” Later, he said, “The Horton case is one of those gut issues that are value issues, particularly in the South, and if we hammer at these over and over, we are going to win.”<sup>31</sup>

Democrats such as Bill Clinton and Joe Biden<sup>32</sup> responded to the GOP’s law-and-order message with their own. In 1992, in a highly publicized move, Clinton rushed home from the New Hampshire primary to personally oversee the execution of a mentally impaired black man.<sup>33</sup> Clinton was reported to have quipped, “I can be nicked on a lot of things, but no one can say I’m soft on crime.”<sup>34</sup> In 1993, Biden, then chair of the Senate Judiciary Committee, on the day before a vote was scheduled on the Senate’s version of the Violent Crime Control and Law Enforcement Act, warned of “predators on our streets” who were “beyond the pale” and said they must be cordoned off from the rest of society because the justice system did not know how to rehabilitate them.

### The “War on Drugs”

In 1971, three years after his racially coded campaign in 1968, Richard Nixon officially declared a “war on drugs” and stated that drug abuse was “public enemy number one.” Indeed, at that time about 48 percent of Americans thought that drug use was a major problem. While Nixon’s funding of his drug initiative increased funding for drug control agencies, he also was the first to propose strict mandatory minimums. He established the Drug Enforcement Administration (DEA) in 1973.<sup>35</sup> Notably, Nixon’s administration was the last to

spend more on prevention and treatment than on law enforcement (with the exception of Jimmy Carter’s administration).

The Carter administration was a brief pause in the War on Drugs, but it was followed by Ronald and Nancy Reagan’s “Just Say No” to drugs campaign. As has been well-documented, Reagan kept up the Republican strategy of using racially coded messages to fight the drug war and the war on the welfare state. Under Reagan’s 1986 Anti-Drug Abuse Act, mandatory minimum sentences were established for certain drug offenses. While later declared unconstitutional,<sup>36</sup> this law set sentences for offenses using crack cocaine (more favored by black users) at 100 times greater than sentences for using powder cocaine (the form of choice for white users).

Throughout the 1980s and 1990s, both federal and state lawmakers enacted laws designed to make sure that more people convicted of crimes would be imprisoned and for much longer sentences. Hoping to recapture moderate Americans,<sup>37</sup> Bill Clinton also supported a tough-on-crime platform, in response to a public frenzy around crime in the 1990s. Despite being warned that its effects would have a disproportionate impact on people of color, particularly by members of the Congressional Black Caucus, Clinton signed both the 1994 Violent Crime Control Act and the 1996 Antiterrorism and Effective Death Penalty Act. His 1994 crime bill included punitive sentencing policies, \$9 billion for new prisons, and \$8 billion for 100,000 additional police officers (the “COPS” program). The law’s sentencing provisions included expansion of the federal death penalty, mandatory minimum sentencing, “truth in sentencing” incentives, and, of course, the “three strikes and you’re out” law.

The 1994 law provided a potent message to states that longer sentences and more prison sentences was a ticket to large amounts of federal funding:

In the federal Violent Crime Control and Law Enforcement Act of 1994 . . . a state applying for a federal grant for prison construction was required to show that it:

(A) Has increased the percentage of convicted violent offenders sentenced to prison; (B) has increased the average prison time which will be served in prison by convicted violent offenders sentenced to prison; (C) has increased the percentage which will be served in prison by violent offenders sentenced to prison.<sup>38</sup>

Until recently, Bill Clinton took credit for the alleged decrease in crime, citing his 1994 crime bill. But in October 2014, during a celebration of the 20th anniversary of his crime bill, he admitted that he got it wrong: “We basically took a shotgun to a problem that needed a .22 – a very significant percentage of serious crimes are committed by a very small number [of criminals]....we...sent everybody to jail for too long.”<sup>39</sup> Indeed, in 2007, the National Research Council announced its findings that the COPS program, specifically, “had little or no impact on crime,” and in its comprehensive evaluation of mass incarceration concluded that while it did have some impact on crime, its effect “was unlikely to have been large.” More damning is Leon Panetta’s conclusion (Clinton’s former chief of staff) who wrote that “[the truth is] that crime was dropping before Clinton and it continued to drop after his presidency.”<sup>40</sup>

### Sentencing Guidelines

At the same time that law and order was increasingly occupying the public’s consciousness, critics of indeterminate sentencing from both the Left and the Right began to emerge. This quickly developed into a crescendo of criticism when Judge Marvin Frankel published an article, “Criminal Sentences—Law without Order,” in which he described criminal sentencing in the United States as “without standards” and as “lawless.”<sup>41</sup> Left-leaning politicians wanted sentencing guidelines because, it was thought, by reducing judicial discretion in sentencing, racial disparities in sentencing could be reduced. Conservatives also wanted to reduce judicial discretion to impose what the Right saw as too much leniency in sentencing, to provide more uniformity in sentencing, and to increase sentences across the board and thus to increase the deterrent effect of punishment.

Thus, a strange coalition of liberals and conservatives coalesced which favored laws to reform sentencing and which were aimed at procedural fairness and making sentences more predictable and consistent. But as the national political discourse became more intently focused on the dual wars on crime and drugs, sentencing “reforms” came in the form of mandatory minimum sentences, “truth-in-sentencing,”<sup>42</sup> and life without parole laws. The outcome of the federal Sentencing Reform Act of 1984 demonstrates the shift in concern about sentencing disparities to the predominance of punitive goals in sentencing. The Sentencing Reform Act directed the U.S. Commission on Sentencing to develop guidelines that would reduce racial disparities and provide alternative sentencing for nonviolent, first offenses. The commission ignored these directives and developed mandatory guidelines that greatly increased the length of sentences for many crimes as well as increased the percentage of people receiving a sentence of imprisonment.<sup>43</sup>

The effects of the Sentencing Reform Act and similar state sentencing laws are complex. Of course, one result was what was intended: longer sentences. But the hope that racial disparities would decrease was not borne out by the data, and some studies indicate that these laws may have slightly contributed to overall racial disparities in U.S. prisons.<sup>44</sup> How could this happen if the reforms were directed at increased uniformity in sentencing? Historical experience with lengthy mandatory sentences would have predicted this result.<sup>45</sup> What is referred to as “circumvention” sentencing requirements perceived to be overly harsh are evaded by every actor in the criminal justice system, from police to prosecutors to judges:

Legislative prescription of a high mandatory sentence for certain offenders is likely to result in a reduction of charges at the prosecution stage, or if this is not done, by a refusal of the judge to convict at the adjudication stage. The issue . . . is thus not solely whether certain offenders should be dealt with severely, but also how the criminal justice system will accommodate to the legislation.<sup>46</sup>

Circumvention of the sentencing laws requires actors in the system to exercise their discretion and set aside policies directed at sentencing uniformity. In doing so, these actors amplify the contribution of the existing mechanisms that cause racial disparities in our prisons. There have been several reforms of the Sentencing Reform Act, some of which it was hoped would

address particular racial disparities as well as reduce sentencing across the board for certain crimes. But measuring the effects of these reforms, and measuring and isolating individual discretion in the chain of arrest to sentencing, i.e., from police-to-prosecutor-to-judge is a difficult analytical problem for researchers. The history of sentencing reform is a history of heated, data-driven debates as to whether high mandatory sentences for more serious crimes or mandatory minimum sentences for less serious crimes create opportunities for discretion.<sup>47</sup> The debate about how to reform sentencing laws illustrates how important it is to fully understand a complex problem to ensure that proposed solutions will work.

### Reform Efforts

With growing concern about mass incarceration in American politics and public policy, many reforms have been implemented both federally and locally. While there are too many examples to detail here, they generally fall into these categories: reform of sentencing guidelines, retroactive sentencing reforms, decriminalization of certain offenses, reduction of pretrial detention and elimination of cash bail, alternative sentencing such as treatment, presumptive parole, elimination of imprisonment for technical parole violations, and elimination of specific collateral consequences (e.g., the right to vote). Because many of these reforms are very recent, their efficacy and long-term consequences are difficult to measure, but preliminary data shows that some progress has been made. Because most incarcerated people are in the pretrial phase between charging and disposition, reforms such as race-neutral risk-assessment tools for use in deciding whether pretrial detention is needed and elimination of cash bail for misdemeanor and nonviolent felony offenses have shown good results in decreasing the incarcerated population, at least initially.<sup>48</sup>



**Judge  
Bridget  
A. Sullivan**

The Hon. Bridget A. Sullivan is a judge in Hennepin County Court. She is currently assigned to the Family Court. To the extent any opinions are expressed in her article, they are solely her personal opinions and do not represent the opinions or views of the Hennepin County Court.



## Notes

- <sup>1</sup> <https://www.vox.com/2015/7/13/8913297/mass-incarceration-maps-charts>
- <sup>2</sup> <https://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>
- <sup>3</sup> <https://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0033.xml>
- <sup>4</sup> Data from The Prison Policy Initiative.
- <sup>5</sup> *Id.*
- <sup>6</sup> *Id.*
- <sup>7</sup> *Id.*
- <sup>8</sup> *Id.*
- <sup>9</sup> See, e.g., <https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/data-reveals-driving-person-color-illinois-leads>
- <sup>10</sup> University of Michigan Law School Study; Christopher Ingraham, "Black Men Sentenced to More Time for the Same Crime as a White Person," Washington Post, April 23, 2019.
- <sup>11</sup> <https://www.princeton.edu/~wdobbie/files/racialbias.pdf>
- <sup>12</sup> Kristine Riley and Chis Mai, "Divided Justice: Trends in Black and White Jail Incarceration, 1990-2013," February 2018, Vera Institute of Justice.
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- <sup>20</sup> John F. Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*, Basic Books (2017).
- <sup>21</sup> Emily Bazelon, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*, Random House (2019).
- <sup>22</sup> Peter Edelman, *NOT a Crime to Be Poor: The Criminalization of Poverty in America*, The New Press (2019); see also Alexandra Natapoff, *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal*, Basic Books (2018).
- <sup>23</sup> National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, The National Academies Press (2014). Available at <https://doi.org/10.17226/18613>.
- <sup>24</sup> *Id.* at 106.
- <sup>25</sup> *Id.*
- <sup>26</sup> *Id.* at 119.
- <sup>27</sup> Emily Dufton, "The War on Drugs: How Nixon Tied Addiction to Crime," *The Atlantic*, March 26, 2012.
- <sup>28</sup> *Id.*
- <sup>29</sup> Philadelphia, Mississippi, is where the three civil rights workers James Chaney, Andrew Goodman, and Michael Schwerner were kidnapped and brutally murdered in the summer of 1964.
- <sup>30</sup> Willie Horton was a black convict who, released from prison on a weekend furlough, escaped to Maryland where he violently attacked a couple in their home.
- <sup>31</sup> <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited>
- <sup>32</sup> <https://www.cnn.com/2019/03/07/politics/biden-1993-speech-predators/index.html>
- <sup>33</sup> The Marshall Project, Commentary, "Bill Clinton, 'Black Lives,' and the Myths of the 1994 Crime Bill."
- <sup>34</sup> *Id.*
- <sup>35</sup> What started in 1973 as an agency with less than 1500 agents and \$75 million in funding is now an agency with 5000 agents and a \$2.03 billion budget.
- <sup>36</sup> Notably, the disparities in cocaine sentences was declared unconstitutional by Hennepin County Judge Pamela Alexander in *State v. Russel*, 477 NW2d 886 (1991). While she paid a high price for her decision (her nomination to the U.S. District Court was abandoned by Bill Clinton), Judge Alexander was vindicated years later by *U.S. v. Booker*, 543 U.S. 220 (2005). In *Booker*, the U.S. Supreme Court struck down the provision of the federal sentencing statute that required federal district judges to impose a sentence within the guidelines along with the provision that deprived federal appeals courts of the power to review sentences imposed outside the range. The Court instructed federal district judges to impose a sentence with reference to a wider range of sentencing factors set forth in the federal sentencing statute, and it directed federal appeals courts to review criminal sentences for "reasonableness," which the Court left undefined.
- <sup>37</sup> The Marshall Project, Commentary, "Bill Clinton, 'Black Lives,' and the Myths of the 1994 Crime Bill."
- <sup>38</sup> National Research Council Report, at 71.
- <sup>39</sup> Reported by Andrew Cohen, in Brennan Center for Justice, "Bill Clinton and Mass Incarceration," August 14, 2014.
- <sup>40</sup> *Id.*
- <sup>41</sup> National Research Council (2014), at 72 (citing Stith and Cabranes, 1998).
- <sup>42</sup> These laws required that people serve at least 85 percent of their sentences.
- <sup>43</sup> In *U.S. v. Booker*, 543 U.S. 220 (2005), these guidelines were effectively converted from presumptive to voluntary.
- <sup>44</sup> Crystal S. Yang, "Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing" (Coase-Sandor Institute for Law & Economics Working Paper No. 661, 2013).
- <sup>45</sup> Michael Tonry, "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings," 16 *Crime & Just.* 243 (1992), available at [http://scholarship.law.umn.edu/faculty\\_articles/480](http://scholarship.law.umn.edu/faculty_articles/480).
- <sup>46</sup> National Research Council Report (2014), at 71.
- <sup>47</sup> See, e.g., Sonya B. Starr and M.M. Rehavi, "Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker," 123 *Yale L.J.* 2 (2013); Joshua B. Fischman and Max M. Schanzenbach, "Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums," 9 *J. Empirical Legal Stud.* 729 (2012).
- <sup>48</sup> E.g., "Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail," Aurelie Ouss and Megan Stephenson, February 25, 2019, George Mason Legal Studies Paper. Available at <https://www.injusticewatch.org/news/2019cook-county-report-sharp-drop-in-jail-population-but-crime-did-not-jump/>; "Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment," Cindy Redcross, Brit Henderson, Luke Miratrix, and Erin Valentine, March 2019, MDRC Center for Criminal Justice Research; and <https://www.injusticewatch.org/news/2019cook-county-report-sharp-drop-in-jail-population-but-crime-did-not-jump/>.



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# When Jail Doors Open and Rental Doors Close: Housing Stability After Conviction

*By Referee Melissa Houghtaling*

Our criminal justice system is premised on the concept that, for certain crimes, removal from society is necessary to rehabilitate the individual. Punishment for criminal behavior serves four purposes: retribution, deterrence, incapacitation, and rehabilitation. After completing a prison sentence, the person is released back into society, free to re-integrate and flourish, now having completed the terms of his or her punishment.

There are repercussions of the conviction itself that can hinder or prevent successful reintegration. While housing has been identified as one of the key factors to reducing recidivism and creating general stability for the post-conviction individual, a conviction (or even a charge) may create barriers to securing safe, stable housing.<sup>1</sup> Without a stable residence, continuity in substance abuse and mental health treatment is compromised<sup>2</sup> and employment can be difficult to obtain or maintain. This article will address general housing statistics in Hennepin County and provide a brief background on tenant screening and fair housing laws considering the impact of criminal charges and convictions on housing stability.

**“The opportunity to secure an affordable, decent place to live is part of an effective second chance.”**

— Former HUD Secretary  
Julián Castro



## Hennepin County Housing Statistics

As many as 100 million U.S. adults—or nearly one-third of the population—have a criminal record of some sort.<sup>3</sup> “When individuals are released from prisons and jail, their ability to access safe, secure and affordable housing is critical to their successful reentry to society.”<sup>4</sup>

The United States has the highest rate of incarceration in the world, but mass incarceration does not affect all communities equally. “Socioeconomic inequity fueled by the history of racial bias in the United States combined with policy changes from the ‘tough on crime’ era further fragment and destroy black communities.”<sup>5</sup> These incarceration statistics and disparate impact on racial minorities trickle down to effect statistics related to housing stability.

Housing instability can be measured at many different points in time while an individual searches for and secures housing. There may be difficulty from the beginning during the tenant screening process or later down the road in a tenancy termination proceeding.

Research is relatively abundant related to public and federally subsidized housing opportunities for post-release individuals. However, almost no information is available related to the access or ease in securing housing in the private rental housing market for individuals with criminal records. Despite this we can look to the guidance and instruction given to private landlords and surmise the difficulty an individual with a criminal history might have in accessing housing. Additionally, there is evidence as to how criminal charges (without conviction) and post-conviction familial assistance impact tenant approval and eviction rates.

In 2018, Hennepin County received 4,724 complaints for residential eviction actions—2,014 of which resulted in the entry of judgment and issuance of writs of recovery—approximately 5.5 evictions per day. This number is down significantly from the height of the recession when Hennepin County eviction filings exceeded 8,500 per year.

Notably, however, the number of total eviction judgments has remained relatively steady—2,000 to 3,000 annually.<sup>6</sup> Further, most evictions are the result of non-payment of rent, indicating economic versus behavioral reasons for tenant removal from the property (approximately 90 percent of filings are for nonpayment of rent versus approximately 10 percent for breach of lease and failure to vacate after notice combined). While securing

consistent employment following a criminal conviction can be challenging, analyzing the more complex interplay between the collateral consequences of convictions with access to employment<sup>7</sup> and housing is beyond the scope of this article.

In 2018, the rental vacancy in Hennepin County was a mere 3 percent. Median rent was \$1,067 and 22 percent of households paid 50 percent or more of their income to rent payments.<sup>8</sup> These numbers are important indicators that as safe, secure housing becomes a scarcity for those individuals without criminal records, landlords can be more selective in the tenants they approve for housing—and stated reasons for denying an applicant housing.

According to Marcy R. Podkopcak, 4th Judicial District Director of Research and Business Practices Divisions, the pretrial scale analysis found that of the 8,426 pretrial criminal defendants in Hennepin County in 2017, an average of 25 percent had nonstable housing (defined as one of the following in the last 12 months: homeless or three or more address changes or moving from parents to friends (couch hopping)). While the court does not track the reason a tenant may be accused of breach of lease or failure to vacate, based on representations made during court appearances, claims related to breach of lease for some tenants often include “unauthorized guests” and “over-occupancy” of units perhaps accounting for some of the criminal defendant “couch-hopping” population. Accordingly, not only can a criminal conviction or charge impact the criminal defendant’s ability to secure independent housing, the conviction or charge can have a ripple effect for family members and friends who want to assist the newly released or charged individual who is unable to find independent suitable housing.

Not only does the court see landlords asserting “unauthorized guests” or “over-occupancy” as a basis for eviction, these concepts are also used by landlords defending against tenant-initiated actions related to repairs and habitability concerns. Landlords who know of additional adults in a rental unit may claim the added occupant, and tenant’s conduct of permitting extra individuals to stay at the property, results in increased wear and tear on the premises thereby alleviating landlords of the obligation to make repairs by shifting the disrepair to the tenant’s conduct.<sup>9</sup>

Combine the forgoing with the realities of generational poverty and breach of lease evictions for unauthorized guests further impact access to affordable housing.

## Tenant Screening and Fair Housing

“Although many factors other than criminal history screening contribute to [housing insecurity for ex-offenders], the only systematic study of the matter [in 2001] found that ex-convicts themselves cited ‘discrimination due to a criminal record’ more often than anything else when asked about their primary concern in trying to find a place to live.”<sup>10</sup>

The law provides protections to tenants with criminal convictions by establishing requirements for landlords during the tenant screening process in state or federally subsidized housing. The Department of Housing and Urban Development (HUD) guidelines generally bar an assisted housing agency from automatically excluding an applicant based on a criminal record, past use of illegal drugs, or abuse of alcohol.

One of the reasons for the prohibition on a blanket exclusion is related to racial disparities in criminal convictions and arrests. As the United States Supreme Court noted “certain criminal convictions are correlated with sex and race” resulting in a disparate impact in post-conviction housing.<sup>11</sup> Statistically, racial minority communities have disproportionately higher rates of arrests, convictions, and sentencing for violent crimes.<sup>12</sup> While commenting on sentencing based on arrest records, the Supreme Court in *U.S. v. Berry* reasoned that “reliance on arrest records may exacerbate sentencing disparities arising from economic, social and/or racial factors. . . . A record of a prior arrest may, therefore, be as suggestive of a defendant’s demographics as his/her potential for recidivism or his/her past criminality.”<sup>13</sup> Taken one step further, a landlord relying too heavily on arrest or criminal conviction records when selecting tenants may result in racial and economic disparities wholly unrelated to the individual’s potential for endangering a housing community.

Because of the tight rental market, landlords can be more selective in whom they select as tenants and/or why they denied tenancy. Landlords will typically look at a prospective tenant’s criminal history, income, employment history, and rental history. When determining the suitability of a tenant, any one of the previously mentioned factors may lead to disqualification. However, if the landlord is using criminal history as a disqualifying factor, it must comply with the HUD Tenant Screening Policy.<sup>14</sup> While having a criminal record is not a protected characteristic under the Fair Housing Act, criminal-history-based restrictions on housing opportunities violate the Act if, without justification, their

burden falls more often on renters of one race or national origin over another.<sup>15</sup>

Landlords and property managers may reject an applicant whose background check reveals that the prospective tenant has been convicted of a crime. However, the landlord or property manager must show that excluding a person with a conviction achieves a substantial, legitimate, nondiscriminatory purpose. Importantly, landlords must distinguish between criminal activity that creates a demonstrable risk to resident safety and/or property and criminal conduct that does not.

HUD instructs landlords and property managers that a general ban on all applicants with a criminal history is impermissible and landlords cannot reject a tenant based upon an arrest that did not result in conviction. Furthermore, landlords must treat comparable criminal histories similarly without consideration of race, national origin, or other protected classes. HUD released a toolkit in 2016 that highlights best practices and case studies that can be replicated by communities looking to build their own reentry housing programs to improve housing opportunities for ex-offenders across the country.<sup>16</sup>

Federal law requires subsidized housing be denied for three categories of criminally involved individuals: 1) those who have been evicted from subsidized housing because of drug-related activity are ineligible for a three-year period from the date of their eviction, but may have their ineligibility period shortened if they can demonstrate they have completed a Public Housing Authority-approved rehabilitation program; 2) any household member who is subject to a lifetime registration requirement under a state sex offender registration program is permanently banned from receiving subsidized housing; and 3) any individual convicted of manufacturing or producing methamphetamine on the premise of federally assisted housing.<sup>17</sup> In addition, federal regulations grant the PHA the discretion to prohibit admission of all other criminally involved individuals.<sup>18</sup>

A policy or practice of excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy the burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. As the Supreme Court has recognized, “[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing

more than that someone probably suspected the person apprehended of an offense.”<sup>19</sup>

Prior to the “war on drugs” era, landlords focused their requirements for good tenants on economic factors. Interestingly, a shift in focus occurred in the late 1980s/early 1990s. “Among twenty ‘how-to-landlord’ books available in local bookstores and libraries, all ten published after 1990 discuss criminal background screening and include criminal history questions in their sample rental applications, but none of the titles published earlier did so. Instead, the older books focused primarily on financial risks—especially nonpayment of rent, turnover costs, and damage to the apartment.”<sup>20</sup>



## of pretrial criminal defendants have non-stable housing

In *Department of Housing and Urban Development v. Rucker*, the Supreme Court analyzed the statute giving public housing authorities the authority to evict for drug-related crimes even when the tenant “did not know, could not foresee, or could not control behavior by other occupants of the unit.”<sup>21</sup> The Court held that the plain language of the statute provided the agency with the requisite discretion; therefore, public housing authorities may terminate tenancy when a member of the household or a guest engages in drug-related activity without the tenant’s knowledge.<sup>22</sup> The Court concluded that such strong eviction policies maximize deterrence for engaging in criminal activity among public housing tenants.<sup>23</sup>

In 2005, the National Multifamily Housing Council (NMHC) (one of three major professional associations for rental housing) surveyed its members about their crime prevention practices, and 80 percent reported that they screen

prospective tenants for criminal histories.<sup>24</sup> The position of some private landlords is to screen because it is better “to ‘evict’ bad applicants in the first place, before they ever have a chance to become your problem tenants!”<sup>25</sup>

The NMHC mainly serves larger property owners whose practices may differ from those of other landlords. Unfortunately, no nationally representative data provide direct evidence about the prevalence of criminal history.<sup>26</sup> For landlords that chose to conduct criminal background checks, the NMHC has developed guidelines identifying areas to pay attention to when conducting individualized assessments including:

**Consistency.** Categorize criminal conduct (felony versus misdemeanor) and be consistent across the board.

**Criminal Activity.** If an applicant is rejected, make sure that their type of criminal activity is severe enough and poses a realistic threat to residents. For example, traffic violations would be insufficient to qualify as serious criminal activity. **Illegal Substances.** While many criminal activities do not qualify as grounds for refusal, there is an exception for the illegal manufacture of a controlled substance. Such cases can always be declined. **Date of Conviction.** Research has shown that after six to seven years, there is the same risk of an individual reoffending as with those who have never committed a criminal offense.

**Age of Offender.** Most crimes take place when individuals are in their teens and early 20s. Eighty percent of people stop committing crimes by age 28.

**Frequency of Convictions.** Recidivism usually occurs within three years of offenses; after that, criminal offenses are unlikely to happen again.<sup>27</sup>

Nationally, the private housing market represents approximately 97 percent of the total housing stock. Police programs targeted at private landlords have been adopted throughout Minnesota that aim “at reducing crime in rental housing” which results in some of “the most prominent and influential government efforts to encourage private crime prevention in the United States.”<sup>28</sup>

In 1995 Minnesota amended a law eliminating the requirement that only evidence of criminal convictions could establish that nuisance activity existed on a property (today a Minnesota prosecutor only needs to establish the existence of nuisance activity by clear and convincing evidence).<sup>29</sup>



Although new nuisance statutes and changes in premises liability establish a stronger incentive to screen tenants, landlords can feel trapped because screening could be contrary to the housing laws described above. To help landlords navigate these legal dangers, professional associations, tenant screening firms, and “how-to-landlord” books all offer extensive advice about defensible approaches to screening. The National Multifamily Housing Council, for example, distributes several white papers on tenant screening to its members, including one that provides a detailed legal analysis of criminal background screening and sex offender registries.<sup>30</sup>

Despite the foregoing, the overarching rule is that housing providers cannot impose a general prohibition on anyone with a conviction record but may later evict if criminal behaviors surface. Under the rules, providers must employ an individualized assessment for every applicant; if a prospective tenant is rejected, “generalized safety concerns” are considered insufficient business justifications for the refusal of an applicant—there must be more behind the rejection.

## Conclusion

Successful post-conviction reentry equals an increase in public safety. Housing is the indispensable and fundamental basis upon which ex-prisoners begin to build new lives. Without housing stability, ex-offenders face lifetime societal and individual consequences for actions for which they have already paid their debt.<sup>31</sup>



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## Notes

- <sup>1</sup> Lottie Joiner and National Journal, “How Families Pay the Never Ending Price of a Criminal Record,” available at: <https://www.theatlantic.com/politics/archive/2015/12/how-families-pay-the-never-ending-price-of-a-criminal-record/433641/> (Dec. 15, 2015).
- <sup>2</sup> Katharine Bradley et al., “No Place Like Home: Housing and the Ex-prisoner” (2001).
- <sup>3</sup> Bureau of Justice Statistics, U.S. Dep’t of Justice, Survey of State Criminal History Information Systems, 2012 at pg. 3 (Jan. 2014), available at: <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>
- <sup>4</sup> See, e.g., Stephen Metraux et al., “Incarceration and Homelessness,” *The 2007 National Symposium on Homelessness Research*, available at: <https://www.huduser.gov/portal/publications/pdf/p9.pdf>
- <sup>5</sup> Shristi Devu, *Trapped in the Shackles of America’s Criminal Justice System*, 20 Scholar: St. Mary’s L. Rev. & Soc. Just. 217–19 (2018).
- <sup>6</sup> Hennepin County Dashboard, available at: <https://app.powerbigov.us/view?r=eyJrJoiOTczNTkzMzQtZm-FjZS00YmQ3LWZhYzktZDI4OGY1OWJlM2M0IiwidCI6IjhhZWZkZjlmLTg3ODAtNDZiO4ZmI3L-TRjOTI0NjUzYTZiZSJ9>
- <sup>7</sup> See Devu, *supra* note 5 (“both public and private sector employers excluded applicants with misdemeanor or felony convictions without evaluating the nature of the offense or the applicant’s potential fitness for the job. These exclusions affect approximately sixty-five million American adults. African-Americans and Latinos are disproportionately impacted by these policies as a result of their overrepresentation in the criminal justice system.”) (internal citations omitted).
- <sup>8</sup> Hennepin County Dashboard, available at: <https://app.powerbigov.us/view?r=eyJrJoiOTczNTkzMzQtZm-FjZS00YmQ3LWZhYzktZDI4OGY1OWJlM2M0IiwidCI6IjhhZWZkZjlmLTg3ODAtNDZiO4ZmI3L-TRjOTI0NjUzYTZiZSJ9>
- <sup>9</sup> See Minn. Stat. § 504B.415 (It is a defense to a tenant’s claim that landlord has violated the covenants of habitability if “violations have been caused by the willful, malicious, negligent, or irresponsible conduct of a complaining residential tenant or anyone under the tenant’s direction or control.”)
- <sup>10</sup> David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 Law & Soc. Inquiry 5, 7 (2008) citing Bradley *supra* note 2, at 8.
- <sup>11</sup> Texas Dept. of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2521 (2015).
- <sup>12</sup> Federal Bureau of Investigation Crime Data Explorer, available at: <https://crime-data-explorer.fr.cloud.gov/explorer/national/united-states/crime/2007/2017> (last accessed May 13, 2019).
- <sup>13</sup> United States v. Berry, 553 F.3d 273, 285 (3d Cir. 2009).
- <sup>14</sup> See U.S. Department of Housing and Urban Development, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, available at: [https://www.hud.gov/sites/documents/HUD\\_OG-CGUIDAPPHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OG-CGUIDAPPHASTANDCR.PDF)
- <sup>15</sup> 42 U.S.C. § 3601 *et seq.* (2018) (Fair Housing Act prohibits discrimination based on race, color, religion, sex, disability, familial status, and national origin).
- <sup>16</sup> U.S. Department of Housing and Urban Development, “It Starts with Housing,” available at: [https://www.hud.gov/sites/documents/HUD\\_IT\\_STARTS\\_WITH\\_HOUSING.PDF](https://www.hud.gov/sites/documents/HUD_IT_STARTS_WITH_HOUSING.PDF); See also Fact Sheet: President Obama Announces New Actions to Reduce Recidivism and Promote Reintegration of Formerly Incarcerated Individuals, 2016 WL 3453404, at \*2 (June 24, 2016).
- <sup>17</sup> 24 C.F.R. § 960.204; 24 C.F.R. § 982.553.
- <sup>18</sup> 24 C.F.R. § 982.553(2)(ii).
- <sup>19</sup> Schware v. Board of Bar Examiners, 353 U.S. 232, 241 (1957); see also United States v. Berry, 553 F.3d 273, 282 (3d Cir. 2009).
- <sup>20</sup> *Id.* at 12.
- <sup>21</sup> Dep’t of Housing and Urban Dev. v. Rucker, 535 U.S. 125 (2002).
- <sup>22</sup> *Id.* at 129.
- <sup>23</sup> *Id.* at 136.
- <sup>24</sup> Jeanne Delgado, “Security Survey Shows Current Premise-Protection Practices of M-H Owners,” *Multifamily Housing News*, June 9, 2005, cited by David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 Law & Soc. Inquiry 5, 12 (2008).
- <sup>25</sup> Leigh Robinson, *Landlording: A Handymanual for Scrupulous Landlords and Landladies Who Do It Themselves*, Express, 4th and 8th eds. (2005).
- <sup>26</sup> Thacher, *supra* note 20, at 12.
- <sup>27</sup> National Multifamily Housing Council, available at: <https://www.nmhc.org/news/articles/tips-for-better-criminal-activity-screening/> (last accessed May 11, 2019).
- <sup>28</sup> Thacher, *supra* note 20, at 10.
- <sup>29</sup> See Minn. Stat. § 617.81, subd. 2(c); see also Thatcher, *supra* note 20, at 15.
- <sup>30</sup> *Id.* at 23.
- <sup>31</sup> David Cotrell et al., *Mortality, Incarceration, and African-American Disenfranchisement in the Contemporary United States*, 47 American Politics Research 195–237 (March 23, 2018).

# The Intersection of Mass Incarceration and Families

## The Justice System as It Operates Outside the Vacuum of the Courtroom

By Maria S. Mitchell



**M**ore recently there is a lot of attention and research about what happens to individuals facing the criminal justice system, and what personal collateral consequences are faced by the incarcerated individual. But the impact on family members and loved ones is often to experience the sentence right alongside the person in prison only outside the prison walls. What happens as the families concurrently serve the jail sentence with their family member?

The incarceration of a child's parent affects many aspects of the child's life, for example, mental health, economic stability, substance use, and academic success.<sup>1</sup> Children who have experienced a parent who is imprisoned presently or in the past are more likely to report long-term mental health problems.<sup>2</sup> A parent's combined substance abuse and incarceration may contribute to intergenerational patterns of substance use and incarceration.<sup>3</sup>



Nationally, at any given time, 1.7 million children under the age of 17 will have an incarcerated parent.<sup>4</sup> One in six Minnesota youth has experienced parental incarceration.<sup>5</sup> The rate of parenthood among those incarcerated is roughly the same as the rate in the general population: 50 percent to 75 percent of incarcerated individuals report having a minor child.<sup>6</sup> A closer examination of the numbers, however, reveals that communities of color are more at risk: National data from 2007 (the most recent data available) show that African-American children and Hispanic children were 7.5 times more likely and 2.3 times more likely, respectively, than white children to have an incarcerated parent.<sup>7</sup> Also, 40 percent of all incarcerated parents were African-American fathers.<sup>8</sup> In Minnesota, people of color are disproportionately represented in the criminal justice system.<sup>9</sup> Black people made up less than 6 percent of Minnesota's population, according to 2013 census estimates, but made up 34 percent of the prison population as of January 2019.<sup>10</sup> Native Americans comprise about 1 percent of Minnesotans but accounted for about 9 percent of the state's prisoners.<sup>11</sup>

### Visitation

Visitation can help inmates build support networks they will need after release.<sup>12</sup> Research conducted by the Minnesota Department of Corrections has shown that positive interactions with friends and family can lower recidivism.<sup>13</sup> Most Minnesota prisons are not connected to public transit systems.<sup>14</sup> The distance between prisoners' home communities and the concentrated disadvantage in their neighborhoods decrease the number of visits Minnesota prisoners receive from families and loved ones.<sup>15</sup> Research is plentiful on the positive impact of visitation on inmates but scarce on the impact of visitation on children.

On the quest for information on how the justice system interacts with the families of people who are incarcerated, I interviewed representatives from two organizations that focus on the impact on the family of incarcerated individuals. The organizations have different infrastructures and approaches to the multi-dimensional and far-reaching impact on persons connected to family members committed to the Department of Corrections.

Peace of Hope was founded by Sharon Brooks in 2012. The mission of the organization is:

to relieve the devastating stresses associated with having loved ones imprisoned by utilizing our service, education and advocacy work.<sup>16</sup>

This nonprofit grew out of a desire to bring hope and peace to family members affected by a family member's incarceration. Brooks' interest in addressing the aftermath of incarceration on the family unit began at age 12 when her older brother went to prison. She recalled that at the time she observed her mother receiving community support. In addition, Brooks was directly impacted a second time by incarceration when her son went to prison. The imprisonment of her child led to her current role as an advocate and CEO of Peace of Hope. She discovered that there was an information void about how to navigate the corrections system for families experiencing incarceration.

There was also a lack of resources directed toward how to emotionally support themselves and their imprisoned loved one. She quickly realized that experiencing the loss of a loved one from the community required her to become educated in the criminal justice system, the department of corrections, and the legislative process. Brooks explained that the Department of Corrections makes it clear that visitation is a right and not a privilege.<sup>17</sup> Brooks used her acquired knowledge to advocate for friends with similar circumstances. Through Peace of Hope she has educated and assisted families on all potential barriers to visitation. Peace of Hope services include arranging transportation to correctional facilities that are largely located outside of the Twin Cities metropolitan area with no public transit access. The organization also prepares family members for visits by helping them obtain valid identification which is required for approval by the Department of Corrections. Peace of Hope has even provided an appropriate guardian to accompany children to visit their parents.

Children of Incarcerated Caregivers (CIC) was founded in 2015. Its mission is:

to research, identify, and implement solutions to enhance the lives of children affected by a parent's incarceration. We urge those working in the Minnesota legal system to consider the child-parent relationship during sentencing and advocate for alternatives to separating children from parents. Using applied research, we aim to reduce the number of parents sent to prisons and jails. We directly support the development and well-being of their children by expanding resources, developing enrichment programs, and collaborating with community organizations.<sup>18</sup>



## 1 OUT OF 6

**Minnesota youth has experienced parental incarceration**



## 40%

**of all incarcerated parents are African-American fathers**



**Children that have experienced parental incarceration are more likely to report LONG-TERM MENTAL HEALTH PROBLEMS**

I interviewed board member Veronica Horowitz<sup>19</sup> and researcher Caity Curry.<sup>20</sup> Horowitz and Curry recently conducted research for an article, tentatively titled “Mass Parental Incarceration and Sentencing Reform in Minnesota,” to be published in an upcoming issue of the Mitchell Hamline Law Review. Through CIC they have presented research to decision makers on the impact of incarcerated caregivers on children. Presentation of those findings led to collaboration with the federal courts in Minnesota to facilitate visitation between incarcerated mothers and children. Presentation of their research has also led to forming other community partnerships. One CIC initiative was to apply for and receive a grant from the Minneapolis Foundation to start a small summer camp for children.

Their research at CIC is geared towards understanding, quantifying, and documenting the impact of mass incarceration of caregivers on their children as well as advocating for solutions and reform. They are currently looking at the impact on caregivers who step into the role of primary caretaker when a parent is incarcerated. Although they have not concluded their research, they agreed to share some of their impressions surrounding their interviews:

The common theme is that separation of a child from a parent is often very abrupt and occurs multiple times, and that incarceration is not the sole reason parents are absent from their child's life. Multiple scenarios prompt abrupt separation of child and parent, for example, arrests away from the home and being taken into custody while in court with no alternative caregivers arranged. Many factors contribute to the parent cycling in and out of a child's life, including mental illness, chemical dependency, and rearrests. One consequence of abruptness is that the interim caregiver is left without legal authority to make decisions on the children's behalf—to accomplish important tasks like school registration, and to make health care decisions. The researchers also observed that these circumstances varied greatly across familial situations.

The statistics of children in Minnesota having experienced an incarcerated caregiver are staggering. Taking into account the

Wilder Foundation's research means that I must know someone who is a caregiver of a child who has experienced an incarcerated parent. A family in my neighborhood recently adopted two of their grandchildren. I explained to them that I was writing an article on the impact of incarceration on family members. They were eager to share their experience. A working-class couple on the verge of retirement, they one day received a call that their son and his partner had been arrested and that the children were taken into the custody of the Department of Social Services. After a week in nonrelative foster care, the children were brought to their doorstep in stocking feet with little to no belongings. They learned that the children were removed from the mother who had been driving around in her car attempting to avoid law enforcement. The couple and the grandchildren consider their situation to be ideal, although abrupt and heartbreaking, because the children had previously bonded with them and were familiar with their house. The couple, now retired, detailed the ups and downs of their journey to gain custody and ultimately adopt their grandchildren. With tears and amazement in his eyes, the grandfather described the resilience of the grandchildren. This story reflects the initial observations of Horowitz and Curry. When asked how the children felt about their father's cycling in and out of prison, the children answered, “When he is in prison, at least we know where he is and that he is safe.”



**Maria S. Mitchell**

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Maria S. Mitchell is an Assistant Ramsey County Attorney. In her role, she represents Ramsey County in child protection cases. She was previously employed by the State Public Defender's Office in Hennepin County where she handled serious person-to-person crimes. She is also a member of the Minnesota Association of Black Lawyers.

*The author would like to thank Stacy Bettison for her editing assistance.*

## Notes

- <sup>1</sup> <https://www.wilder.org/wilder-research/research-library/strengthening-families-affected-incarceration#study-reports>; [https://www.wilder.org/sites/default/files/imports/VOA\\_LiteratureReview\\_5-09.pdf](https://www.wilder.org/sites/default/files/imports/VOA_LiteratureReview_5-09.pdf)
- <sup>2</sup> <https://www.wilder.org/sites/default/files/imports/IncarcerationForum3%2012-2-2015.pdf>
- <sup>3</sup> <https://mn.gov/doc/family-visitor/visiting-information/>
- <sup>4</sup> <https://www.wilder.org/sites/default/files/imports/who-has-an-incarcerated-parent-in-Minnesota.pdf>
- <sup>5</sup> <https://www.wilder.org/wilder-research/research-topics/criminal-justice-and-violence-prevention/sjai>
- <sup>6</sup> Eric Martin, “Hidden Consequences: The Impact of Incarceration on Dependent Children,” *NIJ Journal* 278, March 2017, <https://nij.gov/journals/278/Pages/impact-of-incarceration-on-dependent-children.aspx>.
- <sup>7</sup> *Id.*
- <sup>8</sup> *Id.*
- <sup>9</sup> [https://mn.gov/doc/assets/Adult%20Prison%20Population%20Summary%201-1-2019\\_tcm1089-369002.pdf](https://mn.gov/doc/assets/Adult%20Prison%20Population%20Summary%201-1-2019_tcm1089-369002.pdf)
- <sup>10</sup> *Id.*
- <sup>11</sup> *Id.*
- <sup>12</sup> <https://mn.gov/doc/family-visitor/visiting-information/>
- <sup>13</sup> *Id.*
- <sup>14</sup> Clark, V.A. & Duwe, G. (2017). “Distance matters: Examining the factors that impact prisoner visitation in Minnesota.” *Criminal Justice and Behavior* 44(2) 184-204.
- <sup>15</sup> *Id.*
- <sup>16</sup> <https://peaceofhope.info/>
- <sup>17</sup> <https://mn.gov/doc/family-visitor/visiting-information/>
- <sup>18</sup> <http://cicmn.org/about/mission/>
- <sup>19</sup> Veronica Horowitz started with CIC while working on her Ph.D. in sociology at the University of Minnesota. She is focusing her research on American criminal punishment with an emphasis on gender.
- <sup>20</sup> Caity Curry joined CIC's research team as a Ph.D. student in sociology at the University of Minnesota. Her research explores the intra-institutional and inter-institutional policies and practices within the criminal justice system that reproduce systematic racial and class inequalities. More broadly, her research interests encompass the sociology of punishment and social control, including the causes and consequences of mass incarceration and mass supervision. With CIC, Caity spent over a year investigating barriers faced by children who wish to visit their incarcerated parents.



# Changing Charging Practices

By Anna Gusaas

In March 2019, Hennepin County Attorney Mike Freeman announced two initiatives targeted primarily at reducing racial disparities in the charging practices of his office.

The first initiative is the creation of a “data dashboard” available on the Hennepin County website which shows information on the number of offenders charged, the race of the offenders charged, and the type of offense. Freeman did not indicate what his office intends to do with the information contained in the data dashboard other than provide it to the public.

The second initiative changes the way his office charges marijuana possession. Prior to the change, Hennepin County would prosecute people who possessed 45 grams of marijuana with a felony. Possession of 42.5 grams is a petty misdemeanor punishable by a fine of up to \$300. Under the new policy, there will be no charge for possessing or selling less than 100 grams of marijuana. However, prosecutors would still charge low-level cases if the individual had a firearm in their possession, if they also possessed trace amounts of another illegal substance—including THC oil and wax, and if they were in the presence of a minor at the time of arrest. Additionally, prosecutors may also seek felony charges if the particular case has aggravating factors as defined by statute—including prior convictions.

A concern is how the lines will be drawn with regard to prior convictions aggravating low-level cases into felonies. It is not clear what types of cases the office will consider to be aggravating. For example, if a person had been convicted of a felony previously for possessing 45 grams of marijuana with no other aggravating factors, and

is now arrested for possessing another 45 grams of marijuana—it is not clear whether Freeman’s office would consider the prior felony—which it would not even charge under the new policy—as a prior offense aggravating the current offense to a felony charge. Also, because of the historical disparity in charging, more people of color already have criminal records. Without careful consideration, this fact may continue to channel people of color into being charged with felonies for crimes that the county now believes should not be charged at all.

An underlying issue is the racial disparity in police stops and arrests that are then brought to prosecutors for charging. If prosecutors are always presented with a pool of cases to charge that was generated in a racially biased fashion, then it will be difficult, if not impossible, to charge those cases in a way that reduces racial disparities.



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# One Piece at a Time: Strategically Disrupting the Mass Incarceration Pipeline

By Elizer E. Darris

**In 2017,  
approximately  
3,000 people were  
returned to Minnesota  
prisons for technical  
violations**

I began working for the American Civil Liberties Union of Minnesota (ACLU-MN) in March 2018. I was hired as a community organizer and tasked with helping to create a field operation program that would complement the criminal justice reform work the ACLU-MN was already effectively executing at all judicial levels.

Initially, I was reluctant. And conflicted. I was surprised to find myself feeling guardedly curious. Admittedly, I had very little to fret over. The ACLU was storied and well-respected in most of the circles that I cared about. I knew this. Yet I still had deep reservations holding me back from working for any organization, whether nonprofit or otherwise. I considered myself a free agent who was unchained and untethered to any group, ideology, or organization. I enjoyed the level of autonomy that I had crafted for myself at the time because it afforded me the luxury of speaking freely about issues that bothered me. I cared very little about and

had no fear of organizational retribution or censorship. I was free to pursue community development and empowerment strategies in ways that felt natural, real, and organic. For instance, with the aid of several colleagues, I co-created a neighborhood cleanup initiative in which we picked up trash in our community and sent a signal to the people observing that our neighbors and our neighborhoods had worth. We didn't ask government for even a penny to launch our effort. We just did it. Our values drove us. We believed that we lived in a community filled with people who had intrinsic value. We were not to be treated like trash. We didn't see ourselves as disposable and easily disregarded. Though a great number of us were formerly incarcerated, we carried ourselves with dignity and performed our cleanups with vigor. People saw us serving them by picking up trash, raking leaves, and shoveling out seniors' driveways during snow emergencies. My roots were firmly planted.

My reluctance only lasted until I read the job description. The ACLU was looking for someone with experience with the criminal justice system, preferably someone who had been incarcerated. That sentence alone floored me. I had never seen this type of language be part

of any job description. They were looking for someone who had experience with community development and who had a lens to empower overlooked or under-resourced communities. Previous nonprofit experience was immaterial. The position would offer the organizer freedom to envision, develop, and execute plans that would lead to breaking down racist systems that had been functioning effectively for decades to keep down black and brown bodies in Minnesota.

I had just come off the heels of being the field director for the Nekima Levy-Pounds for Minneapolis mayoral campaign. Her campaign emboldened me to pursue the change that I wanted to see in the political arena. I began lobbying at the state Capitol for various legislation, like a bill that would ban sentences of life without the possibility of parole for juveniles. In these pursuits, I learned of the ACLU's well-organized lobbying arm as well. All of the pieces began slowly falling in place in such a manner that it became impossible to say no.

After accepting the job of organizer, I learned of the national initiative we were pursuing in order to reduce mass incarceration by 50 percent across the entire nation—the ACLU's Campaign for Smart Justice. The campaign is committed to transforming our nation's criminal justice system and building a new vision of justice and public safety.



This campaign has one primary objective: cut mass incarceration in half nationwide. In the process of reaching that goal, we are working to create safer communities; a more fair and just justice system; more transparent data from state and local law enforcement agencies; a better informed and more robust electorate; more stable reentries into our communities for returning citizens; better interdepartmental communications from city, county, and state government officials in relation to a coherent criminal justice reform strategy; and, finally, more trust with better outcomes for communities that have been historically and destructively impacted by the justice system.

Each state that took on the initiative was directed to develop strategies, with the support of the national office, to effect a 50 percent drop in the prison population in their state. In Minnesota, the strategies that we decided to adopt include prosecutorial reform, bail reform, eliminating technical violations, and reentry reform.

Prosecutorial reform sometimes comes by working directly with prosecutors to examine and help adjust any of their practices that are creating or exacerbating disparate outcomes and thereby intensifying the carceral state. These activities include helping to revise diversion criteria to allow more people to enter a diversion program and dropping a charge upon successful completion of the program. Reform could also include directly informing voters of the role and power of the prosecutor and educating them about the electoral process. These efforts are aimed at increasing voter turnout and encouraging prosecutors with reform platforms to run fearlessly.

Other strategies include bail reform and ending the cash bail system, a large driver of economic and racial disparities. These typically unnecessary cash bails disproportionately impact poor people of color, who are forced to sit in county jails because they can't afford to pay bail. This creates a two-tiered system of justice based on people's wealth. I have heard the desperation of the men and women facing charges who are stuck in this trap. They begin thinking about their children, jobs, homes, and pets. After two weeks of being ground down in jail, an offer of eight years of probation and immediate release, even if they are innocent, is very appealing. Only those who are most committed to their principles remain. Trial is very rare. Studies have conclusively shown that people on pretrial detention are at a substantially higher risk of conviction as opposed to those who are able to make bail. We believe that a person's financial status should have no bearing on his or her guilt or innocence.

Yet another strategy that is very relevant to Minnesota is eliminating technical violations for noncriminal offenses. In 2017, approximately 3,000 people were returned to Minnesota prisons for technical violations. These non-criminal, technical detentions often result in people losing their houses, jobs, and means of transportation. The length of stay is typically less than three months, during which time these individuals (called Technical Release Violators) are not allowed to participate in most prison programming. Because of their short length of stay, they are usually relegated to their cells, unable to get a prison job. They have very little, if any, access to rehabilitative or substance abuse programming.

Disrupting mass incarceration means we focus our attention on these little-known, yet highly dysfunctional, areas of our justice system. We will work to end these types of revocations and will work with state and county officials to use different tools to curb undesired conduct. One tool is a process known as "restructuring" the person suspected of a violation. A hearing officer, at the request of the parole officer, can restrict the movement or privileges of someone judged to have committed a rule infraction. That could include imposing a curfew of 10 p.m. or ordering participation in Alcoholics Anonymous or similar programming. Restructuring allows persons in need of additional services to receive them without being completely removed from society—and compelling them to start all over several months later. This strategy avoids the vicious cycle that people leaving prison too often find themselves trapped in for the duration of their probationary period.

Our intention with Smart Justice here in Minnesota is to center the voices of those who are most directly impacted by an issue. We believe in the oft-recited mantra that "nothing about us without us is for us." As we are developing various strategies to decrease our incarceration numbers, we are checking in with community members who are helping to guide our steps. To that end, we created a Smart Justice Advisory Board of 14 community members to help guide our decision making.



**The goal  
of the ACLU  
Campaign for Smart  
Justice is to reduce  
the U.S. jail and  
prison population  
by 50%**

The board meets monthly and will soon become autonomous.

We also have developed a Smart Justice Fellowship Program for Leadership Development. This July, we will select seven fellows and train them in strategic planning, community organizing, lobbying, networking, and leadership development over a 10-month period to force-multiply our effectiveness and to ensure that impacted communities have individuals who are trained and prepared to take the lead on issues most directly impacting them. The creation of this fellowship afforded me an opportunity to give other young people opportunities to operate with confidence in spaces and places where others might think they don't belong.

Here at the ACLU, we believe that all of us are welcome. We fundamentally believe all deserve to have a seat at the table. My spirit lifts every time I look at the program I devised to help train a new crop of leaders to do justice work. I think back to the doors that many opened for me even

though I was fresh out of prison. They gave me a chance when others would not. I know what it feels like to be written off, to be overlooked, and to be marginalized.

The Campaign for Smart Justice gives those who feel overlooked a perfect opportunity to stand firmer and allow their voices to resonate in the halls of government. It empowers even those of us who are locked out of the electoral process (people on felony probation or parole cannot vote in Minnesota) to have a voice and to make our presence felt. It allows us to feel connected to the basic civil processes that have animated this nation for centuries. We don't expect any of our work to be easy or to bring us fame. In fact, most people may never know our names or faces. But we do expect to be victorious. We intend to see fundamental shifts in the way our systems function. We are patient and organized. This system was not built overnight. A steady and focused energy over an extended period of time will be required to dismantle it. But we are committed and willing to take it all apart and reconstruct it one piece at a time.

To learn more about the Smart Justice Fellowship or to apply visit: [www.aclu.org/issues/smart-justice](http://www.aclu.org/issues/smart-justice)



**Elizer E. Darris**

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After being sentenced to natural life in prison as a juvenile and violently struggling for years in adult facilities, Mr. Darris fought to turn his life around. Self-education became his vehicle of self-discovery and through it, his life was redeemed. Through studying law and working with his state-appointed counsel he successfully fought to get his life sentence reversed on appeal. Upon being released Elizer became a business owner, consultant, educator, IT specialist and motivational speaker.



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# How to Draft a Conflicts Waiver

By Eric T. Cooperstein

Seven rules of the Minnesota Rules of Professional Conduct (MRPC) require that a lawyer obtain “informed consent, confirmed in writing” to proceed with a representation despite an actual or potential conflict of interest. The comments to the rules offer some guidance regarding what types of circumstances one might take into consideration when deciding whether a conflict exists or is waivable, but offer precious little in the way of guidance for actually drafting a conflicts waiver.

“Confirmed in writing,” as explained in the definitions section of the MRPC, means a writing that confirms what was discussed orally about a conflict. The client’s signature is not required, although once you’ve bothered to write something down and send it to the client, it should take little more effort to have the client acknowledge receipt and content by signing the writing or by return e-mail.

What to write is the question. Brevity could be a problem. Merely saying “You agree that we have discussed this conflict and you waived it” does little to preserve your conversation with the client. If the conflict does arise or become unmanageable, the disgruntled client is going to say “Well, she never told me that might happen.”

Some conflicts waivers are written as though the lawyer was being paid by the word, cutting-and-pasting the entirety of Rule 1.7 into a retainer agreement and then say “you consent to any conflicts.” The client is not expected to understand the rule; the lawyer is supposed to explain it to them. Close behind, sometimes attached to retainer agreements, are generic statements of firm “policies.” Mostly these concern billing but they sometimes include a section in fine print that begins “If this matter involves the representation of more than one client or if we have identified a conflict of interest, you agree . . .”

If there’s one defining characteristic of a good conflicts waiver, it is probably that it bears little resemblance to the last one you drafted. That is because good conflicts waivers are fact-dependent. Sure, you use similar language

for common situations such as representing a husband and wife in drafting joint estate plans or for representing multiple victims of a car accident. But most waivers will be tailored to the facts of the particular case. More facts, less filler.

## Here are the steps you should take to draft a conflicts waiver:

- Analyze the situation. Determine how the interests of your clients overlap or collide with each other. Identify the correct ethics rule. Figure out if there even is a conflict. If there’s no conflict, be careful about asking for a waiver when you don’t need one because if the client or former client says no, you’ve now planted an idea in their head. If you proceed anyway, you may draw a disqualification motion or ethics complaint. Even if the motion or complaint seems frivolous to you, it will still need to be defended. On the other hand, remember that some conflicts are not waivable, because no reasonable lawyer would think that you could conduct the representation while completely protecting confidences and acting with undivided loyalty.
- Explain your analysis to the client. Start writing where you started, by identifying the parties and their relationship to each other. For example, “We represent your bank in real estate transactions. Another of our clients is seeking a line of credit for his business.” Or “One of the witnesses in your case happens to be a client of ours in another matter.”

• Describe whether there’s already a conflict or not. Joint representations often start off harmoniously; the conflict may be latent. Alternatively, perhaps your joint clients have potential, but remote, cross-claims against each other. Citing an ethics rule number is not by itself important, unless the client is a lawyer and the rule number would help define the scope of the issue.

- Even where it appears there is no conflict between joint clients, describe how things could go bad. Use your imagination. There’s no need for gloom and doom, but if you come up with a

couple of examples of what could go wrong, it helps a client understand what you mean by a “conflict of interest.”

- Let the client know that it’s on you, the lawyer, to watch out for when the situation has changed and you either need additional disclosure and consent to continue the representation or you will be unable to continue.
- Lay out the consequences of the conflict ripening and starting to stink. Usually, you will want to warn the client that you will have to withdraw from representation. There could also be costs and delay.
- Reassure the client that you’ve analyzed all these factors and that you believe it’s reasonable to proceed with the representation. Perhaps that is because the conflict is remote and the clients will save money by using one attorney. Maybe success in a summary judgment motion will make latent cross-claims or witness testimony unnecessary. Perhaps you will set up an ethics screen that assures the client that her confidential information will not be shared with the attorneys in the firm who are working on unrelated transactional matters for the opposing party.
- Last, get the client’s signature. You’ve just done all this work; you might as well lock it down.



**Eric T. Cooperstein**

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Eric T. Cooperstein, the “Ethics Maven,” defends lawyers and judges against ethics complaints, provides lawyers with advice and expert opinions, and represents lawyers in fee disputes and law firm break-ups.

# LawHelpMN 2.0

## The Supercharged Legal Resource and Referral Tool for Lawyers and the Public

*By Tom Walsh*

Originally launched nearly 15 years ago, LawHelpMN.org is the go-to resource for Minnesotans seeking civil legal information and referrals online. The popular site houses an array of legal resources written for the public by the Education for Justice Project of the Minnesota Legal Services Coalition (MLSC), an association of the state's seven regional legal aid programs. In February 2019, MLSC, Volunteer Lawyers Network, and the Minnesota Judicial Branch launched a redesigned and enhanced version of LawHelpMN.org. By March, 51,000 unique visitors had accessed the relaunched site over 58,000 times.

### The Philosophy Behind LawHelpMN 2.0

The redesigned LawHelpMN embraces the idea that offering legal referrals along a continuum of service types means a visitor is more likely to find the kind of help they need, especially if they don't qualify for traditional legal aid. LawHelpMN referrals cover a range of services in addition to legal aid, including free legal clinics, law libraries, self-help centers, alternative dispute resolution services and private attorney referral programs. Recently developed and expanded referral services now include the Minnesota Unbundled Law Project, Community Mediation Minnesota, and the Hennepin County Bar Association's Statewide Low Fee Family Law Project. For visitors who may only need legal information to resolve their issue or answer a question, the site's self-help library offers hundreds of easy-to-understand civil legal facts sheets, booklets and do-it-yourself court forms.

### Introducing the LawHelpMN Guide

In addition to enhanced features from the legacy site, LawHelpMN includes a powerful new navigation tool: the LawHelpMN Guide

(the Guide). The Guide uses simple queries about a user's legal issue and goals and then connects them with a customized set of self-help resources and referrals based on their answers. These guided questions narrow a user's legal topic and, if needed, determines their potential eligibility for services based on a variety of factors including location, income, or specific circumstances such as whether the user is a veteran or lives on a reservation.

A user's personalized results might include self-help fact sheets or a relevant booklet, a link to a helpful outside website, or an interactive form. LawHelpMN Guide users have the option of answering a few questions about their income, household size, and location to see if free or low-cost legal help is available. A future update will allow users to apply for services online directly from the Guide itself.

### For Pro Bono Lawyers and Beyond

LawHelpMN and the Guide are not just for self-represented litigants or the public. Both are handy tools for advocates, legal navigators, and pro bono attorneys alike. Volunteer attorneys can access fact sheets and other legal resources to provide clients with advice, or find online forms to quickly help complete a power of attorney or stop contact letter to a creditor, for example.

LawHelpMN also allows justice partners access to referral listings on its Providers and Clinics Directory, powered by the Legal Organizations Online Network (LOON), a database tool developed to deliver up-to-date information about available legal services across Minnesota. Service listings in the providers and clinics directory include case types and priorities, case acceptance guidelines, clinics offered, and eligibility criteria. Participating organizations

continually update LOON in real time, resulting in more accurate and appropriate referrals and less bounce and frustration for those seeking help.

### Change-Makers

Designed from the ground up to allow for expansion and improvement, LawHelpMN's robust resources and new functionality are set to be reviewed at regular intervals in order to draw on emerging technologies and the evolving needs of Minnesota's legal community. In fact, additional refinements and features are already being planned, all with an eye toward increased access to justice in Minnesota.

### Most Frequently Viewed Resources

1. Rights & Responsibilities of Unmarried Parents (booklet)
2. Termination of Parental Rights (fact sheet)
3. LawHelpMN Guide
4. Powers of Attorney (fact sheet)
5. Tenants' Rights in Minnesota (booklet)



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# JAMS Welcomes...



## Daniel H. Mabley



Handled a wide range of civil and family matters during 26 years on the Hennepin County (Minnesota) District Court; also spent 15 years in prosecuting attorney roles in Dakota, Hennepin and Ramsey counties

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## Lawrence Zelle, Esq.



Fifty years of experience as a lawyer, arbitrator, mediator, negotiator and settlement broker; earned a national and international reputation for expertise in disputes involving questions of insurance or reinsurance

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# Fillable Forms Can Transform Your Practice

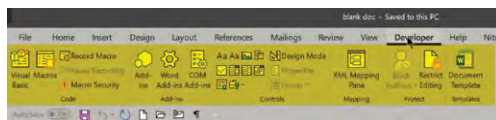
by Jess Birken  
@JessBirken



When we "draft" something, what do we *really* mean? Sure, maybe sometimes that means that you sit at your desk and type into a blank document. But most of the time, I know what you're doing. You do what every lawyer does. You find a similar document, and start plugging in the client's information. Or you hand it over to your legal professionals to plug in the information for you.

So much better than redoing work over and over, right? But there's a downside. You end up having to review the *whole* document to make sure that you didn't leave any old client info in there, or that your team didn't change any of the magic words and change legal meaning – or worse, you used a draft that had that one bit of language that opposing counsel insisted on to get the last deal done.

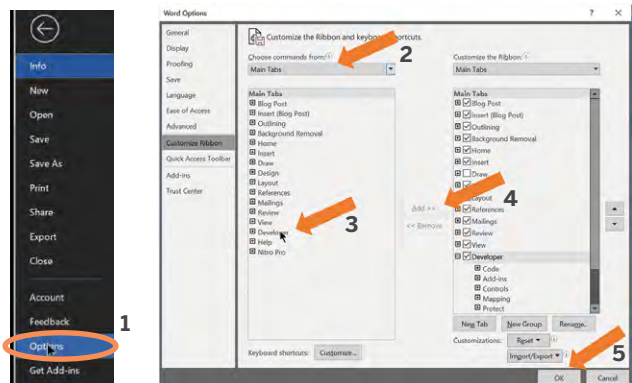
"But, Jess, that's the way we've always done it!" I know. And yeah, it's better than drafting everything from scratch, but it's still... So, what if I said you could make a fillable form using a simple feature in Microsoft Word? Well, guess what – you can do it. If you don't know what I'm talking about yet, let me introduce you to the.... **Developer tab**. \*cue trumpets\*



But wait! Why can't I see that on my screen?

When you first get Word onto your computer, it looks a little different than it does in my screenshot above. And most people are perfectly happy to leave it exactly as it comes. But Word has a ton of super-powers you don't know about. One of those features is Developer, so let's get it added to the toolbar at the top.

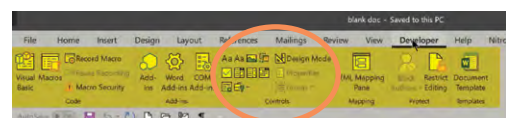
First click the File button on the top left, and then click Options:



Then click Customize Ribbon, and a big dialogue menu comes up.

You want to add Developer to the column on the right. So to do that, click the dropdown on the left and choose Main Tabs. Then highlight Developer in the list, and click Add. Click OK, and voila!

But what does it do? With Developer we can define the fields that need to be fillable – like the client name, the date, a scope of work, or whatever else you might need to customize for each form. We'll use the Controls section on the ribbon to do that.



## Using the Controls

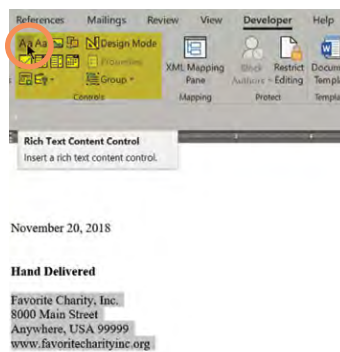
I'm going to build a fillable form out of a letter I've used with my clients (nonprofits). If an employee decides to run for office, I have the nonprofit give the person this letter that outlines how they can do that while still working at the organization. That way the nonprofit doesn't have any appearance of political activity.

It's pretty much the same for every organization, the client is just filling in the name of the employee, the date, and things like that. I'll just walk you through the four types of fields I use for this form.

### 1. Rich Text and Plain Text Controls

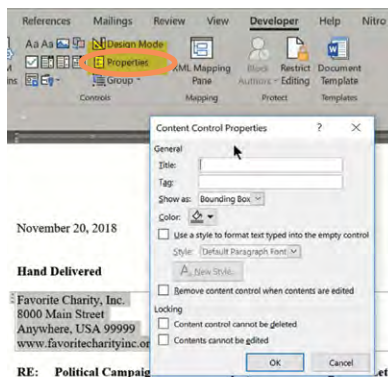
This is exactly what it sounds like –text. If you need someone to type a name, job description, or something else, this is what you'll use.

I'll make the address section of my letter a Rich Text control. I highlight the section and click the Rich Text button at the upper left of the Controls section:



Once you click the button, a box appears around the address field showing that it's now a fillable field.

But I also want to tell the person using the form what's supposed to go in that box. Now I click Properties on the Controls section of the ribbon, and this dialogue box appears:



And here I put "Company Address" in as the Title and the Tag and click OK. And then my field looks like this:

November 20, 2018

#### Hand Delivered

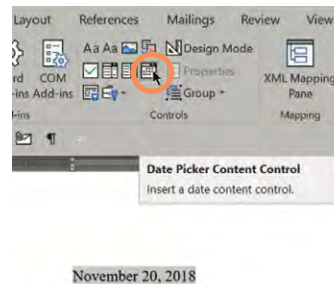
Favorite Charity, Inc.  
8000 Main Street  
Anywhere, USA 99999  
www.favoritecharityinc.org

RE: Political Campaign Notice & Employee Acknowledgement Letter

Pretty snazzy, right? The main difference between a rich and a plain text control is that the user can format text in the Rich Text control. They can use bold, italics, line breaks, and so on. So if I wanted to limit what can be done in the space, that's when you'll use the Plain Text control.

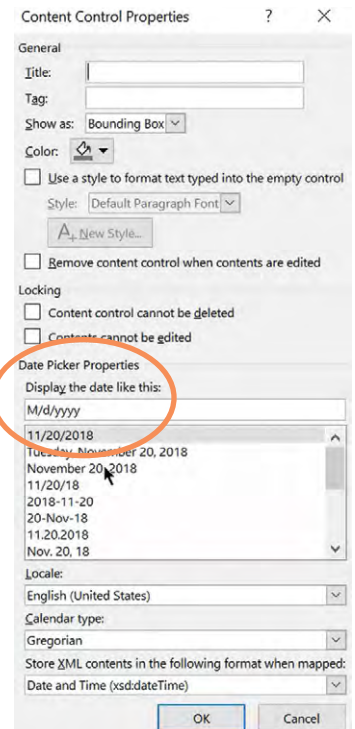
For this form, every time I mentioned the employee's name, title, the org name, and so on, I used a Rich or Plain Text control.

### 2. Date Picker Content Control



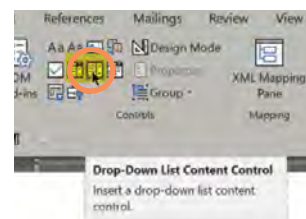
For the date at the top of the letter, I use the Date Picker Content Control:

This control opens up a calendar when you click on it, so you can just choose the correct date from there. But the default setting for the date picker puts the date in MM/DD/YYYY format. That doesn't look great in a formal letter, so I went into the properties and changed the format to Month Date, Year:



As you can see, there are lots of options for you, so you can choose whatever makes sense for your document.

### 3. Dropdown Content Control



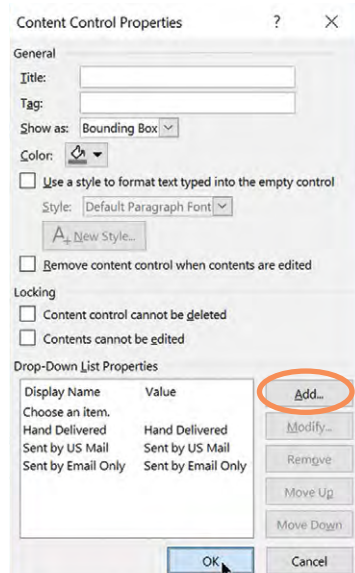
This control lets the person filling out the form pick from a few text options for that field. I used this one for the method of delivery section of my letter. So again, I just highlight that section and click the Dropdown icon in the Controls tab:

November 21, 2018

#### Hand Delivered

Favorite Charity, Inc.  
8000 Main Street  
Anywhere, USA 99999  
www.favoritecharityinc.org

RE: Political Campaign Notice & Employee Acknowledgement Letter



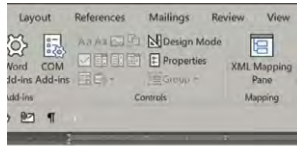
But just doing that gives you an empty dropdown. We need to define what our options are. So I click Properties, and I click Add to enter in each list item:

And then you're left with a nice little drop-down list with all of your options. Woohoo!

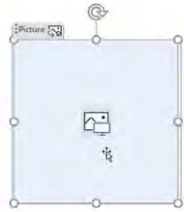


#### 4. Picture Control

Another one that I like to use is the Picture Control. You'll find the button for this one in the same section, and it adds a large picture field wherever you put it:



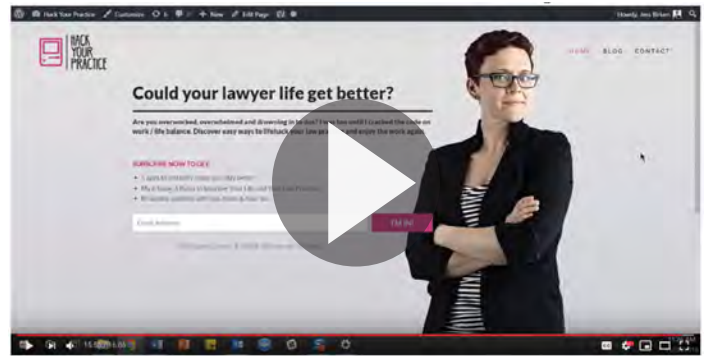
With this one, you can put a logo, a watermark, letterhead, whatever you need into the document. The field will grow or shrink to fit the picture you upload into that area, so you can use it for whatever you need.



#### Finishing the Form

Those are the four controls I use the most often, but don't stop here! There are other tools in that ribbon, so feel free to play around.

Once I have all my fields defined, I like to lock down the text outside of the fields. That way I can give the form out to my assistant or even to clients to fill in without worrying that they'll change any of the important things. To do that you can use the Restrict Editing feature in the Review tab (although I'm gonna let you Google that one – you can do it!).



#### Want to see this in a video walk-through?

You can watch me walk you through all of these things and more at <https://tinyurl.com/fillable-forms-tutorial>. Remember, you can do it, start small and count on a little trial and error, you'll get there.



**Jess Birken**

[jess@birkenlaw.com](mailto:jess@birkenlaw.com)

When she's not helping lawyers use tech tools, Jess Birken is the owner of Birken Law Office—a firm that helps nonprofits solve problems so they can get back to their mission.

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On June 11, the HCBA welcomed 16 past presidents of the HCBA, as well as current members of the executive committee, to a special luncheon. Presidents shared memories of their terms and reflections on the history of the association.



▲ Adine S. Momoh, the 100th president of the HCBA, passes the ceremonial gavel to 101st president, Jeff Baill at the HCBA Annual Meeting on May 30, 2019. Baill's presidential term began on July 1.



# Riverfront Celebration

-2019-

Thursday, Sept. 12

**4:30-7 p.m.**

Nicollet Island Pavilion  
40 Power St., Minneapolis



## Partners in Justice





# Member News

Submit your HCBA member news to [thl@hcba.org](mailto:thl@hcba.org) for consideration.

**Anna M. Koch** has joined the Trepanier MacGillis Battina law firm in Minneapolis as an associate attorney.

Safe Harbor Estate Law is thrilled to announce that **Michael Teeter** has joined the team as an associate attorney.



**Jenneane Jansen** has joined Lommen Abdo.

Moss & Barnett announces that **John P. Boyle** and

**Jana Aune Deach** were elected to three-year terms as member of the board of directors, and **Beth A. Gliedman** and **Jeffrey S. Waldron** were elected shareholders of the firm.

Spencer Fane announces the addition of **Cynthia Rowe** as of counsel in the litigation practice group.



Moss & Barnett announces that **Bryant D. Tchida** has joined the firm's litigation, financial services, and business law teams.

McCoy Peterson welcomes **Joseph P. Pope** as the firm's newest attorney.



Lommen Abdo announces that **Matthew R. Hartranft** has joined the firm.



Heimerl & Lammers welcomes family law attorney **Chelsea Barr**.

## YOST & BAILL ATTORNEYS AT LAW

Yost & Baill is excited to congratulate our Managing Partner, Jeffrey Baill, as he begins his term as the new President of the Hennepin County Bar Association. We look forward to watching you lead!



**JEFFREY BAILL**  
HCBA President





# 10 QUESTIONS

## with Josh Williams

Founder, Law Office of Joshua R. Williams

### 1 When and why did you decide to pursue a career in law?

My first job after graduating college in 2002 was teaching third grade at an urban school district in Kansas City, Missouri. After a few months of teaching, I suspected it was not my calling, and around this time a family friend—a seasoned trial lawyer whom I greatly admire—suggested that lawyering might be a good fit for me. Specifically, he thought using critical thinking skills to help folks solve their problems would be right in my wheelhouse. I decided to give it a shot, and as it turns out, he was right.

### 2 What's your elevator speech?

I am a lawyer who helps employees who are having problems at work. I also help bicyclists and other vulnerable roadway users who were injured on the road.

### 3 What is the most rewarding part of your work?

I love helping people get through difficult times in their lives. I have heard many lawyers characterize what they do as “selling their time” or “selling their knowledge.” I agree with these sentiments, but I would add that most of us are also selling hope. People reach out to us because they have a legal problem, and we give them hope that we can solve it, or at least obtain a result that they can live with so they can move on with their lives.

### 4 What's the most challenging part?

The fact that, at the core of my practice, I profit off of another human being's suffering. But this is counterbalanced by the fact that, more often than not, I help my clients obtain favorable results that they otherwise would not have received.

### 5 As an attorney with a busy litigation practice, what's your go-to for handling stress?

The all-adversarial, all-the-time nature of the litigation world can make things stressful. I am fortunate enough to have a mentor who turned me on to the four-box (also called four-square) breathing technique, which lowers your blood pressure, clears the mind, relaxes the body and improves focus. It took me some time to get the hang of it, but I have found that having the ability to consciously regulate my breathing and heart rate puts stress in the rearview mirror and allows me to enter a state of calm.

### 6 How do you like to spend time outside the office?

Our office is right on the Midtown Greenway—you walk out our back door and the Greenway is right there. So when we moved into this space almost five years ago, I figured I had to take advantage of our location and start bike commuting. Now I'm an avid cyclist who bikes all the time, including during the winter months on my winter bike, Elsa, and with my six-year-old son, Theo.

### 7 What is the best advice you ever received?

I am fortunate to have a mentor who explained to me that zealous advocacy need not involve—nor should it ever involve—yelling at or belittling our adversaries. As she put it, it just doesn't move the ball forward.

### 8 What do you think is the most important trait for an attorney to have?

The trait that has helped me the most in my lawyering life is the ability to maintain poise. Some of us have poise baked into our wiring naturally, and some of us have to really work at it like any other skill. I fall into the latter category.

### 9 Who is your favorite musician?

Prince is my favorite musician, and not just because he's from my adopted hometown of Minneapolis. I was fortunate enough to see Prince live twice—once at Target Center and once at First Avenue—and I was blown away.

### 10 Where do you see yourself 10 years from now?

I can see myself running for an open district court judgeship in an election in 10 years. Hopefully, I can develop some gray hair around my temples by then to make me look a tad more distinguished.



# 2019 TEE IT UP FOR JUSTICE



# 2019 PEDAL FOR JUSTICE

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**Town & Country Club**  
**300 Mississippi River North, St. Paul**

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**\$50 per person**

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## GOLF REGISTRATION INCLUDES:

green fees, golf cart, lunch, and cookout dinner

**11:00 AM:** REGISTRATION & BOX LUNCH

**12:00 PM:** SHOTGUN START

**5:00 PM:** COOKOUT DINNER & PRIZES

**EARLY BIRD REGISTRATION: \$225 per golfer**

(Payment must be received by Friday, August 23)

**\$250 per golfer** (after Friday, August 23)

*Please note: This tournament is scramble format.*

*Golf registration above \$180 is a tax deductible contribution to HCBF.*

**Add-ons:** +\$40 per team. Bernie Zimpfer Memorial Cup Challenge  
+\$25 Players Card Per Person

## BIKE REGISTRATION INCLUDES:

bike ride and cookout dinner

**1:30 PM:** REGISTRATION & SNACK

**2:00 PM:** BIKE RIDE

**5:00 PM:** COOKOUT DINNER & PRIZES

**\$75 per biker**

**Register at [www.hcba.org](http://www.hcba.org)**

Call Amanda Idinge at 612-752-6614 regarding sponsorship opportunities or to register/pay by phone.

**In 2019 your Hennepin Bar Foundation granted \$270,400 to justice related nonprofits. Your support provided grants to the following:**

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Community Mediation and Restorative Services  
Conflict Resolution Center  
Discapitados Abriéndose Caminos  
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JustUs Health  
Lawyers Concerned for Lawyers  
LegalCORPS  
Legal Rights Center  
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