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Ardavan Eizadirad

Faculty of Education, Wilfrid Laurier University

Tina-Nadia Gopal Chambers

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Amadeusz: Inequities in the Enactment and Implementation of Records Suspensions

ARDAVAN EIZADIRAD & TINA-NADIA GOPAL CHAMBERS*

AMADEUSZ IS A NON-PROFIT ORGANIZATION IN ONTARIO that provides access to education, community supports, mentorship, and exceptional care for young adults ages eighteen to thirty-five who are or have been incarcerated.¹ Using case studies of three participants from Amadeusz, we centre the lived experiences of racialized persons with a criminal record, outlining the challenges to accessing, and being approved for, a record suspension. Although the record suspension program is intended to assist with reintegration, the case studies show that the high monetary cost for the record suspension application, extensive waiting periods of five or ten years to qualify, consideration of prior non-conviction dispositions by the Parole Board, and the complexities rooted at the intersection of criminal law with immigration law create systemic barriers to effective long-term reintegration. These inequitable processes contribute to increased recidivism by limiting access to opportunities for upward social mobility and impeding the pathways to move beyond criminalized identities. Recommendations are made to improve the record suspension program, so that it does not continue to inequitably disadvantage Black, Indigenous, People of Colour (“BIPOC”), and those from lower socio-economic backgrounds.

I. OVERVIEW OF AMADEUSZ: HISTORY AND SERVICES OFFERED

The idea for Amadeusz originated when a group of six to eight young people came together in spaces defined by them as safe, such as in apartment building staircases and local housing communities, to discuss their experiences, challenges, and needs of living in Toronto’s racialized and marginalized communities. Over the years, their frustrations and experience with violence, incarceration, and tragedy turned into a desire to make a difference. The youth organized themselves into a formal group, and with support of the Executive Director of a local non-profit community agency, Amadeusz was formulated in 2009. Amadeusz formalized its membership and established a mandate which states, “to foster the opportunity among young people who have been impacted by incarceration to create positive change in their lives and communities.”²

* Dr. Ardavan Eizadirad is an Assistant Professor in the Faculty of Education at Wilfrid Laurier University. He is the author of *Decolonizing Educational Assessment: Ontario Elementary Students and the EQAO* (2019), and co-editor of *Equity as Praxis in Early Childhood Education and Care* (2021), and *International Handbook of Anti-Discriminatory Education* (forthcoming 2022). Dr. Eizadirad is also the founder and Director of EDication Consulting offering equity, diversity, and inclusion training to organizations.

Tina-Nadia Gopal Chambers teaches at various post-secondary institutions in Toronto. She has worked with children, youth, and families for over twenty years in community, recreation, prison, and academic settings. She is the founder of Amadeusz, a not-for-profit organization in Ontario. Her research interests include equitable access to education and community supports for the remand population in Ontario, youth vulnerable to the involvement in serious violence and crime, and community development.

¹ Amadeusz, online: *Amadeusz – Welcome to Amadeusz* <amadeusz.ca> [perma.cc/P44M-N7YN].

² Sarah Woods, Tina N Gopal & Purnima George, “Responding to Neoliberalism: The Case of the Look at My life Project” (2018) 19:2 *Critical Soc Work J* 60 at 66.

In the early years of Amadeusz, the most important issue for the group was mitigating the minimal opportunities for young people in remand to access education.³ As Sarah Woods, Tina Gopal, and Purnima George emphasize,

[i]t is estimated that 75% of individuals do not have a high school education upon entry to a federal correctional facility. More specifically, the Correctional Service of Canada found that 82% of individuals test below a Grade 10 level and 37% of males have a Grade 9 education or less.⁴

Amadeusz envisioned that formal educational attainment, such as gaining a high school diploma or its equivalent, would lead to positive change for the individual while incarcerated and post-release as part of reintegration and resettlement back into the community. Amadeusz submitted a funding application, which was approved, for the implementation of a six-month educational pilot program in partnership with a detention centre in Toronto. The project was a success and Amadeusz continued to grow over time to become an incorporated non-profit organization offering various programs and services for creating equitable access to education, community supports, mentorship, and care for people in remand custody.

Currently, Amadeusz is the only organization in Ontario that provides opportunities, resources, and supports for young people held in remand to complete high school and attend post-secondary schooling. From 2010 to 2020, Amadeusz's high school completion stream has graduated fifteen people with their Ontario Secondary School Diploma (OSSD), 173 people have obtained their General Education Diploma (GED), and 300 people have written the GED exam. In the post-secondary stream of the education program, 180 post-secondary courses have been completed by those in remand and three college certificates have been achieved. In 2018, Amadeusz expanded to also provide a service called *Prosper* which uses intensive case management and peer support to work with young people with firearm-related charges. To date, fifty-six people have been supported through *Prosper*.⁵

II. FROM PARDONS TO RECORD SUSPENSIONS

The pardon program has been replaced with the record suspension program under the *Criminal Records Act* as of 2012.⁶ Unless an individual applies for and is granted a record suspension, their criminal record will remain on their file. Subsection 4 in the statute outlines provisions in relation to applications for records suspensions:

4 (1) Subject to subsections (3.1) and (3.11), a person is ineligible to apply for a record suspension until the following period has elapsed after the expiration according to law of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, imposed for an offence:

³ Remand, or pre-trial detention, refers to the temporary detention of accused persons in provincial or territorial custody prior to trial or a finding of guilt.

⁴ Woods, Gopal & George, *supra* note 2 at 61.

⁵ Amadeusz, "Our Impact," online <amadeusz.ca/our-impact/> [perma.cc/96D4-Y9G7].

⁶ *Criminal Records Act*, RSC 1985, c C-47, s 3.

(a) 10 years, in the case of an offence that is prosecuted by indictment or is a service offence for which the offender was punished by a fine of more than five thousand dollars, detention for more than six months, dismissal from Her Majesty's service, imprisonment for more than six months or a punishment that is greater than imprisonment for less than two years in the scale of punishments set out in subsection 139(1) of the National Defence Act; or

(b) five years, in the case of an offence that is punishable on summary conviction or is a service offence other than a service offence referred to in paragraph (a).

(2) Subject to subsection (3), a person is ineligible to apply for a record suspension if he or she has been convicted of

(a) an offence referred to in Schedule 1; or

(b) more than three offences each of which either was prosecuted by indictment or is a service offence that is subject to a maximum punishment of imprisonment for life, and for each of which the person was sentenced to imprisonment for two years or more.⁷

A record suspension means that information regarding a person's convictions and charges is sealed and will not be made available through a police record check. However, it is important to note that prior convictions and charges are not erased, nor are the police notes affiliated with prior charges. Hence this information can be used in sentencing if the individual is subsequently convicted of a crime. Also, as of 31 March 2021, a fee of \$657.77 is associated with applying for a record suspension.⁸ This is highly problematic and inequitable for a population that often needs to provide a police record check to access employment, housing, and educational opportunities as part of reintegration and resettlement back into the community. On the Government of Canada website, the "Record Suspension" program is described as:

A record suspension allows people who were convicted of a criminal offence but have completed their sentence and demonstrated that they are law-abiding citizens for a prescribed number of years, to have their criminal record kept separate and apart from other criminal records.

A record suspension removes a person's criminal record from the Canadian Police Information Centre (CPIC) database. This means that a search of CPIC will not show that the individual has a criminal record or a record suspension. This helps them access employment and educational opportunities and to reintegrate into society.⁹

⁷ *Ibid*, s 4(1) & (2).

⁸ Government of Canada, "Record Suspensions," *Policing, justice and emergencies* (12 June 2021), online: <canada.ca/en/parole-board/services/record-suspensions.html> [perma.cc/7LDM-B9S5] [Government of Canada, "Record Suspensions"].

⁹ Government of Canada, "What is a Record Suspension?" (19 October 2018), online: <canada.ca/en/parole-board/services/record-suspensions/what-is-a-record-suspension.html> [perma.cc/L9JP-PXKC] [Government of Canada, "What is a Record Suspension?"].

Canadians with a record can apply for a record suspension with the Parole Board of Canada which is “the official and only federal agency responsible for ordering, refusing to order and revoking record suspensions under the *Criminal Records Act*.”¹⁰ There are, however, some exceptions to who is eligible to apply for a record suspension. The Government of Canada website further describes the “limits of a record suspension” as follows:

A record suspension (or pardon) can be **revoked or cease to have effect** if you are:

- Convicted of a new indictable offence, or in some cases, a summary offence;
- Found to no longer be of good conduct;
- Found to have made a false or misleading statement, or hidden information when you applied;
- Found to have been ineligible for a record suspension at the time the record suspension was ordered.

If a record suspension is revoked or ceases to have effect, the record of the offence(s) are added back in to the Canadian Police Information Centre (CPIC) database.¹¹

Granting of a record suspension under the *Criminal Records Act* may provide legal protection from discrimination on the basis of a criminal conviction under certain circumstances. For example, section 3(1) of the *Canadian Human Rights Act* outlines that one cannot be discriminated against due to a prior conviction for which a pardon or record suspension has been granted.¹² This serves as a protective factor against discriminatory practices, particularly as it applies to accessing opportunities. Protection under the *Canadian Human Rights Act* only applies for those who have been granted a record suspension and not those who have a police record.¹³ It also only applies when dealing with federally regulated businesses or federal government entities. Provincial and territorial human rights codes apply within their respective jurisdictions. Ontario’s *Human Rights Code*, for example, provides protections with respect to employment that are similar to the *Canadian Human Rights Code*.¹⁴ While some provincial and territorial jurisdictions offer broader protections—prohibiting discrimination on the basis of a conviction unrelated to the employment being sought irrespective of whether a pardon or suspension has been granted—a handful of provinces offer no protection from discrimination based on a criminal record, even where the record has been suspended. Moreover, as the John Howard Society of Ontario emphasizes in relation to the *Ontario Human Rights Code*, additional concerns arise regarding the non-conviction information contained in records:

¹⁰ Government of Canada, “Applying for a Record Suspension? – Information you should know,” (31 March 2021), online: <canada.ca/en/parole-board/corporate/publications-and-forms/applying-for-a-record-suspension-information-you-should-know.html> [perma.cc/2E6P-353L]. See also section 2.1(1) of the *Criminal Records Act*, *supra* note 6.

¹¹ Government of Canada, “What is a Record Suspension?” *supra* note 9, emphasis in original.

¹² *Canadian Human Rights Act*, RSC 1985, c H-6 s 3(1).

¹³ John Howard Society of Ontario, “The Invisible Burden: Police Records and the Barriers to Employment in Toronto” (February 2018), online (pdf): <policerecordhub.ca/wp-content/uploads/2018/02/The-Invisible-Burden-Report-FINAL.pdf> [perma.cc/E9V2-BACX].

¹⁴ *Human Rights Code*, RSO 1990, c H19 s 5(1).

Individuals with unsealed records (convictions for which there is no pardon or record suspension), and non-conviction information (like arrests, withdrawn charges, acquittals, stays) can be discriminated against.

Where tribunals have had the opportunity to interpret the *Code* as applying to individuals with non-conviction records, the tribunal has determined that the *Code* does not apply to these types of records. This absurdity – that people who are convicted have legal protection, while those who are legally innocent have little to no protection – must be corrected by legislative change.¹⁵

The inconsistencies between jurisdictions in protection from discrimination and the failure to expressly address non-conviction records are important to rectify in order to ensure equitable access to opportunities. Doing so would be a significant step in promoting effective long-term reintegration and reducing recidivism.

III. AMADEUSZ CASE STUDIES

The three case studies that will be discussed are selected purposefully because each scenario emphasizes challenges and limitations affiliated with accessing and being approved for a record suspension under the *Criminal Records Act*. As noted, currently it costs \$657.77 to apply for a record suspension. This fee is inequitable considering that most people with a police record live in neighbourhoods plagued by poverty and inequitable access to services and support programs. Heightened surveillance and social stigma affiliated with racialized neighbourhoods make low-income individuals and BIPOC more vulnerable in their interactions with the police, which increases their chance of being charged, convicted, and/or incarcerated.¹⁶

When the Parole Board is considering whether to grant a record suspension, they consider various factors including the nature, gravity, and duration of the offence, and the circumstances surrounding the commission of the offence including offending history. This is highly problematic given that due to systemic racism, there is an over-representation of BIPOC at all stages within the justice system. Specifically, section 4.1 (3) of the *Criminal Records Act* outlines,

[i]n determining whether ordering the record suspension would bring the administration of justice into disrepute, the Board may consider

- (a) the nature, gravity and duration of the offence;
- (b) the circumstances surrounding the commission of the offence;
- (c) information relating to the applicant’s criminal history and, in the case of a service offence, to any service offence history of the applicant that is relevant to the application; and
- (d) any factor that is prescribed by regulation.¹⁷

¹⁵ John Howard Society of Ontario, *supra* note 13 at 29.

¹⁶ Colour of Poverty - Colour of Change, “Fact Sheet #7: Racialized Poverty in Justice & Policing” (2019) online: <<https://colourofpoverty.ca/wp-content/uploads/2019/03/cop-coc-fact-sheet-7-racialized-poverty-in-justice-policing-2.pdf>> [perma.cc/YR9E-YCZQ] [Colour of Poverty – Colour of Change, “Fact sheets”]; John Howard Society of Ontario, *supra* note 13.

¹⁷ *Criminal Records Act*, *supra* note 6, s 4.1 (3).

A key factor in approving a record suspension by the Parole Board is the extent to which the applicant has demonstrated good conduct.¹⁸ What is inequitable as part of this process is the consideration of offending history which can include both proven and unproven charges. This creates a huge systemic barrier for someone who has multiple unproven charges, as it may deny them from having their record sealed. We acknowledge that this applies to a small percentage of the population who find themselves in these circumstances, but it makes a difference in their lives in terms of access to opportunities and chances for effective reintegration. If people are not able to have their record suspended, the cycle of stigma, unemployment, and marginalization continues. It does not give them a fair chance to reintegrate back into society and it will likely perpetuate conditions that gravitate them towards crime as a means of survival.¹⁹ This largely disadvantages BIPOC and racialized communities as they are overrepresented at all levels in the justice system from being charged with crimes to sentencing.

In the upcoming subsections, three case studies from Amadeusz participants are examined with more depth to demonstrate the inequities embedded in applying for a record suspension. Pseudonyms are used to maintain confidentiality of the participants.

A. CASE STUDY #1 TROY

At age eighteen, Troy was charged by the police with assault causing bodily harm. He received bail right away posted by his mother's sister, who put up her home for bail. At the completion of his trial, Troy was convicted of the charge and found guilty. A year later, at age nineteen, he was charged again, this time with eight criminal charges. He spent eighteen months on remand awaiting his trial. He was acquitted of all charges at the completion of his trial and subsequently released in 2003.

Seven years later, in 2010, with the financial support of an employment and social services agency, Troy began the process of applying for a pardon. It was not until 2015 that the Parole Board sent Troy a request for the last requirement in the record suspension process: a written letter from him discussing the circumstances associated with his prior charges and to illustrate good conduct from the date of his last conviction. Troy was also expected to show how a pardon would serve to sustain his rehabilitation and would not bring the administration of justice into disrepute. In April 2015, Troy was notified that his pardon application was denied. The letter issued by the Parole Board attributed the denial of the application to Troy not discussing the circumstances surrounding his involvement in charges he had been acquitted of. The letter outlined that the Parole Board found the police notes about his acquitted charges reliable and persuasive.

Implication: An acquittal signifies that a prosecutor failed to prove their case beyond a reasonable doubt. This is not equivalent to the defendant being innocent. Hence, police notes about prior charges, including non-conviction dispositions, can be used against the applicant to deny their record suspension application.

In criminal proceedings, a person is considered innocent until proven guilty. At the conclusion of a trial, the verdict by a jury or a judge is “guilty” or “not guilty,” instead of “guilty”

¹⁸ *Ibid*, sections 2.3(a), 4.1(1)(a), and 7(b).

¹⁹ Roy McMurtry & Dr Alvin Curling, “The Review of the Roots of Youth Violence” (2008), online (pdf): *Service Ontario Publications* <children.gov.on.ca/htdocs/English/documents/youthandthelaw/rootsofyouthviolence-voll.pdf> [perma.cc/SKE8-RXPG].

or “innocent.” Not guilty does not mean innocent. An acquittal indicates that a prosecutor failed to prove their case beyond a reasonable doubt, not that a defendant is innocent. Daniel Givelber and Amy Farrell point out that “acquittals do not answer, nor even address, the question of whether defendants are factually innocent. All we know is that the juries [or the judges as the case may be] were not persuaded that the defendants committed the crimes charged.”²⁰

What is important to consider is the impact of an acquittal on an application for a record suspension. In accordance with section 4.1 (3) of the *Criminal Records Act*, the Parole Board may consider the nature, gravity, and duration of the applicant’s offending history along with the circumstances surrounding the commission of the offences. In Troy’s case, even though he was acquitted of all charges, his prior acquitted charges, along with police notes, were relied upon when a ruling was made on his record suspension application for his convicted charge of causing bodily harm at the age of eighteen. The history of unproven charges was held against him, resulting in a denial of a record suspension, and consequentially limiting his access to opportunities for upward social mobility. As it currently stands, the verdict of “not guilty” can be interpreted as a *little* bit guilty and held against someone who is applying for a record suspension after being a good, law-abiding citizen for multiple years. Ironically, this can also create a two-tier system where being guilty on all counts, rather than just some, makes you a better applicant for a record suspension.²¹

B. CASE STUDY #2 SHAUN

When Shaun was in grade ten at age fifteen, he got into a fight at school. Shaun was charged by police with assault. He spent three weeks on remand and was bailed out of jail by his sister-in-law. He subsequently completed the requirements of the courts according to the *Youth Criminal Justice Act*, which included peer mediation, house arrest, and community service.²² Four years later, at age nineteen, Shaun was charged with another five charges including conspiracy to traffic weed, conspiracy to traffic cocaine, conspiracy to traffic guns, possession of a firearm, and possession of a firearm for the purpose of trafficking. He spent three weeks in remand and was granted bail with conditions, one being house arrest. After one year on house arrest, Shaun was arrested and charged again with firearm possession, resisting arrest, and assaulting an officer. He was convicted of the firearm possession and resisting arrest charges and did three years and six months in a federal facility. In 2015, while on parole, Shaun violated parole by failing a urine test for marijuana. Shaun said he was smoking marijuana to cope with stress. He was re-incarcerated once more for not abiding by his parole conditions. After another six months in jail, Shaun was released on parole at the end of 2015. He attended a pre-employment program in 2018, but the program was not successful in finding him a placement because of his police record. Shaun was devastated as he was trying to make positive changes in his life but kept facing challenges and barriers. This time, Shaun was even more determined to secure employment and better his life. He went to an employment and social services agency seeking support for housing and employment. In late 2018, Shaun’s older brother submitted Shaun’s resume to his place of work. After a good reference from his brother who was doing well in the company, Shaun was hired. He has been working there since

²⁰ Daniel Givelber & Amy Farrell, *Not Guilty: Are the Acquitted Innocent?* (New York: NYU Press, 2012) at 2.

²¹ Michael Ashby, “How the Pardon System Treats the Presumption of Innocence” (4 April 2014), online (blog): *iPolitics* <ipolitics.ca/2014/04/04/how-the-parole-system-treats-the-presumption-of-innocence/> [perma.cc/S6AN-BXCZ].

²² See: *Youth Criminal Justice Act*, SC 2002, c 1 s 41 & 42. This legislation applies to youth under eighteen years of age charged with criminal offences.

2018, while still receiving support from a local employment and social services agency. Shaun wants to apply for a record suspension to better his life, but the eligibility wait-time and the monetary cost associated with the application are barriers. Under the *Criminal Records Act*, after completion of the sentence imposed by the court, one must wait a period of five years for a summary conviction offence, and ten years for an offence prosecuted by indictment, to qualify for a record suspension.²³

Implication: The waiting period of five or ten years, depending on the nature of the prior conviction(s), before being eligible to apply for a record suspension keeps many people who are trying to reintegrate back into society and resettle back into their community in a cycle of poverty. This extensive waiting period perpetuates conditions that makes people vulnerable to reinvolvement with violence and crime.

The eligibility waiting period for a record suspension leaves those with a history of convictions with limited options for employment, education, and volunteer opportunities.²⁴ This extensive waiting period needs to be re-examined if the ultimate goal of the justice system is to reduce recidivism and deter people from being vulnerable to a life of crime as a result of poor living conditions and circumstances.²⁵

C. CASE STUDY #3 BASIL

At the age of twenty, Basil was charged with aggravated assault and armed robbery. After serving six months in remand, he was told if convicted he could get a sentence of up to ten years. Basil was told he could either remain in remand and go to trial or plead guilty and be released on time served. He chose the latter. Two years later, in 2003, he was charged with eight criminal charges. Even though he was acquitted of all eight charges, due to the seriousness of his earlier charges and guilty plea, although he was a permanent resident at the time of committing the crimes and had lived in Toronto since the age of two, he was deported to his country of origin. The law in this area has become even harsher since Basil was deported. Currently, under the “serious criminality” provisions of the *Immigration and Refugee Protection Act*, a permanent resident is inadmissible to Canada and subject to deportation if convicted in Canada of an offence for which the maximum sentence possible is ten years, or if sentenced to serve a term of imprisonment of six months or more.²⁶ Significantly, where a sentence is six months or more, there is no right of appeal to the Immigration Appeal Board where a broad range of humanitarian and compassionate factors can be considered.²⁷ While a crime for which a person has received a record suspension cannot be considered in determining inadmissibility,²⁸ given the length of time to secure a record suspension, as with Basil, there is a strong likelihood of deportation before even being eligible to apply for a record suspension. As a result of being deported, Basil faced the challenge of integrating into a new country with no employment, housing, or access to support systems. This drastically gravitated him towards crime and violence as a means of survival. While someone in Basil’s

²³ *Criminal Records Act*, *supra* note 6, s 4(1).

²⁴ John Howard Society of Ontario, *supra* note 13.

²⁵ Ardavan Eizadirad, “Is it ‘Bad’ Kids or ‘Bad’ Places? Where is All the Violence Originating From? Youth Violence in the City of Toronto” (2016) 38:2 *Rev Education Pedagogy & Cultural Studies* 170.

²⁶ *Immigration and Refugee Protection Act*, SC 2001, c 27 s 36(1).

²⁷ *Ibid*, s 64(1) & (2).

²⁸ *Ibid*, s 36(3) (b).

position could apply for a record suspension from abroad, any convictions in the country of origin pose new barriers to admissibility.

Implication: The intersectionality of immigration law with criminal law creates additional barriers to effective reintegration for those without citizenship status.

Being charged with a crime while not being a Canadian citizen carries with it the potential for removal from Canada and if a permanent resident, the loss of that status. Moreover, when a history of charged crimes and convictions intersects with settlement issues, the lack of accessibility to support services intensifies, increasing one's vulnerability to reinvolvement with violence and crime. Within this system, there is no room for mistakes.

IV. DISCUSSION - CHARGED BUT NOT FORGOTTEN

The three case studies discussed illustrate various inequities and limitations around applying for and being granted a record suspension in Canada. The lived experiences of Troy, Shaun, and Basil demonstrate the systemic barriers and struggles those convicted of criminal offences face while trying to better themselves and their circumstances. They continue to pay a price, years and in some cases decades beyond completion of their sentence. Perhaps the most important barrier that those with a criminal record face is finding meaningful employment, given that the use of criminal record checks by employers is a common practice.²⁹ This is ironic as gaining employment is an important protective factor for rehabilitation and for reducing recidivism.³⁰ The negative effects are intensified for a population having to live with the stigma and stereotype of "being a criminal."

It is important to contextualize the social make-up of the populations charged and convicted. Firstly, people who are held in correctional facilities are disproportionately racialized.³¹ Secondly, the majority of those with records live in poverty and/or in areas marked as neighbourhood improvement areas where access to services and opportunities is limited relative to the number of people living in the area.³² These neighbourhoods are also heavily surveilled by police.³³

Looking at the intersection of race, poverty, and justice, the Colour of Poverty fact sheet titled *Racialized Poverty in Justice and Policing* points out:

- As a result of higher levels of 'scrutiny compared to white people, minorities are more likely to be arrested, convicted and punished', which has been identified as a significant contributing factor to the overrepresentation of Black males in the criminal justice system...

²⁹ John Howard Society of Ontario, *supra* note 13.

³⁰ Stephen P Shepard, "Negligent Hiring Liability: A look at how it affects employers and the rehabilitation and reintegration of ex-offenders" (2011) *Appalachian JL* 10:2 145; Christopher Uggen et al, "The Edge of Stigma: An experimental audit of the effects of low-level criminal records on employment" (2014) *Criminology* 52:4 627.

³¹ Colour of Poverty - Colour of Change, "Fact Sheets," *supra* note 19.

³² Sheila Block & Grace-Edward Galabuzi, "Canada's Colour Coded Labour Market: The gap for racialized workers" (March 2011), online (pdf): *Wellesley Institute and Canadian Centre for Policy Alternatives* <wellesleyinstitute.com/wp-content/uploads/2011/03/Colour_Coded_Labour_MarketFINAL.pdf> [perma.cc/7SXV-UAMF]; United Way, "Rebalancing the Opportunity Equation" (May 2019), online (pdf): *United Way Greater Toronto* <unitedwaygt.org/file/2019_OE_fullreport_FINAL.pdf> [perma.cc/25PC-HZWW].

³³ Eizadirad, *supra* note 25 at 169-70.

- In 2016, Black people comprise 3.5% of the general Canadian population, but made up 10% of the federally incarcerated population....
- In 2016, 25% of the total federally incarcerated population – and 35% of federally-sentenced women – were Indigenous, despite accounting for only around 4.3% of the total Canadian population.
- Between 2005 and 2015, the number of incarcerated Indigenous Peoples increased by more than 50%, while the number of incarcerated Indigenous women almost doubled.
- Racialized communities are over-represented among the low-income population and face heightened risk of homelessness, incarceration, and human rights violations. This increases their likelihood of being over-policed, while diminishing their access to justice and security.
- Access to justice, and the fair representation of racialized individuals before courts, administrative tribunals, and access to legal aid is made that much more difficult because of their race and immigration status on the one hand, and the lack of culturally and linguistically responsive and safe services in the justice system on the other.³⁴

The statistics above situate how BIPOC are racialized systemically and disadvantaged within the Canadian justice system at various levels, from being charged and sentenced to post-release. Expanding on these trends, the John Howard Society of Ontario further situates how racial disparities exist in the justice system, disadvantaging Black and Indigenous communities:

[D]espite comprising less than 5% of Canada’s total population, Aboriginal Peoples make up more than 26% of the incarcerated population. ... The number of Black people in Canadian correctional institutions has increased by 50% in the last three decades and their overrepresentation in custodial sentences is among the highest: while Black men comprise only 1.25% of Canadian population, they account for approximately 20% of individuals in federal institutions.³⁵

From an anti-oppressive lens, we must move away from deficit thinking that places blame exclusively on the individual for their decisions and look to the broader systems and conditions that contribute to governing lives and regulating access to opportunities.³⁶ We need to examine how the legal system systemically disadvantages BIPOC through its policies and practices, such as the record suspension program. The general stereotype inscribed on those criminalized with a record is that they are incompetent, unfit, and may put the company or organization and its employees at risk.³⁷ The John Howard Society interviewed employers in Toronto who hired people with police records and found that 73% said that these employees’ performance was no different

³⁴ Colour of Poverty - Colour of Change, “Racialized Poverty in Justice and Policing” (May 2019), online (pdf): *Colour of Poverty - Colour of Change* <colourofpoverty.ca/wp-content/uploads/2019/03/cop-coc-fact-sheet-7-racialized-poverty-in-justice-policing-2.pdf> [perma.cc/PT9C-VXWV] [Colour of Poverty - Colour of Change, “Racialized Poverty in Justice and Policing”].

³⁵ John Howard Society of Ontario, *supra* note 13 at 17.

³⁶ Robert P Mullaly, *Challenging Oppression: A critical social work approach*, (Don Mills, On: Oxford University Press, 2002).

³⁷ Kathryn M Zainey, “The Constitutional Infirmity of the Current Federal Sentencing System: How the use of uncharged and acquitted conduct to enhance a defendant's sentence violates due process” (2010) 56:2 Loy L Rev 375.

than that of their co-workers who did not have records.³⁸ Heather Rose and Glenn Martin claim that the justice system has created a “second-class citizenry,” which is the result of the invisible punishment the charged experience. The authors argue that this discrimination is intertwined with racism and classism.³⁹ It seems that those who have had police interactions that result in a conviction have very little chance of moving beyond their conviction history.

Rose and Martin state that “criminal record based discrimination is a multifaceted issue because of its close relation to historical race-based discrimination and the swelling Prison Industrial Institution.”⁴⁰ A study conducted in Minnesota illustrated how race plays a part in the likelihood that employers call back job applicants who are Black men with criminal records versus white men with criminal records.⁴¹ In this study, Black and white men, with and without a criminal record, were asked to apply to similar jobs across the city. When it came to those with a record, white men were more likely to get a call-back from prospective employers, despite having identical police records as their Black counterparts.⁴²

To add to this discrimination, Black men are also more likely to have criminal records. This could be attributed to several systemic reasons, including increased police presence and surveillance in racialized neighbourhoods and racial profiling by officers.⁴³ Kathryn Zainey states “the argument could be offered that the adjudicatory system itself is discriminatory in practice; otherwise, all races would be convicted at proportional rates and there would be no disparities.”⁴⁴ Racialized people in general have been placed on the margins, making it more challenging for them to move past their criminalized identity post-release.⁴⁵ Being a racialized person exposes one to inequities and more systemic barriers which regulate access to opportunities.

Perhaps the most important gap in the literature about criminal record suspensions is the lack of Canadian research about the impact of a record on an individual's life post-release, and its intersection with provincial/territorial statutes, including criminal record checks and human rights legislation at various levels. In sum, there needs to be more of an understanding about how deeply a criminal record can affect an individual, and how, in many cases, the current record suspension program is ineffective in reducing recidivism and promoting resettlement into the community for those who have had prior interactions with the police and the legal system. We need to start asking whether there is a better and more effective way of transitioning and reintegrating the charged population back into society.

V. RECOMMENDATIONS

To eliminate the systemic oppression caused by the *Criminal Records Act*, particularly via the record suspension program, we make the following recommendations:

³⁸ John Howard Society of Ontario, *supra* note 13.

³⁹ Heather Rose & Glenn E Martin, “Locking Down Civil Rights: Criminal record-based discrimination” (2008) 2:1 Race/Ethnicity: Multidisciplinary Global Contexts 13.

⁴⁰ *Ibid* at 14.

⁴¹ Uggen et al, *supra* note 30.

⁴² *Ibid*.

⁴³ Eizadirad, *supra* note 25.

⁴⁴ Zainey, *supra* note 37 at 286.

⁴⁵ Christopher J Williams, Devon C Jones & Rose-Ann M Bailey, “From the Margins: Building curriculum for youth in transition” (30 November 2013), online (pdf): *Ministry of Justice & Youth Association for Academics, Athletics and Character Education* <yaaace.com/from-the-margins/> [perma.cc/5C9Q-4BYA]; Colour of Poverty - Colour of Change, “Racialized Poverty in Justice and Policing,” *supra* note 34.

- The Parole Board should not take into consideration any prior acquitted or withdrawn charges or police notes from past or on-going investigations when ruling for a record suspension application. This will create a more equitable assessment of an applicant prioritizing the goal of reintegration and reducing recidivism versus promoting punishment.
- The waiting period to apply for a record suspension should be reduced, non-cumulative, and the requirement for an application and its fee of \$657.77 eliminated; instead, the process should be initiated automatically and free of charge once a set period of time has passed. Those convicted or charged need access to employment and education opportunities which open pathways for bettering their lives and enabling upward social mobility. As a pattern, the number of record suspension applications received by the Parole Board has decreased every year going from 14,253 in 2013-2014 to 9,461 in 2017-2018.⁴⁶ The majority of those with criminal records live below the poverty line and the high cost of the application deters individuals from applying.
- More funding needs to be invested by the federal and provincial/territorial governments to support intensive case management of the charged population from incarceration to post-release. An example would be Amadeusz' service, *Prosper*, which provides intensive case management and peer support for young people with firearm-related charges.⁴⁷ Other suggestions as part of intensive case management models can include offering pre-charge diversion, extra judicial sanctions, and measures similar to those offered to youth aged twelve to seventeen but extended to young people between the ages of eighteen to twenty-nine.
- Mentorship is often a key initiative in helping people be resilient when dealing with stressors and transitions. We need to invest in mentorship opportunities as part of intensive case management models for those who are recently released. Weekly check-ins would be requirements of the program to assess how individuals are doing and identifying how they can be supported with challenges they are experiencing resettling back into the community. This would allow for timely mentorship and support as required on a case-by-case basis.

Overall, the enactment of these recommendations can work towards systematically reducing crime and recidivism by promoting more holistic reintegration for those with criminal records. These recommendations can assist in creating better conditions to break the cycle of poverty and oppression that disproportionately disadvantages BIPOC and those from lower socio-economic backgrounds who have a police record or prior charges. We would like to conclude by emphasizing that our criticism of the *Criminal Records Act* is not intended to stop the legal system from holding people responsible and accountable for their actions. Rather, the goal is to work towards improving the system, so it is more equitable leading to a reduction in crime and lower

⁴⁶ Public Safety Canada, "2018 Corrections and Conditional Release Statistical Overview" (19 August 2019), online: *Public Works and Government Services Canada* at 111 <publicsafety.gc.ca/cnt/rsrscs/pblctns/ccrso-2018/index-en.aspx#sectione5> [<https://perma.cc/C87B-UV9J>].

⁴⁷ Amadeusz, "About," online: <amadeusz.ca/about/> [perma.cc/2F7B-YBSZ].

rates of recidivism through more effective reintegration. This requires us to move beyond labeling those convicted or charged as criminals for life, as good or bad people, and instead explore constructive approaches and adjustments to existing laws to create a more equitable system that benefits all in society.