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CHALLENGING OVERINCARCERATION: THE ROLES OF LAW SCHOOL CLINICS WORKING IN PARTNERSHIP – A SYMPOSIUM*

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On March 31, 2023, the University of Maryland Francis King Carey School of Law hosted a symposium on “Decarceration: The Roles of Law School Clinics.”¹ It was jointly sponsored by this Journal and the school’s Clinical Law Program to celebrate the Program’s fifty-year history.² There were five panels of experts from around the country. The panelists included clinical law and social work faculty, other law faculty, leaders of national criminal justice organizations, and formerly incarcerated people who were leaders in prison and are reform leaders outside today.³ Five Maryland Law School faculty members who have

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¹ UNIV. MD. CLINICAL L. PROGRAM & UNIV. MD. L. J. RACE, RELIGION, GENDER, & CLASS, THE 2023 ANNUAL MARYLAND LAW JOURNAL OF RACE, RELIGION, GENDER, AND CLASS SYMPOSIUM, DECARCERATION: THE ROLES OF LAW SCHOOL CLINICS (2023) [hereinafter SYMPOSIUM PROGRAM] (on file with the U. MD. L.J. RACE, RELIGION, GENDER & CLASS).

² The law school informs students that “the Clinical Law Program is at the heart of your Maryland Carey Law experience.” *About Our Clinical Law Program*, Univ. of Md. Francis King Carey Sch. of L. <https://www.law.umaryland.edu/academics/clinics/> (last visited Sept. 14, 2023). In 1988, the faculty decided to require day division students to take an experiential course as a condition of graduation; one of the first schools in the country to do so. UNIV. OF MD. BALT., UNIVERSITY OF MARYLAND SCHOOL OF LAW 1988-89 CATALOGUE 60 (1988) (on file with author). Each semester, the school offers from eighteen to twenty or so clinical courses in a wide variety of practice areas for students to choose from. *About Our Clinical Law Program*, Univ. of Md. Francis King Carey Sch. of L. <https://www.law.umaryland.edu/academics/clinics/> (last visited Sept. 14, 2023). “Each year, 20 faculty lead 150 students in providing almost 75,000 hours of free legal services to the community, making the Clinical Law Program one of the region’s largest public interest law firms.” *Francis King Carey School of Law*, Univ. of Md. Balt. Inst. for Clinical & Translational Rsch., <https://www.umaryland.edu/ictr/for-the-community/francis-king-carey-school-of-law/> (last visited Dec. 22, 2023). The school “was the first law school program in the country to receive the John Minor Wisdom Award, the American Bar Association’s leading public service honor.” *Id.*

³ See SYMPOSIUM PROGRAM, *supra* note 1.

clinics in this field moderated the panels.⁴ The overflowing audience included people from all the above constituencies who came from around the country and Canada, as well as law students and other interested people.

One definition of “decarceration” is “the effort to limit the number of people who are detained behind bars, either by limiting who is sent to prison in the first place, or by creating avenues to release people already in custody.”⁵ The panelists described a broad range of decarceration activities within the scope of this definition. The activities included seeking to enforce the release mechanisms that exist, for example, new Second Look laws,⁶ New York’s Domestic Violence

⁴ *Id.* These clinics are Professor Michael Pinard’s Youth, Education, and Justice Clinic (representing children in Maryland who have been pushed out of school via suspension, expulsion, or other means, as well as individuals serving life sentences for crimes committed when they were children or emerging adults); Professor Leigh Goodmark’s Gender, Prison, and Trauma Clinic (representing incarcerated and formerly incarcerated people in post-sentencing proceedings and before the Maryland legislature); Professor Lila Meadows’s Survivors of Violence Clinic (representing survivors of violence and trauma in administrative and judicial proceedings, including under Maryland’s Second Look law, and before the Maryland legislature); Professor Maneka Sinha’s Criminal Defense Clinic (representing petitioners in federal compassionate release cases as well as defendants in state court misdemeanor trials); and Professor Michael Millemann’s Post-Conviction and Sentencing Clinic (representing petitioners under Maryland’s Second Look law).

⁵ *Decarceration*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/decarceration#:~:text=Decarceration%20is%20the%20effort%20to,release%20people%20already%20in%20custody> (last visited Sept. 14, 2023).

⁶ *See infra* Section II.A. In a website available to members, the Second Look Network of The Sentencing Project lists a number of categories of “Second Look Laws.” *Second Look Network*, SENT’G PROJECT, <https://www.sentencingproject.org/advocacy/second-look-network/> (last visited Oct. 29, 2023) [hereinafter “*Second Look Network*, SENT’G PROJECT”]. These include “Judicial Reconsideration Laws” (eleven states have laws, many with common features); “Elder/Geriatric Parole” laws based on age (nine states have these); “Juvenile & Emerging Adult Parole” laws (sixteen states have these); “Clemency Laws” (all states have some version of these); “Compassionate Release” laws (all states have some version of these); and “Prosecutor Initiated Resentencing” laws (five states have these). *Id.* In the Model Penal Code, the American Law Institute recommends a second look sentencing provision that allows people to be considered for a sentence modification after they have served 15 years and reconsidered every 10 years after that. *Modification of Long Term Prison Sentences*, THE ALI ADVISER (Mar. 27, 2019), <http://www.thealiadviser.org/sentencing/modification-of-long-term-prison-sentences/>. *See generally*, Kathryn E. Miller, *A Second Look for Children Sentenced to Die in Prison*, 75 OKLA. L. REV. 141 (2022); Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83 (2019); Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 BROOK. L. REV. 149 (2015); Debra Cassens Weiss, *Momentum Builds for Second Look’ Legislation That Allows Inmates to Get Their Sentences Cut*, ABA JOURNAL (May 19, 2021), <https://www.abajournal.com/news/article/momentum-builds-for-second-look-legislation-that-allows-inmates-to-get-their-sentences-cut> (“‘Second look’ legislation has been introduced in 25 states that would authorize reevaluation of lengthy prison sentences, according to a report released last week by the Sentencing Project.”).

Survivors Justice Act,⁷ state and federal compassionate release laws,⁸ and parole, commutation, and clemency laws.⁹

The panelists also discussed reform work, including efforts to expand release laws (through both judicial interpretations of existing laws and new legislation),¹⁰ and ways in which to limit the numbers of people who enter the criminal legal system.¹¹ The panelists examined the large roles that race and gender discrimination have played, and continue to play, in overincarceration.¹²

⁷ See *infra* Section II.C. See generally, Domestic Violence Survivors Justice Act, CRIM. PROC. LAW § 440.47 (McKinney 2023).

⁸ See *infra* Section II.B. See generally, Renagh O’Leary, *Compassionate Release and Decarceration in the States*, 107 IOWA L. REV. 621 (2022).

⁹ See *infra* Sections II.A, II.B.

¹⁰ See *infra* Sections II.A., II.B. and II.C.

¹¹ See *infra* Section II.D.

¹² See *infra* Sections II.C., II.D. There are a number of law school clinics other than those of the panelists that do legal work related to the themes of the symposium, including decarceration clinics. E.g., *Juvenile Justice Clinic*, CORNELL L. SCH., <https://www.lawschool.cornell.edu/academics/experiential-learning/clinical-program/juvenile-justice-clinic/> (last visited Sept. 14, 2023) (representing juveniles, especially in South Carolina, sentenced to life without parole and other extreme sentences); *Criminal Justice Reform Clinic (CJRC)*, LEWIS & CLARK L. SCH., https://law.lclark.edu/clinics/criminal_justice_reform/ (last visited Sept. 14, 2023) (representing clients in clemency, parole and second look cases, among others, with more than 100 people released from prison over the last six years); *Institute to End Mass Incarceration Clinic*, HARV. L. SCH., <https://hls.harvard.edu/clinics/in-house-clinics/institute-to-end-mass-incarceration-clinic/> (last visited Sept. 14, 2023); *Decarceration and Community Reentry Clinic*, UNIV. VA. SCH. L., <https://www.law.virginia.edu/clinics/decarceration-and-community-reentry-clinic> (last visited Sept. 14, 2023); *Post-Conviction Relief Clinical Practicum*, WASH. UNIV. ST. LOUIS. SCH. L., <https://law.wustl.edu/academics/clinical-education-program/post-conviction-relief-clinical-practicum/> (last visited Sept. 14, 2023) (capital and life without parole cases); *Compassionate Release Practicum*, B.U. SCH. L., <https://www.bu.edu/law/experiential-learning/clinics/compassionate-release-practicum/> (last visited Sept. 14, 2023); *Clinics: Compassionate Release and Parole Clinic*, B.C.L. SCH., <https://www.bc.edu/content/bc-web/schools/law/academics-faculty/experiential-learning/clinics.html> (last visited Sept. 14, 2023); *Legal Assistance to Incarcerated People: Second Look Advocacy Clinic*, UNIV. WISC. L. SCH., <https://secure2.law.wisc.edu/courseInfo/courseDescription.php?iCatNBR=862&iSection=002&iTerm=1242&iSc=A1> (last visited Sept. 14, 2023); *Caritas Clemency Clinic*, VILL. SCH. L., <https://www1.villanova.edu/university/law/experience/clinics-externships/clinics/caritas-clemency-clinic.html> (last visited Sept. 14, 2023) (created response to the First Step Act); *Parole Assistance and Re-entry Clinic*, LA. STATE UNIV. L. SCH., <https://law.lsu.edu/experiential/clinics/parole-reentry/> (last visited Sept. 14, 2023); *Clinic - Clemency and Pardon Project*, BROOK. L. SCH., <https://www.brooklaw.edu/Courses/Clinic—Clemency-and-Pardon-Project#:~:text=Students%20work%20in%20teams%20to,with%20the%20US%20Pardon%20Office> (last visited Sept. 14, 2023). There are many more post-conviction, criminal defense, juvenile justice and defense, wrongful conviction, and innocence clinics. In addition, there are a number of racial justice clinics. E.g., *Tools for Social Change: Race and Justice Clinic*, UNIV.

At the beginning of the last panel, Professor Michael Pinard, the faculty director of the Gibson-Banks Center for Race and the Law and the panel moderator, summarized the views of many about the symposium, saying “this has been a very magical day here; one of these unique singular days that will be marked in the history of this law school.”¹³ As the panelists described what they were doing, and their successes, there was a sense of excitement and community in the room. For decades, advocates who sought to get people out of prison fought hard, but usually with only occasional successes.¹⁴ The panelists offered a more hopeful, collective vision of an array of successful decarceration strategies, albeit with plenty of formidable challenges.

In Part I, I describe the explosion of the prison population in this country from the 1970s through 2009, which has made the United States the hands-down incarceration leader in the world.¹⁵ In 1970, there were 196,429 people incarcerated in state and federal prisons in the United States.¹⁶ By 2009, that number had grown to 1,553,574.¹⁷ This was more than a seven-fold increase in forty years.¹⁸

In Part I, I also describe the relatively recent and modest reductions in prison populations and some reasons for these.¹⁹ Among

WASH. SCH. L., <https://www.law.uw.edu/academics/experiential-learning/clinics/race-and-justice> (last visited Sept. 14, 2023); *Advocacy for Racial and Civil Justice Clinic*, UNIV. PA. CAREY L., <https://www.law.upenn.edu/clinic/arc/> (last visited Sept. 14, 2023); *Racial Justice Clinic*, UNIV. S.F. SCH. L., <https://www.usfca.edu/law/engaged-learning/law-clinics> (last visited Sept. 14, 2023). A number of clinics seek to break the school-to-prison pipeline. *E.g.*, *Youth Defender and Education Justice Clinics*, U.C. BERKELEY SCH. L., <https://www.usfca.edu/law/engaged-learning/law-clinics#chapter=chapter-22519-Racial-Justice-Clinic> (last visited Sept. 14, 2023).

¹³ See *infra* Section II.D. Panel Recording: Decarceration: The Role of Law School Clinics, Panel 4 – Race and Over-Incarceration: Overcoming Racism to Decarcerate, held by the University of Maryland Journal of Race, Religion, Gender and Class and University of Maryland Francis King Carey School of Law Clinical Law Program (Mar. 31, 2023) (on file with school Media Services) (remarks of Michael Pinard). When speakers are quoted, they were given a chance to make non-substantive edits after the Symposium. Also, ellipses are not used to show deletions of excess text, and the words in recordings were sometimes not entirely clear. The substance of the quotes, and the words as nearly as possible, are that of the attributed speaker.

¹⁴ There have been notable exceptions. “Some recent examples of large-scale resentencings include the federal courts’ re-evaluation of 50,000 sentences as result of a sentencing guideline change by the U.S. Sentencing Commission and California’s modification of nearly 3,000 sentences as a result of that state’s retroactive three-strikes law reform.” NAZGOL GHANDNOOSH, *A SECOND LOOK AT INJUSTICE, THE SENT’G PROJECT* 16 (2021).

¹⁵ See *infra* Section I.A.

¹⁶ *Causes of Mass Incarceration*, VERA INST. OF JUST., <https://www.vera.org/ending-mass-incarceration/causes-of-mass-incarceration> (last visited Sept. 14, 2023).

¹⁷ *Id.*

¹⁸ ASHLEY NELLIS, *THE SENTENCING PROJECT, MASS INCARCERATION TRENDS 1* (2023).

¹⁹ See *infra* Section I.B.

these reasons is the foundation of several of the panelists' projects - a line of Supreme Court decisions that requires reconsideration of the sentences of many prisoners who were convicted of crimes as juveniles and given actual life or *de facto* life sentences (sometimes called "juvenile lifers").²⁰

In Part II, I describe the five Symposium panel discussions.²¹ A number of common themes emerged from these discussions.

First, several panelists stressed that to challenge mass incarceration, advocates need to focus on incarcerated people who have received long sentences for violent crimes. "Mass incarceration happened not because there were more people committing crimes but because the people who were accused of crimes spent more time in prison" and "were more likely to be convicted of felonies than misdemeanors"²² In addition, "[w]hen convicted, they were more likely to be sentenced to prison rather than not," and "their sentences were longer, and they stayed in prison for a higher proportion of their sentences"²³

Although "initial [decarceration] reforms focused on low-level drug offenders and other 'nonviolent' offenders without challenging discourses that treat 'violent' offenders as a homogenously irredeemable threat to social welfare," recent "attention has shifted to violent offenders, especially those serving very long sentences, as an ongoing source of mass incarceration."²⁴ One of the most exciting dimensions of the Symposium was the fact that the panelists and their students were *successfully* challenging assumptions and political accommodations that for years left violent offenders out of reform proposals. They were doing this in the many ways I describe in this article, including through litigation, rule-making and legislative advocacy, coalition-building, training sessions, public education, and scholarship.

A second theme is how dynamic this field is now. The speakers and their students are implementing new laws and policies, taking the lead in litigating "test cases" aimed at giving expansive meanings to ambiguous text, and drafting and supporting new laws and policies. As part of these conversations, panelists discussed the gross unfairness of

²⁰ See *infra* Sections I.B.2. and II.A.

²¹ See *infra* Part II.

²² Pamela Oliver, *What the Numbers Say About How To Reduce Imprisonment: Offenses, Returns, and Turnover*, 103 MARQ. L. REV. 1073, 1075-76 (2020).

²³ *Id.* at 1076.

²⁴ *Id.* at 1078.

prospective-only laws and the importance of developing strategies of retroactivity.

A third theme, present in every panel, is the critical importance of coalitions and partnerships to the successes in this field between and among national advocacy organizations, public defenders, pro bono lawyers, law school faculty and law school clinics, incarcerated and formerly incarcerated people and their families, policymakers, researchers, and others. These were mini-courses on organizational structures necessary to accomplish social and legal changes.

A fourth theme, which is an extension of the third theme, is the special importance in this field of the experiences and leadership of incarcerated and formerly incarcerated people and their families. Common arguments for releasing large numbers of people who have served long sentences for violent crimes are the low recidivism rate of this group and the extreme costs of aging prisoners. What came through powerfully in the presentations also, particularly in the lunch presentation led by formerly incarcerated persons, is the significant social good they are doing. For example, in extended families, as leaders of communities, in reentry programs, and as criminal system reformers. The loss of this socially important human capital as a result of needless incarceration and extreme sentences is not apparent to the public but is an extraordinary loss that directly or indirectly affects every person and segment of our society.

A fifth theme, related to the fourth, is the importance of storytelling, telling the stories of clients, their redemption, maintenance of hope when hope seemed impossible, personal growth, and value to society. Panelists discussed how important these stories are to judges, policymakers, and the public, as well as to students and the advocates themselves.

A sixth theme is the persistence of discrimination in this field, against racial minorities, women (including criminalized survivors), and gender non-conforming people. The panelists discussed – and occasionally debated – what is being done and can be done to combat these evils, including through Second Look laws aimed at gender violence, by breaking the school-to-prison pipeline, reforming or eliminating reliance on racially skewed technology, and challenging core legal doctrines, like the “reasonable person” standard that underlies both Fourth Amendment jurisprudence and substantive criminal law.

In Part III, I argue that clinics in this field provide rich educational experiences to students and excellent legal services to clients.²⁵ This was another theme in every panel presentation.

In the Conclusion, I summarize the day.²⁶

I. THE UNITED STATES PRISON POPULATION: THE LAST HALF CENTURY

A. Mass Incarceration and its Causes

There is an extensive bibliography on mass incarceration in the United States.²⁷ Here is one summary:

The US incarceration rate began an unprecedented ascent in 1973, after which the number of people under the supervision of the criminal legal system increased more than fivefold. This trend continued through 2007, when nearly one in 100 adults lived behind bars, 5 million were on probation or parole, roughly 10 million spent time in jail, and nearly one in three US residents were living with a criminal record. By 2020, the imprisonment rate had declined by 28 percent from its peak in 2007. Even so, the US incarceration rate remains the highest in the world.²⁸

Indeed, the incarceration rate in the United States “sharply differentiates” it “from comparable democratic countries”²⁹ For example, its incarceration rate (more than 600 per 100,000 in 2020) is more than fifteen times the rate in Japan, which is on the lower end of the international scale (38 per 100,000 in 2021), and over three times the rate in New Zealand (188 per 100,000 in 2021), which is at the

²⁵ See *infra* Part III.

²⁶ See *infra* Conclusion.

²⁷ See, e.g., Nicole P. Dyszlewski, Lucinda Harrison-Cox, & Raquel Ortiz, *Mass Incarceration: An Annotated Bibliography*, 21 ROGER WILLIAMS U. L. REV. 471 (2016). The authors adopt Michele Alexander’s expansive definition of “mass incarceration” that “refers not only to the criminal justice system but also to the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison.” *Id.* at 472 (quoting MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 13 (rev. ed. 2012)).

²⁸ Katherine Beckett & Allison Goldberg, *The Effects of Imprisonment in a Time of Mass Incarceration*, 51 CRIME & JUST. 349, 350 (2022) (citations omitted).

²⁹ *Id.*

higher end.³⁰ “Though the [United States] has less than 5% of the world’s population, it houses nearly 25% of the world’s prisoners.”³¹

It has been well-documented that racism plays a large role in this disparity.³² In *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michele Alexander argues that after Emancipation, incarceration was a form of racial control, and through mass incarceration today it remains a form of racial control.³³ Without question, our prisons are “characterized by highly disproportionate confinement of people of color, especially young Black men with low levels of formal education.”³⁴ Besides gross unfairness, there are numerous drawbacks to locking up this many people:

There is little evidence that it makes Americans safer. It is exorbitantly expensive. It imposes significant human and social costs. Because racial and ethnic disparities in

³⁰ *Id.*

³¹ Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 UNIV. PA. J.L. & SOC. CHANGE 125, 126 (2017).

³² See generally Dyzlewski, *supra* note 27.

³³ See generally, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (10th Anniversary ed., 2020). In fact, a key Nixon operative expressly acknowledged the racist underpinnings of the Nixon “Law and Order” campaign in 1968, which ushered in the beginning of mass incarceration. See Dan Baum, *Legalize it All: How to Win the War on Drugs*, HARPER’S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/>. “One of Richard Nixon’s top advisers and a key figure in the Watergate scandal said the war on drugs was created as a political tool to fight blacks and hippies, according to a 22-year-old interview recently published in Harper’s Magazine.” Tom LoBianco, *Report: Aide Says Nixon’s War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016), <https://www.cnn.com/2016/03/23/politics/john-ehrllichman-richard-nixon-drug-war-blacks-hippie/index.html>.

“The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people,” former Nixon domestic policy chief John Ehrlichman told Harper’s writer Dan Baum. “You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or black, 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.”

Id.

³⁴ Beckett & Goldberg, *supra* note 28, at 350. “These racial disparities have decreased in recent years: from 2010 to 2020, US state and federal imprisonment rates fell by 37 percent among Black residents, 32 percent among Hispanic/Latinx residents, and 25 percent among White residents. Still, substantial racial inequities in incarceration nonetheless persist. For example, the imprisonment rate among Black residents in 2010 was 6 times higher than among White residents and remained 5.1 times higher in 2020.” *Id.* at 350-51 (internal citations omitted).

imprisonment have been, and remain, staggeringly high, these costs are disproportionately borne by people and communities of color. As a result of its scale, mass incarceration has damaged enormous numbers of people.³⁵

In sum, mass incarceration serves no legitimate interests than significantly less incarceration would serve, and comes with extraordinary financial and human costs.

How did we get here? In part, because there was a half century of political “law and order” campaigns, many racially driven, that fueled draconian sentencing laws:

From President Lyndon Johnson’s “War on Crime” to President Richard Nixon’s infamous “Southern Strategy,” politicians began to focus on “law and order” messages with explicit racial undertones, setting the stage for the next dramatic increase in incarceration beginning in 1970, with a rise in harsher drug laws, punitive policing, and longer sentences.³⁶

Rhetoric, not careful policy considerations, drove the push for more incarceration.³⁷

“Tough on crime” politics continued to be popular during the Reagan Administration, encouraging “a bipartisan push for harsher federal criminal penalties.”³⁸ The result was the 1984 Comprehensive Crime Control Act, which “created the United States Sentencing Commission . . . and abolished parole. Congress intended these two provisions to achieve more consistent sentencing, satisfying the common goal of 1970s conservatives and liberals.”³⁹ Instead, it was an important step towards mass incarceration.

³⁵ *Id.* at 351 (internal citations omitted).

³⁶ VERA INST. OF JUST., *supra* note 16.

³⁷ *See id.*; Baum, *supra* note 33.

³⁸ John F. Ferraro, Note, *Compelling Compassion: Navigating Federal Compassionate Release After The First Step Act*, 62 B.C.L. REV. 2463, 2473 (2021). *See also* Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 532-38 (1996) (discussing how generally conservative politicians, including President Reagan, successfully deployed ‘tough on crime’ and ‘law and order’ political narratives as a means of garnering electoral support). *Id.* at 2473 n.67.

³⁹ *Id.* at 2474.

The George H.W. Bush campaign's use of the notorious Willie Horton ads was a powerful example of the mixture of racially inspired fear and crime:

In the 1988 presidential campaign, supporters of George H.W. Bush produced two "Willie Horton" campaign ads that attacked Michael Dukakis, the Democratic candidate, for being soft on crime and leading to Horton's crimes. Horton was a Black man who had been convicted of murder in Massachusetts and had run away from a work-release center in Massachusetts in 1987 when Dukakis was governor. He then traveled to a Maryland suburb of Washington, D.C., where he raped a white woman twice and brutally assaulted her fiancé. The TV ads were among the most racially divisive in modern political history. They appealed to white fear and the worst Black stereotypes.⁴⁰

This was demagoguery at its worst.

In the run-up to the 1992 election, Bill Clinton and George H.W. Bush continued this demagogical tradition.⁴¹ Looking back in 2015, when Hillary Clinton and Jeb Bush were running for President, Peter Baker of the New York Times said: "The last time a Clinton and a Bush ran for president, the country was awash in crime and the two parties were competing to show who could be tougher on murderers, rapists and drug dealers. Sentences were lengthened and new prisons sprouted up across the country."⁴²

When elected, President Clinton proposed the "tough on crime" 1994 Crime Bill, which Congress enacted.⁴³

The bill included \$9 billion for prison construction and \$8 billion for 100,000 police officers. Among its

⁴⁰ Michael Millemann, Jennifer E. Chapman & Samuel P. Feder, *Releasing Older Prisoners Convicted of Violent Crimes: The Unger Story*, 21 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 185, 213 (2021) (citations omitted).

⁴¹ See generally James D. Boys, *Grand Strategy, Grand Rhetoric: The Forgotten Covenant of Campaign 1992*, 41 POLITICS 80 (2021).

⁴² Peter Baker, *2016 Candidates are United in Call to Alter Justice System*, N.Y. TIMES (Apr. 27, 2015), <https://www.nytimes.com/2015/04/28/us/politics/being-less-tough-on-crime-is-2016-consensus.html>.

⁴³ Marc Mauer, *Bill Clinton, "Black Lives" and the Myths of the 1994 Crime Bill*, The Marshall Project (Apr. 11, 2016, 7:15 AM), https://www.themarshallproject.org/2016/04/11/bill-clinton-black-lives-and-the-myths-of-the-1994-crime-bill?gclid=EAIaIQobChMI79bbk96BgAMVgU1yCh2pLQIfEAAAYiAAEgKqHPD_BwE.

sentencing provisions were an expansion of the federal death penalty, mandatory minimum sentencing, and “truth in sentencing” incentives to encourage states to adopt harsh punishments and limit parole. In January 1994 the President even touted the federal “three strikes and you’re out” provision of the bill in his State of the Union address.⁴⁴

This package of legislation produced still higher incarceration rates.⁴⁵

Admittedly, some of the advocacy for more and longer incarceration from both parties was linked to higher crime rates and the belief, mistakenly many argue, that more prisons and longer sentences would reduce crime.⁴⁶ There were, however, other forces at work:

While both crime and incarceration rates did rise significantly from the early 1960s to the 1980s, violent crime fell in the 1990s even as the incarceration rate continued to rise, and crime rates stabilized at a relatively low level in the 2000s as incarceration rates hit their peak. For this reason, the National Academy of Sciences flatly stated in 2014 that “the very high rates of incarceration that emerged over the past decades cannot simply be ascribed to a higher level of crime today compared with the early 1970s, when the prison boom began.”⁴⁷

In fact, “social science evidence had ‘strikingly little influence on deliberations about sentencing policy.’”⁴⁸ Instead, policy was driven by well-nurtured public fear campaigns, including those just described, and through the inflammatory misstatements about “juvenile ‘super predators’ in the 1990s.”⁴⁹

At both state and federal levels, legislators responded by approving increasingly harsh sentencing laws, including

⁴⁴ *Id.*

⁴⁵ Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019), <https://www.aclu.org/news/smart-justice/how-1994-crime-bill-fed-mass-incarceration-crisis>.

⁴⁶ Nicholas Turner, *Research Shows That Long Prison Sentences Don’t Actually Improve Safety*, VERA INST. OF JUST. (Feb. 13, 2023), <https://www.vera.org/news/research-shows-that-long-prison-sentences-dont-actually-improve-safety>.

⁴⁷ Takei, *supra* note 31, at 130.

⁴⁸ *Id.*

⁴⁹ *Id.* at 130-31.

mandatory minimum sentences, “Truth in Sentencing,” Three Strikes laws, and stiff sentencing guidelines. The same dynamics led legislators to ramp up the size and aggressiveness of the police presence in cities—particularly in Black and Brown neighborhoods. Both liberals and conservatives supported many of these changes—including the shift from indeterminate sentencing to the use of sentencing guidelines, which liberals incorrectly believed would reduce racial disparities and biases in sentencing.⁵⁰

Because of this Congressional bipartisanship and Presidential concurrence, there were few checks and balances on dramatic increases in prison populations.⁵¹

B. Modest Reductions in Prisons Populations Beginning in 2009 and Reasons for Them

1. General Trends

In recent years, there have been modest reductions in prison populations.⁵² “Between fiscal year 2013 and April 2018, the number of federal prison inmates dropped more than fourteen percent. State experiences have varied, with many seeing a significant decrease in their prison population, and others seeing little or no decline.”⁵³

Some of these reductions were achieved through “the Justice Reinvestment Initiative, a public-private partnership that includes the U.S. Justice Department’s Bureau of Justice Assistance, The Pew Charitable Trusts . . . and other organizations.”⁵⁴ Beginning in 2007, “35 states have reformed their sentencing and corrections policies through” this initiative.⁵⁵ These states aimed “to improve public safety and control taxpayer costs.”⁵⁶ In 2018, the PEW Charitable Trusts reported that “since the wave of reforms began, the total state imprisonment rate has

⁵⁰ *Id.* at 131.

⁵¹ *Id.*

⁵² Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 *Am. Crim. L. Rev.* 1579, 1581 (2019).

⁵³ *Id.*

⁵⁴ *35 States Reform Criminal Justice Policies Through Justice Reinvestment*, THE PEW CHARITABLE TRUSTS (July 2018), https://www.pewtrusts.org/-/media/assets/2018/07/pspp_reform_matrix.pdf.

⁵⁵ *Id.*

⁵⁶ *Id.*

dropped by 11 percent while crime rates have continued their long-term decline. At the same time, states that have enacted justice reinvestment laws expect to save billions of dollars because of their reforms.”⁵⁷

The recent reforms also “appear to be fueled by a genuine change in attitude about the harshness of the criminal law. For the first time in decades, there is a still-evolving view that longer sentences and more criminalization is not always better and that favoring a more lenient justice system does not automatically lead to the politically-fatal ‘soft on crime’ label.”⁵⁸

The COVID-19 pandemic “intensified the push for decarceration, and the number of incarcerated people fell 14 percent, from 2.1 million people to 1.8 million from March 2020 to June 2021.”⁵⁹

There are cautions, however. Although “[t]he number of people in prison began a marginal decline . . . beginning in 2010 and thus far has not reversed course[,] [i]t is important to note that the remarkable 14% decline in 2020 alone was principally caused by accelerated releases during the first year of the global pandemic and thus misrepresents the overall 25% drop in imprisonment since 2010.”⁶⁰ Leaving out 2020, “prison numbers have declined in the range of 0.5 to 3% annually. Compared with 2020, in 2021, the United States dramatically slowed its prison decarceration and increased its jail population.”⁶¹

2. *The Special Case of Juvenile Lifers*

A number of the panelists discussed their representation of juvenile lifers pursuant to new Second Look statutes. Legislatures enacted these statutes in response to a line of decisions by the Supreme Court that recognized that juvenile offenders are less culpable and more capable of change than adults.⁶² These decisions were based in significant part on a scientific (neurological) and developmental consensus about the characteristics of juveniles.⁶³ The Court began this line of decisions in 2005 in *Roper v. Simmons*,⁶⁴ invalidating the death penalty for those who committed their crimes when they were juveniles.

⁵⁷ *Id.*

⁵⁸ Leipold, *supra* note 52, at 1580-81.

⁵⁹ Beckett & Goldberg, *supra* note 28, at 351 (internal citations omitted).

⁶⁰ NELLIS, *supra* note 18, at 2.

⁶¹ *Id.*

⁶² *See infra* notes 64-73.

⁶³ *Id.*

⁶⁴ 543 U.S. 551 (2005).

Five years later, in 2010, the Court decided *Graham v. Florida*,⁶⁵ holding that an automatic sentence of life without parole is unconstitutional for those who committed a crime other than homicide as a juvenile.⁶⁶ The Court explained its decision in language that it repeated in later decisions:

[B]ecause juveniles have lessened culpability they are less deserving of the most severe punishments. As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed. . . . [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults. It remains true that from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.⁶⁷

The Court was applying well-accepted principles of medical science and psychology to develop constitutionally-based mitigation rules for juveniles in the most serious criminal sentencing proceedings.⁶⁸

The most important decisions for juvenile lifers and their advocates came a few years later in *Miller v. Alabama*,⁶⁹ which held that an automatic sentence of life without parole is unconstitutional for those who committed a homicide offense as a juvenile,⁷⁰ and *Montgomery v.*

⁶⁵ 560 U.S. 48 (2010).

⁶⁶ *Id.* at 82.

⁶⁷ *Id.* at 68 (internal quotation marks and citations omitted).

⁶⁸ *Id.* at 68-69.

⁶⁹ 567 U.S. 460 (2012).

⁷⁰ *Id.* at 490.

Louisiana,⁷¹ which held that *Miller* applies retroactively.⁷² This entitled thousands of juvenile lifers to some form of review of their sentences.⁷³

In *Carter v. State*,⁷⁴ the Supreme Court of Maryland, formerly known as the Maryland Court of Appeals,⁷⁵ summarized the Supreme Court's reasoning in its juvenile offender cases:

The [Supreme] Court identified the following characteristics of juveniles: (1) juveniles lack maturity, leading to “an underdeveloped sense of responsibility,” as well as “impetuous and ill-considered actions and decisions”; (2) juveniles are more vulnerable or susceptible to negative influences and peer pressure due, in part, to juveniles having less control over their environment or freedom “to extricate themselves from a criminogenic setting”; and (3) the personality of a juvenile is not as well formed as that of an adult, and their traits are more transitory and less fixed.⁷⁶

The combination of the developments in brain science and psychology along with these Supreme Court decisions, invited a revision of the traditional justifications for punishment for juvenile offenders. The case for retribution is not as strong because of the lesser culpability.⁷⁷ Harsh sentences are unlikely to deter other juveniles because “the characteristics that make juveniles more likely to make bad decisions also make them less likely to consider the possibility of punishment, which is a prerequisite to a deterrent effect.”⁷⁸ The need to incapacitate to protect public safety diminishes and disappears as juveniles mature and become rehabilitated.⁷⁹ Finally, a “meaningful opportunity to obtain

⁷¹ 577 U.S. 190 (2016).

⁷² *Id.* at 212.

⁷³ *Miller v. Alabama: EJI Won A Landmark Ruling from the Supreme Court Striking Down Mandatory Death-In-Prison Sentences for Children*, EQUAL JUST. INITIATIVE, <https://eji.org/cases/miller-v-alabama/> (last visited Nov. 4, 2023). See also MONTGOMERY V. LOUISIANA SIX YEARS LATER: PROGRESS AND OUTLIERS, CAMPAIGN FOR THE FAIR SENT'G OF YOUTH (Jan. 2022).

⁷⁴ 192 A.3d 695 (Md. 2018).

⁷⁵ In November 2022, a constitutional amendment passed which renamed the Court of Appeals, Maryland's highest court, the Supreme Court of Maryland. Press Release, Maryland Judiciary Government Relations and Public Affairs Division, Voter-Approved Constitutional Change Renames High Courts to Supreme and Appellate Court of Maryland (Dec. 14, 2022), <https://mdcourts.gov/media/news/2022/pr20221214>.

⁷⁶ *Id.* at 703 (citations omitted).

⁷⁷ *Id.* at 704.

⁷⁸ *Id.*

⁷⁹ *Graham v. Florida*, 560 U.S. 48, 72 (2010).

release based on demonstrated maturity and rehabilitation”⁸⁰ motivates incarcerated people to seek out available programs and thereby promotes rehabilitation.⁸¹

These decisions, combined with the other factors already discussed, have led to a series of sentencing reforms through legislation, court decisions, and policy changes that the panelists discussed during the Symposium.⁸²

3. *Federal Compassionate Release*

A number of panelists, including clinical teachers, discussed their representation of incarcerated people in compassionate release cases. The following section provides a synopsis of the laws surrounding compassionate release, as discussed by the panelists.

In 1984, Congress replaced federal parole with a determinate sentencing system with sentencing guidelines and created the United States Sentencing Commission.⁸³ In The Sentencing Reform Act (“the Act”), there is a provision that authorizes a court to reduce a sentence if it finds there are “extraordinary and compelling reasons” to do so.⁸⁴ In deciding whether to exercise this power, commonly called “compassionate release,”⁸⁵ the court must consider the sentencing factors in the Act⁸⁶ and act consistently with policy statements of the Sentencing Commission.⁸⁷

Many saw compassionate release “as a much-needed safety valve following the abolition of parole – a means of still granting relief to individuals whose continued incarceration pose[s] little public safety

⁸⁰ *Id.* at 75.

⁸¹ *Id.* at 74.

⁸² *States that Ban Life Without Parole for Children*, CAMPAIGN FOR THE FAIR SENT’G OF YOUTH, <https://cfsy.org/media-resources/states-that-ban-juvenile-life-without-parole/> (last visited Oct. 10, 2023). Twenty-eight states now preclude a life without parole sentence for juvenile offenders. *Id.*

⁸³ Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551 – 3612 (1984).

⁸⁴ 18 U.S.C. § 3582(c)(1)(A)(i).

⁸⁵ U.S. SENT’G COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES 1, 7 (Apr. 27, 2023). “Sentence reductions under [The Sentencing Reform Act] . . . came to be known as ‘compassionate release,’ though that phrase appears nowhere in the SRA and sentence reductions that do not result in immediate release are authorized by the law.” *Id.*

⁸⁶ 18 U.S.C. § 3553(a).

⁸⁷ 18 U.S.C. § 3582(c)(1)(A).

benefit and for whom extraordinary and compelling circumstances necessitate release.”⁸⁸

The Commission’s definitions of “extraordinary and compelling reasons” include terminal illness, serious health concerns, and age-related deterioration.⁸⁹ In practice, however, compassionate release was a virtual dead letter. This is primarily because the Act gave the enforcement power to the federal Bureau of Prisons (“BOP”), which was supposed to act on behalf of any eligible prisoner by filing a compassionate release motion.⁹⁰ The BOP hamstrung the Act by passing over many eligible prisoners and adding its own limiting policies to the Sentencing Commission’s definitions of “extraordinary and compelling reasons” for release.⁹¹ In 2012, the *New York Times* summarized a report on the implantation of compassionate release, saying just that:

In practice, [] the Bureau of Prisons and the Justice Department, which oversees the bureau, have not just failed to make use of this humane and practical program, but have crippled it. That is the disturbing and well-substantiated conclusion of a new report by Human Rights Watch and Families Against Mandatory Minimums. From 1992 through this November, a period in which the population of federal prisons almost tripled from around 80,000 to close to 220,000 inmates, the bureau released 492 prisoners under this program. This is a mere two dozen or so on average each year, and the

⁸⁸ Comment from Amy Fettig & Liz Komar of The Sentencing Project to the U.S. Sentencing Commission Regarding Compassionate Release 2 (Mar. 14, 2023), <https://www.sentencingproject.org/advocacy-letter/comment-to-the-u-s-sentencing-commission-regarding-proposed-amendments-to-the-guidelines-governing-compassionate-release/>.

⁸⁹ U.S. SENT’G COMM’N, AMENDMENTS TO THE SENTENCING Guidelines, *supra* note 85, at 8-9. In April 2023, the Commission amended its compassionate release policies, saying:

The list of specified ‘extraordinary and compelling reasons’ is expanded by: (a) adding two new subcategories to the ‘Medical Circumstances of the Defendant’ ground for relief; (b) making three modifications to the ‘Family Circumstances’ ground; (c) adding a new ground called ‘Victim of Abuse’; and (d) adding a new ground called ‘Unusually Long Sentence,’ which permits a judge to consider a non-retroactive change in sentencing law as an extraordinary and compelling reason in specified circumstances.

Id. at 3. *See generally id.* for a detailed discussion of how these changes significantly expand the grounds for release.

⁹⁰ 18 U.S.C. § 3582(c)(1)(A).

⁹¹ HUM. RTS. WATCH & FAMS. AGAINST MANDATORY MINIMUMS, THE ANSWER IS NO: TOO LITTLE COMPASSIONATE RELEASE IN US FEDERAL PRISONS 2-3 (Nov 2022).

number has so far not surpassed 37. The percentage of prisoners released has shrunk from tiny to microscopic.⁹²

So, for this two-decade period, compassionate release had no impact on overincarceration.

The track record of the BOP was not much better between 2012 and 2018, when Congress enacted The First Step Act.⁹³ In 2023, the Sentencing Commission said, summarizing BOP's history, that "BOP filed [compassionate release] motions extremely rarely—the number of defendants receiving relief averaged two dozen per year—and for the most part limited its motions to cases involving inmates [incarcerated people] who were expected to die within a year or were profoundly and irremediably incapacitated."⁹⁴

With the enactment of The First Step Act in 2018, Congress breathed life into the compassionate release law. The Act "changes and expands the compassionate release eligibility criteria; ensures the prisoners have the right to appeal the BOP's denial or neglect of the prisoner's request for a compassionate release directly to court; and provides other important features, such as notification, assistance, and visitation rules."⁹⁵

Ending BOP's stranglehold on the Sentencing Reform Act was the most important change.⁹⁶ The Sentencing Commission said that courts were now authorized "to grant a motion for a sentence reduction upon a defendant's own motion."⁹⁷ This change, the Commission said, was "for the express purpose, set forth on the face of the enactment, of

⁹² Editorial, *What Compassionate Release?*, N.Y. TIMES (Dec. 8, 2012), <https://www.nytimes.com/2012/12/09/opinion/sunday/what-compassionate-release.html>.

⁹³ First Step Act of 2018, 18 U.S.C. §§ 3631-5043 (2018).

⁹⁴ U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 85, at 1. The Commission added that:

BOP's sparing use of its authority persisted despite guidance from the Commission in 2007 that 'extraordinary and compelling reasons' can be based on (a) the medical condition of the defendant, (b) the age of the defendant, (c) the defendant's family circumstances, and (d) reasons other than, or in combination with, those three specified ones.

Id.

⁹⁵ FAMS. AGAINST MANDATORY MINIMUMS, COMPASSIONATE RELEASE AND THE FIRST STEP ACT: THEN AND NOW 2 <https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf> (last accessed Nov. 5, 2023).

⁹⁶ Ferraro, *supra* note 38, at 2484. "In effect, the First Step Act's amendments to the compassionate release system meant prison wardens and the BOP Director no longer held exclusive authority to bring motions for compassionate release. Many judges described this amendment as the removal of the BOP's gatekeeping function." *Id.*

⁹⁷ U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 85, at 1.

‘increasing the use’ of sentence reduction motions under [the Compassionate Release provisions].”⁹⁸

The results of these changes, enhanced by the COVID-19 epidemic, were significant. “In fiscal year 2020, courts decided [compassionate release motions] for 7,014 offenders and granted a sentence reduction to 1,805 offenders (25.7%). The number of Offenders Granted Relief increased more than twelvefold from First Step Year One (145 offenders).”⁹⁹ These successes overwhelmingly came in prisoner-filed motions: “In fiscal year 2020, 96.0 percent of Offenders Granted Relief filed their own motion.”¹⁰⁰

With this background, I turn to what the panelists had to say about these legal developments and their work to implement them.

⁹⁸ *Id.*

⁹⁹ JULIE ZIBULSKY ET AL., U.S. SENT’G COMM’N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC 3 (Mar. 2022).

¹⁰⁰ *Id.* Although the Sentencing Commission lacked a quorum after the enactment of The First Step Act, and therefore could not adopt implementing policies, “[f]or an overwhelming majority of Offenders Granted Relief in fiscal year 2020, courts cited reasons specifically described in the Commission’s [pre-existing] compassionate release policy statement (USSG §1B1.13), or reasons comparable to the reasons specifically described in the policy statement.” *Id.* In 2023, the Commission said: “courts have found extraordinary and compelling reasons warranting sentence reductions based on all of the factors the Commission identified in [the First Step Act], *i.e.*, the three specified bases of medical condition, age, and family circumstances, and the ‘other reasons’ catchall.” U.S. SENT’G COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 85, at 1-2. In 2022, a member was appointed to the Commission, giving it a quorum, and in April 2023, it amended the Guidelines to implement The First Step Act. *Id.* at 2. The Commission explained:

Among other things, the amendment extends the applicability of the policy statement to defendant-filed motions; expands the list of specified extraordinary and compelling reasons that can warrant sentence reductions; retains the existing ‘other reasons’ catchall; provides specific guidance with regard to the permissible consideration of changes in the law; and responds to case law that developed after the enactment of the First Step Act.

Id. at 2.

II. THE FIVE SYMPOSIUM PANELS

A. Panel 1: Decarceration Reforms and Legal Representation in State Release Proceedings: The Roles of Law School Clinics and Public Interest Organizations, Including National Leaders

The panelists were Amy Fettig (“Ms. Fettig”),¹⁰¹ James Zeigler (“Mr. Zeigler”),¹⁰² Professor Kimberly Thomas (“Professor Thomas”),¹⁰³ and Professor Shobha L. Mahadev (“Professor Mahadev”).¹⁰⁴ Professor Lila Meadows (“Professor Meadows”) was the moderator.¹⁰⁵

Innocence and post-conviction projects and clinics have been in existence for decades.¹⁰⁶ The projects and clinics that these panelists discussed, by comparison, represent long-incarcerated clients in resentencing, parole or other similar release proceedings. The clients

¹⁰¹ Deputy Director of Fair and Just Prosecution. Ms. Fettig was formerly the Executive Director of The Sentencing Project and former Deputy Director for the ACLU’s National Prison Project. *See Our Team*, FAIR AND JUST PROSECUTION <https://fairandjustprosecution.org/about-fjp/our-team/> (last visited Oct. 10, 2023).

¹⁰² Founder and Co-Executive Director of the Second Look Project. *See Our Team*, SECOND LOOK PROJECT, <https://www.secondlookdc.org/staff> (last visited Nov. 5, 2023).

¹⁰³ Clinical Professor of Law and Director, Juvenile Justice Clinic, Michigan Law School. *Faculty and Scholarship: Kimberly A. Thomas*, UNIV. MICH. SCH. L., <https://michigan.law.umich.edu/faculty-and-scholarship/our-faculty/kimberly-thomas> (last visited Sept. 21, 2023).

¹⁰⁴ Clinical Professor of Law at the Children and Family Justice Center, Northwestern Pritzker School of Law. *Faculty Profiles: Shobha L. Mahadev*, NW. PRITZKER SCH. L., <https://www.law.northwestern.edu/faculty/profiles/shobhamahadev/> (last visited Sept. 21, 2023).

¹⁰⁵ Clinical Instructor and Director of the Survivors of Violence Clinic and Staff Attorney with the Gender, Prison, and Trauma Clinic at the University of Maryland Francis King Carey School of Law. *Faculty & Staff: Lila N. Meadows*, UNIV. OF MD. FRANCIS KING CAREY SCH. L., <https://law.umaryland.edu/faculty—research/directory/profile/index.php?id=1207> (last visited Nov. 5, 2023); SYMPOSIUM PROGRAM, *supra* note 1. The moderator and all the panelists, except Mr. Zeigler, are advocates for incarcerated people in state prisons who have been convicted of violent crimes (under the applicable definitions) and are serving long sentences, while Mr. Zeigler administers a D.C.-based project under a D.C. Second Look statute. *See supra* notes 100-103. The Symposium organizers considered D.C. a state for this panel, even though those convicted of felonies in D.C. serve sentences in federal prisons throughout the country. *See* D.C. CODE § 24-101.

¹⁰⁶ *See, e.g., Chronicling a Powerful Legacy of Justice Work*, INNOCENCE PROJECT <https://history.innocenceproject.org/> (last visited Dec. 24, 2023) (noting that the Innocence Project was founded as a clinic in 1992 at the Benjamin N. Cardozo School of Law); *Post-Conviction Justice Project (PCJP)*, U.S.C. GOULD SCH. L., <https://gould.usc.edu/academics/experiential/clinics/pcjp/> (last visited Dec. 24, 2023) (founding Post-Conviction clinic in 1981).

cannot bring innocence claims or assert legal errors in these proceedings.¹⁰⁷

The panelists' state court focus is important for several reasons.¹⁰⁸ First, most of the incarcerated population is in state prisons.¹⁰⁹ Professor Thomas pointed out that over 1.5 million of the 1.9 million incarcerated people in the U.S. are in state prisons or jails, with over 1 million in state prisons.¹¹⁰ Second, there is a developing body of new state release laws that state courts are charged with enforcing.¹¹¹ Third, in several of the presentations, panelists described the important work that state courts are doing in answering the questions left open by the Supreme Court in *Miller* or in interpreting new state statutes.¹¹²

The focus on prisoners serving long sentences for violent crimes responds to the data, as well as the lack of reasonable justifications, for many extreme sentences.¹¹³ Professor Thomas noted that there are

¹⁰⁷ That does not mean that there are not innocent clients in this group of clients or that there were not significant errors in some of their trials. See generally *The National Registry of Exonerations*, UNIV. CA. IRVINE NEWKIRK CTR. FOR SCI. & SOC'Y, UNIV. MI. L. SCH. & MI. STATE UNIV. COLL. L., <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last accessed Dec. 24, 2023). These cases are windows to criminal proceedings that occurred two, three or more decades ago in which there often are examples, sometimes shocking, of ineffective assistance of counsel and *Brady* violations, *Brady v. Maryland*, 373 U.S. 83 (1963), as well as other legal errors. Many of these types of claims and legal errors have never been litigated or were mishandled pro se or by lawyers. See *Inadequate Defense*, INNOCENCE PROJECT, <https://innocenceproject.org/inadequate-defense/> (last visited Dec. 24, 2023). Some clients in the projects and clinics the panelists discussed also assert their innocence, sometimes credibly and sometimes not. This poses difficult strategic issues because decision-makers, whether resentencing judges or parole board members, invariably consider remorse an important mitigating factor and many of them believe innocence claims are incompatible with remorse. Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. REV. L. SOC. CHANGE 133, 172 (2015).

¹⁰⁸ Panel Recording: Decarceration: The Role of Law School Clinics, Panel 1 – Decarceration Reforms and Legal Representation in State Release Proceedings, held by the University of Maryland Journal of Race, Religion, Gender and Class and the University of Maryland Francis King Carey School of Law Clinical Law Program (Mar. 31, 2023) (on file with school Media Services). When speakers are quoted, they were given a chance to make non-substantive edits after the Symposium. Also, ellipses are not used to show deletions of excess text, and the words in recordings were sometimes not entirely clear. The substance of the quotes, and the words, as nearly as possible, are that of the attributed speaker.

¹⁰⁹ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html>.

¹¹⁰ Comments of Kimberly Thomas, Panel 1, *supra* note 108. See also Sawyer & Wagner, *supra* note 109.

¹¹¹ See *Second Look Network*, SENT'G PROJECT, *supra* note 6.

¹¹² See *infra* notes 151-67 and accompanying text.

¹¹³ See GHANDNOOSH, *supra* note 14, at 4.

Criminological research has established that long prison sentences are counterproductive to public safety. Many people serving long sentences, including for a violent crime, no longer pose a public safety risk when they

650,000 people who are incarcerated in state prisons for what are considered violent crimes.¹¹⁴ Almost two-thirds of state prisoners have sentences of ten years or more,¹¹⁵ and over 200,000 prisoners are serving life sentences.¹¹⁶ There are significant racial disparities in these sentences, with the sentence-length gap between Black (longer sentences) and white people growing.¹¹⁷

Professor Thomas described Michigan and its 32,000 prisoners as a national “microcosm,” with half of the prisoners serving sentences of fifteen years or more, and a quarter serving sentences of twenty-five years or longer.¹¹⁸

Amy Fettig, former Executive Director of The Sentencing Project,¹¹⁹ said that “we have to take on the hard cases in order to end mass incarceration, cases in which crimes of violence have produced extreme sentences.”¹²⁰ She is encouraged that “people are starting to do that,” and said “law school clinics are wonderful resources because they can take on the harder cases the private attorneys don’t want to take on.”¹²¹

Ms. Fettig noted the novelty of the projects that panelists were discussing and the upbeat atmosphere in the room. “Ten years ago,

have aged out of crime. Long sentences are of limited deterrent value and are costly, because of the higher cost of imprisoning the elderly. These sentences also put upward pressure on the entire sentencing structure, diverting resources from better investments to promote public safety.

Id.

¹¹⁴ Comments of Kimberly Thomas, Panel 1, *supra* note 108.

¹¹⁵ Sanya Mansoor, *State Prison Sentences in the U.S. Are Getting Longer—But Not Necessarily Keeping Us Safer*, TIME (Mar. 21, 2023, 2:33 PM) <https://time.com/6264655/state-prisoners-us-long-sentences/>. In 2005 only 46% of state prisoners were serving sentences of ten years or more. *Id.*

¹¹⁶ Josh McGhee, *Over 200,000 People are Serving Life in U.S. Prisons. These are the Consequences*, INJUSTICE WATCH (Feb. 25, 2021) <https://www.injusticewatch.org/news/prisons-and-jails/2021/sentencing-project-report-life-imprisonment/>.

¹¹⁷ *Id.*

¹¹⁸ Comments of Kimberly Thomas, Panel 1, *supra* note 108.

¹¹⁹ Amy Fettig said The Sentencing Project is a “research and advocacy organization that focuses on fair and effective public safety policies, but we do that with a racial justice lens. Make no mistake, if you don’t bring a racial justice lens to criminal legal reform, you are just going to replicate the racist underpinnings that support the entire system.” Comments of Amy Fettig, Panel 1, *supra* note 108. She added that “we are a research and advocacy organization; we do the research and then work with state advocates on the ground on legislative and policy reforms.” *Id.* See generally *About Us*, SENT’G PROJECT, <https://www.sentencingproject.org/about/> (last visited Nov. 5, 2023).

¹²⁰ Comments of Amy Fettig, Panel 1, *supra* note 108.

¹²¹ *Id.*

nobody was talking about extreme sentencing in this country.”¹²² She warned, however, that this movement is in its infancy and faces formidable challenges. “This is the 50th year of sustained mass incarceration in this country. Today we now have more people serving life in prison than we had in our entire prison system in 1972.”¹²³

James Zeigler, Founder and Co-Executive Director of the Second Look Project, gave the history of the D.C. Second Look law, which is a national model.¹²⁴ In 2016, D.C.’s City Council enacted the Incarceration Reduction Amendment Act to provide sentence review for incarcerated people who had served at least twenty years in prison for crimes they committed as juveniles.¹²⁵ This was passed as part of a broader package of juvenile justice reforms. As a result, the Second Look provisions did not get a lot of attention.¹²⁶ The law was amended twice, first, to reduce the eligibility period of incarceration to fifteen years, and second, to expand the law to apply to those who committed crimes before the age of twenty-five, commonly called “emerging adults.”¹²⁷

This was a first-of-its-kind law nationally.¹²⁸ The current D.C. law has several key provisions summarized below:

- “[T]he Court shall reduce a term of imprisonment imposed upon a defendant for an offense committed before the defendant’s 25th birthday if,” the petitioner meets the age and length-of-incarceration

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Comments of James Ziegler, Panel 1, *supra* note 108. *See generally*, James Zeigler, *D.C. Council’s ‘Second Look’ Sentencing Efforts are Thoughtful, Safe, and Just Responses to Crisis of Mass Incarceration*, THE DC LINE (Aug. 13, 2019), <https://thedcline.org/2019/08/13/james-zeigler-dc-councils-second-look-sentencing-efforts-are-thoughtful-safe-and-just-responses-to-crisis-of-mass-incarceration/>; Michael Serota, *Second Looks & Criminal Legislation*, 17 OHIO ST. J. CRIM. L. 495 (2020); Michael Serota, *Taking A Second Look at (In)justice*, U. CHI. L. REV. ONLINE 1 (2020).

¹²⁵ Comments of James Ziegler, Panel 1, *supra* note 108.

¹²⁶ *Id.*

¹²⁷ *See generally*, Meg O’Connor, *D.C. May Give People Convicted as Young Adults a Chance at Resentencing*, THE APPEAL (Dec. 14, 2020), <https://theappeal.org/dc-council-youth-resentencing-vote/>; Leah Sakala & Leigh Courtney, *The New D.C. Second Look Amendment Act Is a Step in the Right Direction, and Community Supports for Young Adults Can Build on This Progress*, URB. INST. (Dec. 17, 2020), <https://greaterdc.urban.org/blog/new-dc-second-look-amendment-act-step-right-direction-and-community-supports-young-adults-can>; Kellie R. Hannan et al., *Public Support for Second Look Sentencing: Is There a Shawshank Redemption Effect?*, 22 CRIMINOLOGY & PUB. POL’Y. 263, 265-66 (2023).

¹²⁸ Comments of James Ziegler, Panel 1, *supra* note 108. For an early assessment of how states complied with *Miller*, see Lauren Kinell, *Answering the Unanswered Questions: How States Can Comport with Miller v. Alabama*, 13 CONN. PUB. INT. L. J. 143 (2013).

requirements and “[t]he court finds, after considering [eleven enumerated factors], that the defendant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification.”¹²⁹

- Upon the filing of a motion to modify a sentence under the law, a court “shall hold a hearing on the motion at which the defendant and the defendant’s counsel shall be given an opportunity to speak on the defendant’s behalf. The court may permit the parties to introduce evidence. The court may consider any records related to the underlying offense.”¹³⁰
- The law sets forth eleven factors that the resentencing court shall consider.¹³¹ These factors make relevant, a broad array of evidence relating to the petitioner’s age, personal history, family circumstances, the crime, the petitioner’s role in the crime and the role(s) of others, views of the victim or surviving family and friends of the victim and of the prosecutor, a range of the petitioner’s actions in prison (e.g., disciplinary record, educational achievements, job performances, successful completion of programs), mental and physical health reports, general assessments of maturity and fitness to reenter society, and “any other [relevant] information.”¹³² The last factor invites petitioners to submit a comprehensive reentry plan.¹³³
- “The court shall issue an opinion in writing stating the reasons for granting or denying the application”¹³⁴
- In resentencing petitioners, the judge “[m]ay issue a sentence less than the minimum term otherwise required by law,”¹³⁵ and “[s]hall not impose a sentence of life imprisonment without the possibility of parole or release.”¹³⁶

¹²⁹ D.C. CODE § 24-403.03(a) (2023).

¹³⁰ *Id.* § (b)(2).

¹³¹ *Id.* § (c).

¹³² *Id.*

¹³³ *Id.* § (c)(11) (“Any other information the court deems relevant to its decision.”).

¹³⁴ *Id.* § (b)(4).

¹³⁵ *Id.* § (e)(2)(A).

¹³⁶ *Id.* § (e)(2)(B).

- “In considering applications filed by defendants for offenses committed after the defendant’s 18th birthday, the court shall endeavor to prioritize consideration of the applications of defendants who have been incarcerated the longest”¹³⁷
- A court has jurisdiction over a second application if “the court denies or grants only in part the defendant’s 1st application,” but “no sooner than 3 years after the date that the order on the initial application becomes final.”¹³⁸ A court may consider a third application, but no additional ones, if “the court denies or grants only in part the defendant’s 2nd application,” but “no sooner than 3 years following the date that the order on the 2nd application becomes final.”¹³⁹

Mr. Zeigler explained that the original law enacted in 2017 was not retroactive, but after lobbying efforts and pressure from presently and formerly incarcerated individuals and their families, the D.C. City Council amended the Second Look law to apply retroactively.¹⁴⁰ He emphasized “the importance of engaging directly impacted people and the community and families in” reform work.¹⁴¹

The litigation results in 2018, “were extremely successful, with twenty to twenty-five petitioners, out of about thirty, being released.”¹⁴² The lawyers for the petitioners included Mr. Zeigler (who had primarily a misdemeanor practice at the time), public defenders, and lawyers and law students in two Georgetown Law Center clinics.¹⁴³

Mr. Zeigler, like all of the panelists, stressed the importance of storytelling. Like many lawyers and law students doing this work, he finds his clients to be “warm, thoughtful, generous, and remarkable adults who do not resemble at all the kids who committed the crimes.”¹⁴⁴ It is critically important that the public, policymakers, and judges learn about these compelling stories of redemption and reformation.

¹³⁷ *Id.* § (g).

¹³⁸ *Id.* § (d).

¹³⁹ *Id.*

¹⁴⁰ Comments of James Ziegler, Panel 1, *supra* note 108.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

In 2019, Mr. Zeigler created the Second Look Project with foundation funding, which was later enhanced with City Council funding.¹⁴⁵ The number of eligible incarcerated people increased dramatically in 2021, from about 100 to between 500 and 600, as a result of the increase in age eligibility to those under twenty-five.¹⁴⁶ In response to the great need for legal assistance, the Second Look Project helped to create The Second Look Act Counsel Committee.¹⁴⁷ Its members include the Second Look Project, the D.C. Public Defender Service, and a Georgetown Law Center clinic.¹⁴⁸ The members of the Committee recruit, train, and support (including through co-counsel relationships) pro bono and court-appointed lawyers who agree to represent Second Look Act petitioners.¹⁴⁹ They have had great success. To date, about 135 prisoners have been released in about 165 cases, an 80 percent or so success rate!¹⁵⁰

The D.C. Second Look law has become an important national model. It has been replicated in significant part by some jurisdictions¹⁵¹ and bills like it are being considered in other jurisdictions.¹⁵²

The new release laws around the country, and the *Miller* opinion itself, leave many important questions unanswered. The panelists described ways in which lawyers, including clinical teachers and students, are working successfully in state courts not only to obtain releases under new laws, but also to clarify and apply *Miller*, new laws, and state constitutions. These decisions have often expanded incarcerated persons' release rights.

Professor Thomas described the implementation questions being addressed in Michigan following *Miller v. Alabama* and *Montgomery v.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See *supra* note 6 and accompanying text.

¹⁵² See GHANDNOOSH, *supra* note 14, at 4. As of 2021,

[I]egislators in 25 states, including Minnesota, Vermont, West Virginia, and Florida, [had] introduced second look bills. A federal bill allowing resentencing for youth crimes has bipartisan support. And, over 60 elected prosecutors and law enforcement leaders have called for second look legislation, with several prosecutors' offices having launched sentence review units.

Id.

Louisiana,¹⁵³ such as: who bears the burden of proof; what is the standard of proof; and, when the state is seeking a life-without-parole sentence, does the state have to show the person is not redeemable?¹⁵⁴

In *People v. Taylor*,¹⁵⁵ the Michigan Supreme Court said: “this case presents us with a vehicle to provide much-needed guidance to criminal defendants, prosecutors, and trial courts on the proper procedure for conducting [the post-*Miller* statutory] sentencing hearings when a prosecutor seeks to impose a sentence of life without parole (LWOP) for a crime committed when the defendant was a juvenile.”¹⁵⁶ The court held “that, as the moving party at a *Miller* hearing, the prosecutor bears the burden to rebut a presumption that LWOP is a disproportionate sentence. The standard for rebuttal is clear and convincing evidence.”¹⁵⁷

Another question was, even if the court is not imposing an LWOP sentence, does it have to consider “the mitigating features of youth” and provide an individualized hearing, “before imposing a long or effectively life sentence?” (The Supreme Court of Michigan said yes.)¹⁵⁸ And, another: Does a sentence of life with parole for second degree murder for a juvenile violate the “cruel or unusual punishment” provision of the Michigan Constitution? (Again, the Supreme Court of Michigan said yes.)¹⁵⁹

¹⁵³ See *infra* Part I.B.2. This law, MICH. COMP. LAWS § 769.25, required prosecutors to decide whether they would seek life-without-parole (“LWOP”) sentences in cases of juvenile lifers affected by *Miller* and *Montgomery* and provided for resentencing hearings in those cases as well as cases in which prosecutors agree terms-of-year sentences are appropriate. MICH. JUD. INST., PROCEDURES FOR HANDLING JUVENILE LIFE-WITHOUT-PAROLE (“LWOP”) SENTENCINGS AND RESENTENCINGS UNDER MILLER V. ALABAMA, JONES V. MISSISSIPPI, PEOPLE V. SKINNER, AND MCL 769.25/MCL 769.25A (Sept. 21, 2022) <https://www.courts.michigan.gov/4ab18e/siteassets/publications/benchbooks/qrms/family/juvenile-justice/juvenile-lwop-tables.pdf>. See also Thomas Dawson, *Sentencing the Juvenile Lifer: The Wayne County Experience*, 98 MICH. BAR J. 36 (2019).

¹⁵⁴ See generally MICH. JUD. INST., *supra* note 154. Michigan “[h]as not banned juvenile life without parole sentences” and the state has the “highest JLWOP population in the nation.” CAMPAIGN FOR THE FAIR SENT’G OF YOUTH, *supra* note 82.

¹⁵⁵ 987 N.W.2d 132 (Mich. 2022).

¹⁵⁶ *Id.* at 135.

¹⁵⁷ *Id.*

¹⁵⁸ Comments of Kimberly Thomas, Panel 1, *supra* note 108. In *People v. Boykin*, 987 N.W.2d 58, 66–68, 70–71 (Mich. 2022), the Court held that sentencing courts must consider a juvenile offender’s youth as a mitigating factor at sentencing hearings conducted under post-*Miller* statutes even when the state is not seeking an LWOP sentence. In these two consolidated cases, the state had sought 40-to-60-year sentences, which the sentencing court imposed. *Id.* at 62.

¹⁵⁹ The court held in *People v. Stovall*, 987 N.W.2d 85, 94-95 (Mich. 2022), that the sentence constituted cruel or unusual punishment in violation of MICH. CONST. art. 1, § 16. The court made this decision retroactive, affecting approximately eighty juvenile lifers according to Professor Thomas. Comments of Kimberly Thomas, Panel 1, *supra* note 108.

In two companion cases in Michigan, *People v. Parks*¹⁶⁰ and *People v. Poole*,¹⁶¹ the issue was whether imposing a mandatory life sentence for murder on an eighteen-year-old defendant, violated Michigan's cruel or unusual punishment clause.¹⁶² The Clinic submitted an amicus brief in *Poole* that analyzed the history of Michigan's cruel or unusual clause dating back to its inclusion in the 1835 Michigan Constitution.¹⁶³ The court in *Parks* held the mandatory LWOP sentence unconstitutional, finding no significant neurological differences between seventeen and eighteen-year-old youths.¹⁶⁴

Professor Shobha Mahadev discussed some of the appellate litigation of the Children and Family Justice Center, part of the Bluhm Legal Clinic at Northwestern Law School. Her students filed an amicus brief in *People v. Davis*, in which the Illinois Supreme Court held that *Miller* applied retroactively, before the U.S. Supreme Court decided *Montgomery*.¹⁶⁵

Professor Mahadev and her students also worked on an amicus brief in *People v. Buffer*.¹⁶⁶ The issue was what term-of-years sentence constitutes a *de facto* life sentence, triggering a trial court's obligation to consider the young age and features of adolescence of a defendant. Buffer was sixteen years old when he committed a crime that carried a mandated minimum sentence of forty-five years. He received a sentence of fifty years. The court held that a sentence greater than forty years was a *de facto* life sentence and remanded the case for resentencing pursuant to a statute that the legislature enacted to implement *Miller*.¹⁶⁷

In thinking about the structure of the advocacy efforts in this field, the panelists strongly endorsed the need to work in coalitions—coordinated groups of advocates—and to include current and formerly incarcerated people and their families in these coalitions. These were themes throughout the day in all the panel discussions.

Professor Mahadev said, “being lawyers is not enough.”¹⁶⁸ Her clinic is part of a broad-based coalition called the Illinois Coalition for

¹⁶⁰ 987 N.W.2d 161 (Mich. 2022).

¹⁶¹ 977 N.W.2d 530, 531 (Mich. 2022).

¹⁶² *Id.* at 164. The court also considered if the punishment violated the Eighth Amendment of the United States Constitution but determined that under Supreme Court precedent this argument must fail. *Id.*

¹⁶³ Comments of Kimberly Thomas, Panel 1, *supra* note 108.

¹⁶⁴ *Parks*, 987 N.W.2d at 167.

¹⁶⁵ *People v. Davis*, N.E.3d 709, 720 (Ill. 2014); Comments of Shobha Mahadev, Panel 1, *supra* note 108.

¹⁶⁶ 137 N.E.3d 763 (Ill. 2019).

¹⁶⁷ *Id.* at 774-75.

¹⁶⁸ Comments of Shobha Mahadev, Panel 1, *supra* note 108.

the Fair Sentencing of Children, which is housed in the Bluhm Legal Clinic and which she and her colleagues staff.¹⁶⁹ In 2015, the Coalition and the Bluhm Legal Clinic “celebrated the passage of . . . [a law that] eliminates mandatory life-without-parole sentences for youth under 18 at the time of the offense.”¹⁷⁰ The law also “requires judges to consider specific age-related factors in mitigation at the time of sentencing” and “grants judges a broader set of choices when sentencing children who are transferred to adult court.”¹⁷¹ This is an example of the importance of clinical work through coalitions.¹⁷²

Professor Mahadev also emphasized the importance of the Illinois coalition in coordinating individual lawsuits and law reform strategies.

We have been very conscious in Illinois of marrying a reform and policy strategy with the litigation one. That is why we have this coalition. We are in constant, deliberate conversation about this, because we never want the litigation to harm the policy, [or] the policy to harm the litigation.¹⁷³

She said the coalition and its partners have been able to “bring at least thirty people home.”¹⁷⁴ She added that this achievement “has been the result of this collaboration with private lawyers, the Public Defender’s office, and our state appellate defender. We have a gigantic listserv of attorneys working on these cases. We do trainings and provide materials and do a lot of other work with them.”¹⁷⁵

¹⁶⁹ *Id.*, Elizabeth Monkus, *Victory for Fair Sentencing of Children*, CHI, APPLESEED CTR. FOR FAAIR CTS. (AUG. 13, 2015), <https://www.chicagoappleseed.org/2015/08/13/victory-for-fair-sentencing-of-children/>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² There are more recent examples as well. The clinic worked on two policy initiatives that have become law. One, Professor Mahadev said, “created parole opportunities for people under the age of 21 for the first time since parole was abolished in 1978.” See *Created First New Parole Opportunities in Illinois Since 1978*, RESTORE JUST., <https://www.restorejustice.org/legislative-impact/created-first-new-parole-opportunities-in-illinois-since-1978/> (last visited Jan. 10, 2024). The second abolished life without parole for children and most emerging adults (age 18 to 20). See *Life Without Parole Abolished for Children and Most Emerging Adults 18-20*, RESTORE JUST., <https://www.restorejustice.org/legislative-impact/life-without-parole-abolished-for-children-most-emerging-adults-18-20/> (last visited Jan. 10, 2024).

¹⁷³ Comments of Shobha L. Mahadev, Panel 1, *supra* note 108.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

The coalition gives returning citizens and their family members major roles. “One of the bright, shining spots has been that the folks who come home now help lead our policy work,” Professor Mahadev said. “My friend James Swansey, who came home after serving some thirty years in prison, is the guy who leads our policy discussions and tells the law students why a certain framing won’t work.”¹⁷⁶

A problem that emerged in the day’s presentations is the *ad hoc* nature of the legal services in decarceration cases and projects. Although the coalitions most often were the result of careful planning, there is a “patchwork” quality to the national legal infrastructure. Ms. Fettig said that “we can deploy our statisticians, researchers and seasoned organizers to help what’s happening on the ground, but there needs to be a legal infrastructure to actually help people get home.”¹⁷⁷ It is clear that we “need to develop a more comprehensive advocacy system. James [Ziegler] has done an amazing job with The Second Look Project, but we need that in every single state.”¹⁷⁸

Ms. Fettig provided two bits of “good news” here. First, when The Sentencing Project did an assessment of the legal services infrastructure “we found there is actually more out there than we had expected. The challenge was most folks were not talking to one another. They are not connected. They are pretty nascent.”¹⁷⁹ There are “law school clinics, some pro bono lawyers, and some public defender offices, but not as many as we would wish; public defenders are not resourced to do post-conviction work, unlike in Maryland.”¹⁸⁰

Second, Ms. Fettig announced that on March 7, 2023, a few weeks before the Symposium, The Sentencing Project had created a new national Second Look Network and hired Becky Kling Feldman to direct it. Through this Network, Ms. Fettig said, “we are going to create a national community of practice so that people can share resources and share strategies.”¹⁸¹ This is a wonderful opportunity that many decarceration advocates are taking advantage of.¹⁸²

¹⁷⁶ *Id.* Many of the formerly incarcerated people and their family members belong to an organization called Restore Justice. *See About Us*, RESTORE JUST., <https://www.restorejustice.org/about-us/> (last visited Nov. 10, 2023).

¹⁷⁷ Comments of Amy Fettig, Panel 1, *supra* note 108.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Ms. Feldman has a long history of extraordinarily successful advocacy for prisoners serving extreme sentences. When she was with the Maryland Office of the Public Defender, she served as the Deputy Public Defender, and was one of two leaders of the Unger Project (Brian Saccenti

B. Panel 2: Decarceration Reforms and Legal Representation in Federal Release Proceedings: The Roles of Law School Clinics and Public Interest Organizations, Including Those of Families of Incarcerated and Decarcerated People

On this panel, which Professor Maneka Sinha (“Professor Sinha”) moderated,¹⁸³ were Mary Price (“Ms. Price”),¹⁸⁴ The Honorable Andre Davis (“Judge Davis”),¹⁸⁵ Professor Vida Johnson (“Professor Johnson”),¹⁸⁶ and Professor Katharine Tinto (“Professor Tinto”).¹⁸⁷

To give the legal background for the discussions that would follow, Judge Davis traced the history of federal sentencing. He said the changes since 1984 were “a perfect storm of injustice. They were based on a failed war on drugs, flawed science about differences between crack and powder cocaine, and ‘tough on crime’ ideas like mandatory

was the other) that obtained the releases of approximately 200 state prisoners. See Michael Millemann, Rebecca Bowman-Rivas & Elizabeth Smith, *Digging Them Out Alive*, 25 CLINICAL L. REV. 365, 369 (2019). More recently, she was the Chief of the Sentencing Review Unit of the Baltimore City State’s Attorney’s Office. Alyssa Eng, *Maryland State Attorney Sentencing Review Unit Achieves New Milestone*, DAVIS VANGUARD (Nov. 26, 2022), <https://www.davisvanguard.org/2022/11/maryland-state-attorney-sentencing-review-unit-achieves-new-milestone/#>. In November 2022, that office “announced that [the] Sentencing Review Unit has arranged for the release of 50 inmates since its inception in December 2020, and none of those released have since committed another offense.” *Id.* In this article, Becky Feldman, who was primarily responsible for these releases, said:

Prosecutors should be responsible for ensuring that the sentences of people who are still in prison after many decades continue to be fair and reasonable under our most current standards. And in reviewing these older cases, we can also create a bigger space for redemption and rehabilitation in the criminal justice system, which can serve to heal us all.

Id.

¹⁸³ Associate Professor of Law and Director of the Criminal Defense Clinic at the University of Maryland Francis King Carey School of Law. See *Maneka Sinha*, UNIV. MD. FRANCIS KING CAREY SCH. L., <https://www.law.umaryland.edu/faculty—research/directory/profile/index.php?id=1212> (last visited Oct. 16, 2023).

¹⁸⁴ General Counsel, Families Against Mandatory Minimums. See *Mary Price*, FAMS. AGAINST MANDATORY MINIMUMS, <https://famm.org/about-us/staff-board/mary-price-general-counsel/> (last visited Oct. 16, 2023).

¹⁸⁵ Judge, United States Court of Appeals, Fourth Circuit (Retired). Judge Davis also served as a judge on the United States District Court for the District of Maryland and on two state courts, the District Court for Baltimore City, and the Circuit Court for Baltimore City. See *Judge Andre Davis*, UNITED STATES DIST. CT., DIST. MARYLAND, <https://www.mdd.uscourts.gov/biography-judge-andre-m-davis> (last visited Oct. 16, 2023).

¹⁸⁶ Associate Professor of Law, Georgetown University Law Center and former Supervising Attorney, D.C. Office of Public Defender - Trial Division. See *Vida Johnson*, GEO. L., <https://www.law.georgetown.edu/faculty/vida-johnson/> (last visited Oct. 16, 2023).

¹⁸⁷ Clinical Professor of Law and Director, Criminal Justice Clinic, University of California Irvine School of Law. See *Katharine Tinto*, UNIV. CAL. IRVINE SCH. L., <https://www.law.uci.edu/faculty/full-time/tinto/> (last visited Oct. 16, 2023).

minimums. They took trial court discretion and transferred it, first to the prosecution and then to appellate judges.”¹⁸⁸

Addressing compassionate release, Ms. Price outlined three major problems with the Sentencing Reform Act.¹⁸⁹ First, although any reduction in a sentence must be “consistent with applicable policy statements issued by the Sentencing Commission,”¹⁹⁰ the Commission “took over twenty years to write those policy statements.”¹⁹¹ There was no guidance during these two decades whatsoever, and so in the breach, the Bureau of Prisons wrote its own policies. “So here we have the jailer writing the rules about who it is going to let out.”¹⁹² Second, “only the Bureau of Prisons could file the release motion.”¹⁹³ Third, federal prisoners had no right to appeal the Bureau’s decision. “So, the Bureau of Prisons was the judge and the jailer, and when they said no, it meant no.”¹⁹⁴

The First Step Act, giving incarcerated individuals the right to file a compassionate release motion in federal court, “was an absolute game changer” said Ms. Price, General Counsel, Families Against Mandatory Minimums (FAMM).¹⁹⁵ Her organization “began to look for eligible prisoners, recruited and trained pro bono lawyers, collaborated with public defenders and law school clinics” and began to enforce the First Step Act.¹⁹⁶ With the combination of the First Step Act and the COVID-19 Pandemic, “4500 people have been granted compassionate release, compared to two dozen every year before” the First Step Act.¹⁹⁷

¹⁸⁸ Panel Recording: Decarceration: The Role of Law School Clinics, Panel 2 – Decarceration Reforms and Legal Representation in Federal Release Proceedings, held by the University of Maryland Journal of Race, Religion, Gender and Class and University of Maryland Francis King Carey School of Law Clinical Law Program (Mar. 31, 2023) (on file with school Media Services) (comments of Andre Davis). When speakers are quoted, they were given a chance to make non-substantive edits after the Symposium. Also, ellipses are not used to show deletions of excess text, and the words in recordings were sometimes not entirely clear. The substance of the quotes, and the words as nearly as possible, are that of the attributed speaker.

¹⁸⁹ See *supra* Section I.B.3. As noted earlier, the Sentencing Reform Act authorizes releases for “extraordinary and compelling reasons.” See *supra* note 89. 18 U.S.C. § 3582(c)(1)(A)(i) requires courts deciding compassionate release motions to consider the sentencing factors set forth in 18 U.S.C. § 3553(a) and provides that any reduction in a sentence be “consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(1)(A).

¹⁹⁰ 18 U.S.C. § 3582(c)(1)(A)(ii).

¹⁹¹ Comments of Mary Price, Panel 2, *supra* note 188.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

The way some clinics began doing compassionate release work was opportunistic. Professor Johnson, Associate Professor of Law at Georgetown, said that her students made a “big pivot” to compassionate release work from misdemeanor work after “our courthouse was closed” due to COVID-19.¹⁹⁸ The statute they enforced, however, was the D.C. Compassionate release law, not the federal law.¹⁹⁹

The D.C. law has age provisions that bring it close to being a geriatric release law.²⁰⁰ It provides that a court “shall modify a term of imprisonment” if the petitioner “is not a danger to the safety of any other person or the community,” considering enumerated factors.²⁰¹ One set of factors is that the petitioner either be “60 years of age or older and has served at least 20 years in prison” or is “60 years of age or older” and has “served the lesser of 15 years or 75% of the [] sentence,” and has “a chronic or serious medical condition related to the aging process or that causes an acute vulnerability to severe medical complications or death as a result of COVID-19.”²⁰² Many incarcerated people sixty-years-old and older have “a chronic or serious medical condition related to the aging process.”²⁰³

“We have been able to free dozens of people from the federal Bureau of Prisons,” Professor Johnson said.²⁰⁴ “Our clients serve their sentences within the Bureau, so they are scattered across the country, but it’s been incredible to be able to bring so many people home, and students have just played a huge part in that.”²⁰⁵

Professor Tinto, Clinical Professor of Law at California Irvine Law School, explained that her clinic was doing compassionate release work before COVID. She told the story about how they got into this work. The clinic initially was doing state criminal work, but they also had a client incarcerated in Texas serving a life sentence on a federal

¹⁹⁸ Comments of Vida Johnson, Panel 2, *supra* note 188.

¹⁹⁹ D.C. CODE § 24–403.04.

²⁰⁰ *Id.* § 24–403.04(a).

²⁰¹ *Id.*

²⁰² *Id.* §§ 24–403.04(a)(2), (a)(3)(B)(i)-(iii).

²⁰³ Kimberly A Skarupski, et al., *The Health of America’s Aging Prison Population*, 40 EPIDEMIOLOGIC REVS. 157, 158 (2018).

One of the challenges in assessing and understanding aging in prison is determining the appropriate cutoff to define ‘old age.’ Although 65 years is the conventional cutoff used to define older age in the general US population, unhealthy lifestyles and inadequate health care often accelerate the onset and progression of many chronic conditions associated with aging; thus, old age in prison typically commences at ages 50 or 55 years.

Id.

²⁰⁴ Comments of Vida Johnson, Panel 2, *supra* note 188.

²⁰⁵ *Id.*

drug conviction. President Obama was in office and granting more clemencies than his predecessors, so they filed a clemency petition on his behalf. When President Obama did not grant the requested clemency, the question became what, if anything, could they do next. The client answered the question by sending a draft compassionate release motion to Professor Tinto. She educated herself about the federal statute (she had been a state public defender before teaching), and she and her students “ghost wrote the motion with the client and the client filed it pro se.”²⁰⁶ The federal judge appointed a federal public defender in Texas to represent the client and they were successful. She offered this as an example of learning from your clients.²⁰⁷

Professor Tinto and her students thought about this experience and the fact that “there are a lot of people serving life in federal prison for drug crimes, and we started looking for other people.”²⁰⁸ They read a Marshall Project article about a man “serving life in prison for drugs in Alabama,” and he became their second compassionate release client. They won his case.²⁰⁹

“Then COVID hit. The beauty of the law school clinic is that we were able to react when we suddenly saw a need for this work,” Professor Tinto said.²¹⁰ Her clinic now has a national compassionate release practice, “primarily throughout the South, because there is a lot of need for lawyers there.”²¹¹

In many, if not all clinics doing this work, there are interdisciplinary dimensions, especially social workers and in some, social work students.²¹² Professor Johnson described an established medical school partnership that Georgetown Law has with

²⁰⁶ Comments of Katharine Tinto, Panel 2, *supra* note 188.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See Comments of Maneka Sinha, Panel 2, *supra* note 188. Maryland Carey Law School’s Clinical Law Program has a partnership with the School of Social Work. Rebecca Bowman-Rivas, a Licensed Clinical Social Worker, is the Clinical Law Programs’ Law & Social Work Service Program Manager. *Rebecca Bowman-Rivas*, UNIV. MD. FRANCIS KING CAREY SCH. L., <https://www.law.umaryland.edu/faculty—research/directory/profile/index.php?id=308> (last visited Oct. 12, 2023). The Program is a “field practicum placement” or “internship” for graduate students in the University’s School of Social Work. *Initiatives*, UNIV. OF MD. FRANCIS KING CAREY SCH. OF L., <https://www.law.umaryland.edu/academics/clinics/initiatives/> (last visited Nov. 10, 2023). Ms. Bowman-Rivas directs the program, teaches the social work students, helps to teach the law students, and generally collaborates with the clinical faculty. The program provides case management, referral, support, and other services to clinic clients, and in some cases testifies in, or provides reports to courts. *Id.*

Georgetown's Medical School.²¹³ Based on that model, Professor Johnson added this interdisciplinary dimension to her clinic as well. Fourth year medical students help the law students review prison medical records in the compassionate release cases.²¹⁴ "What we discovered," Professor Johnson said, "is absolutely appalling. Our clients are treated terribly," and prison medical staff either do not pick up serious disease or do not tell the incarcerated people about it.²¹⁵ So often, "we have been the ones to deliver very bad news to our clients, like you have kidney disease and are going to need dialysis very soon, or you have been receiving the wrong medication for your Parkinson's disease for decades."²¹⁶ "Normally in a misdemeanor clinic," she said, "when any bad news gets delivered, it's delivered by the judge. But we had to learn how to give bad news, and the medical students were great at teaching us how to do that, because they do that every day in hospitals across the country."²¹⁷

The partnership is good for the medical students too. "A few of the graduate medical students have said that their time in our clinic was the highlight of their medical school experience."²¹⁸ That is "because they formed relationships with real clients, and they have seen what poor medical treatment and a poor diet will do to a human body."²¹⁹

It was apparent from the Panel 1 presentations that *Miller* and the states' implementation of *Miller*, especially state court decisions interpreting new release laws, has created a very dynamic, growing body of release law. It was just as clear from the Panel 2 discussions that this also is true with respect to the federal compassionate release laws and implementing policies. Indeed, the new Sentencing Commission policy statements are not effective until November 1, 2023.²²⁰

The federal judiciary has added a dynamic factor. It began playing a much more active role in applying the compassionate release provisions during the five-year period between the 2018 enactment of the First Step Act and the 2023 adoption of new policy statements by

²¹³ Comments of Vida Johnson, Panel 2, *supra* note 188. There is a joint clinic called The Health Justice Alliance Clinic at Georgetown. See *Health Justice Alliance Clinic*, GEO. UNIV. L. CTR., <https://www.law.georgetown.edu/experiential-learning/clinics/our-clinics/health-justice-alliance-clinic/> (last visited Dec. 25, 2023).

²¹⁴ Comments of Vida Johnson, Panel 2, *supra* note 188.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 85.

the United States Sentencing Commission.²²¹ In its 2023 report, the Commission said: “because the Commission lost its quorum in early 2019 and did not regain it until 2022, it was unable to amend [the policy statements] during the more than four-year period since defendants were first permitted to file [compassionate release] motions” as a result of the First Step Act.²²² In explaining the new “amendments,” the Commission said that one “amendment retains the ‘Other Reasons’ catchall,” and acknowledged that federal courts have played, and should play, a significant role in giving this phrase meaning:

The Commission recognized that during the period between the enactment of the First Step Act in 2018 and this amendment, district courts around the country based sentence reductions on dozens of reasons and combinations of reasons. Based on a careful review of those cases, the Commission continues to believe what is stated in Application Note 4 to the current policy statement, *i.e.*, that judges are “in a unique position to determine whether the circumstances warrant a reduction.”²²³

This appears to be both a validation by the Commission of the court’s significant involvement during this five-year period and an invitation to courts to stay engaged.

The federal decisions expanded the list of reasons justifying release, but also generated conflicts in the circuits.²²⁴ “[T]he majority of circuits [held] that the [Sentencing Commission’s] Guidelines Manual [was] no longer authoritative following the First Step Act,” leading to many district court decisions providing “novel circumstances” for granting compassionate release.²²⁵ In contrast, there was a “minority camp of district judges who maintain[ed] that the Guidelines Manual [was] authoritative and binding after the First Step Act’s reforms.”²²⁶ The “deluge of motions, driven by COVID-19 [nearly 11,000], gave almost all federal courts ample opportunity to weigh in on how compassionate release ought to work in the First Step era.”²²⁷

²²¹ *Id.* at 1-2.

²²² *Id.* at 1.

²²³ *Id.* at 4-5.

²²⁴ *See generally* Ferraro, *supra* note 38, at Part II.

²²⁵ *Id.* at 2487.

²²⁶ *Id.*

²²⁷ *Id.*

Ms. Price said that “this beautiful living experiment” by many federal judges encouraged “visionary lawyers” to be creative in their compassionate release motions.²²⁸ In its 2023 amendments, the Sentencing Commission adopted as new policy statements, many of the circumstances recognized by the courts.²²⁹ The Commission also resolved splits in the circuit courts, including on a very important issue: whether “non-retroactive changes in law may be considered as extraordinary and compelling reasons” for granting compassionate release.²³⁰ The Commission gave a qualified “yes” to the question.²³¹ The relevant new Guideline states:

If a defendant received an unusually long sentence and has served at least 10 years . . . , a change in the law . . . may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant’s individualized circumstances.²³²

The revisions included two other important changes. First, “rehabilitation,” although not an “extraordinary and compelling reason” by itself, “may be considered in combination with other circumstances in determining whether and to what extent a reduction in the defendant’s term of imprisonment is warranted.”²³³ Second, “physical abuse resulting in ‘serious bodily injury,’ as defined [in the Commentary],” and “sexual abuse involving a ‘sexual act,’ as defined” by a federal statute, can qualify as an “extraordinary and compelling reason” under some circumstances.²³⁴ It must be “committed by, or at the direction of, a correctional officer, an employee or contractor of the Bureau of Prisons, or any other individual who had custody or control over the

²²⁸ Comments of Mary Price, Panel 2, *supra* note 188.

²²⁹ U.S. SENT’G COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 85, at 3-4.

²³⁰ *Id.* at 5-6.

²³¹ *Id.* at 3, 5-6.

²³² *Id.* at 11; U.S. SENT’G COMM’N, GUIDELINES MANUAL, §1B1.13(b)(6) (Nov. 2023).

²³³ U.S. SENT’G COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 85, at 11; U.S. SENT’G COMM’N, GUIDELINES MANUAL, *supra* note 232, §1B1.13(d).

²³⁴ U.S. SENT’G COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 85, at 4; U.S. SENT’G COMM’N, GUIDELINES MANUAL, *supra* note 232, §1B1.13(b)(4).

defendant.”²³⁵ In addition, it “must be established by a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding, unless such proceedings are unduly delayed or the defendant is in imminent danger.”²³⁶

In assessing the choices of legal work in a clinic, the panelists discussed if and how individual cases relate “to a larger movement.”²³⁷ Judge Davis, speaking “from the perspective of the courts,” said “the individual cases are incredibly important.”²³⁸ That is because the “individual case, rather than group or systemic interests are always at issue before the judge,” and “the individual case is an important way to educate the individual judge, who can then become part of the momentum for systemic change.”²³⁹ Also, “individual cases have the power to highlight themes” and “narratives that are true for so many of incarcerated individuals.”²⁴⁰ Individual cases help judges develop “scientific literacy,” like the juvenile lifer cases, in which neuroscience, for example, is important.²⁴¹

Individual cases can have an impact on other decisionmakers, as well. Judge Davis pointed out that a lot of individual, unjust cases, led Congress to reduce the sentencing disparity between crack and powder cocaine through the 2010 Fair Sentencing Act.²⁴² Those cases also persuaded President Obama to grant clemency to a number of prisoners,²⁴³ and more recently, helped persuade the Department of

²³⁵ U.S. SENT’G COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 85, at 4; U.S. SENT’G COMM’N, GUIDELINES MANUAL, *supra* note 232, §1B1.13(b)(4)(B).

²³⁶ U.S. SENT’G COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 85, at 4; U.S. SENT’G COMM’N, GUIDELINES MANUAL, *supra* note 232, §1B1.13(b)(4).

²³⁷ This was posed as a question by the moderator, Professor Maneka Sinha. Comments of Maneka Sinha, Panel 2, *supra* note 188.

²³⁸ Comments of Andre Davis, Panel 2, *supra* note 188.

²³⁹ *Id.*

²⁴⁰ Comments of Katherine Tinto, Panel 2, *supra* note 188.

²⁴¹ Comments of Andre Davis, Panel 2, *supra* note 188.

²⁴² *Id.* *Fair Sentencing Act*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/fair-sentencing-act> (last visited Dec. 25, 2023). “In 2010, Congress passed the Fair Sentencing Act (FSA), which reduced the sentencing disparity between offenses for crack and powder cocaine from 100:1 to 18:1.” *Id.* “In another step toward fairness, in 2011, the U.S. Sentencing Commission voted to retroactively apply the new FSA Sentencing Guidelines to individuals sentenced before the law was enacted. This decision will help ensure that over 12,000 people — 85 percent of whom are African-Americans — will have the opportunity to have their sentences for crack cocaine offenses reviewed by a federal judge and possibly reduced. (Even though people sentenced before the FSA can benefit from the retroactive Sentencing Guideline amendments, they remain subject to pre-FSA statutory mandatory minimums).” *Id.*

²⁴³ Kevin Liptak, *Obama Cuts Sentences of Hundreds of Drug Offenders*, CNN POLITICS (Jan. 17, 2017, 5:18 PM), <https://www.cnn.com/2017/01/17/politics/obama-cuts-sentences-of-hundreds-of-drug-offenders/index.html>.

Justice to instruct federal prosecutors to “promote the equivalent treatment of crack and powder cocaine offences.”²⁴⁴ In the accompanying memo, Attorney General Merrick Garland said: “the crack/powder disparity in sentencing has no basis in science, furthers no law enforcement purposes, and drives unwarranted racial disparities in our criminal justice system.”²⁴⁵

Ms. Price offered a compelling example of the link between individual cases and law reform. She spoke about what was known as “the rape club” in a federal prison in California.²⁴⁶ In reporting on the sentencing of the former warden of the prison, as well as the convictions of at least four others, including the *former prison chaplain* (who received a seven-year sentence), a Los Angeles Times article said:

The former warden of a federal women’s prison in California so plagued by sexual abuse it was known as the “rape club” was sentenced Wednesday to nearly six years in prison for sexually abusing incarcerated women and forcing them to pose naked and for lying to the FBI as part of a cover-up. In announcing the 70-month sentence of Ray J. Garcia, U.S. District Judge Yvonne Gonzalez Rogers castigated the former warden of Federal Correctional Institution Dublin for what she called “ludicrous” lying on the witness stand and for perpetuating the prison’s culture of sexual abuse.²⁴⁷

President Barack Obama on Tuesday reduced or eliminated the sentences for hundreds more non-violent drug offenders. The move brings Obama well beyond his most recent predecessors, who used their commutation powers more sparingly. He’s now reduced sentences for 1,385 individuals, the vast majority of whom are serving time for crimes related to distribution or production of narcotics. Many of those whose punishments he’s reduced were incarcerated for crimes involving crack cocaine, which came with mandatory sentences that were longer than those for the powdered version of the drug. The discrepancy – a facet of a decades-long war on drugs – overwhelmingly affected African-Americans.

Id.

²⁴⁴ Max Matza, *US to End Crack and Powder Cocaine Sentencing Disparity*, BBC NEWS (Dec. 17, 2022), <https://www.bbc.com/news/world-us-canada-64009199>.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Richard Winton, *Former Warden at Women’s Prison Known as ‘Rape Club’ Gets 70 Months for Sexual Abuse*, L.A. TIMES (March 22, 2023, 4:37 PM), <https://www.latimes.com/california/story/2023-03-22/former-warden-sentenced-for-sexual-abuse-at-female-prison>.

Ms. Price related how these individual cases led to the recent Sentencing Commission amendment providing that “sexual abuse,” under some circumstances, can be an “extraordinary and compelling reason” for compassionate release.²⁴⁸ After the criminal convictions, she said, “we thought that’s not vindication. What’s vindication is getting those women out of prison because they cannot heal. You cannot heal in a carceral setting.”²⁴⁹ Worse, she pointed out that the women who cooperated with investigators were “shipped off to other prisons” and when the correction officers there learned they had provided truthful information to investigators, there was retaliation.²⁵⁰ “It was just disgusting.”²⁵¹

When the BOP failed to bring compassionate release motions for the victims, “we worked with a California organization that was in touch with these women,” identified those who wanted to file motions, and “placed most of those cases with these amazing law school clinics.”²⁵² A number of organizations also lobbied The Sentencing Commission to add sexual abuse as “an extraordinary and compelling reason” for compassionate release, which the Commission eventually did in the qualified way discussed.²⁵³

The developments discussed by the panelists offer prisoners new hopes, put a premium on creative lawyering, and offer clinical faculty many wonderful teaching opportunities.

*C. Panel 3: Decarceration and the Problem of Gender Violence:
Representing Criminalized Survivors*

Professor Leigh Goodmark (“Professor Goodmark”) moderated the third panel.²⁵⁴ Panelists were Professor Kate Mogulescu (“Professor

²⁴⁸ Comments of Mary Price, Panel 2, *supra* note 188.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ See *supra* note 229 and accompanying text; U.S. SENT’G COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 85, at 4; Carrie Johnson, *Advocates Seek Compassionate Release for Women Sexually Abused While Incarcerated*, NPR (Oct. 28, 2022, 4:42PM), <https://www.npr.org/2022/10/28/1132163791/advocates-seek-compassionate-release-for-women-sexually-abused-while-incarcerate>.

²⁵⁴ Director of the Gender, Prison, and Trauma Clinic (formerly the Gender Violence Clinic), Co-Director of the Clinical Law Program, and Marjorie Cook Professor of Law at the University of Maryland Francis King Carey School of Law. See *Leigh Goodmark*, UNIV. MD. FRANCIS KING CAREY SCH. L., <https://www.law.umaryland.edu/faculty—research/directory/profile/index.php?id=982> (last visited Sept. 13, 2023). Panel Recording:

Mogulescu”),²⁵⁵ T. Shekhinah Braveheart (“Ms. Braveheart”),²⁵⁶ and Rebecca Bowman-Rivas (“Ms. Bowman-Rivas”).²⁵⁷

Professor Goodmark set the context for the discussions by presenting the largely discouraging data about incarcerated women. “Extreme sentencing is no different for women than men,” Professor Goodmark said.²⁵⁸ “Nationwide, one of every fifteen women in prison, more than about 6,600 women, are serving a sentence of life with parole, life without parole (or death by incarceration), or a virtual life sentence of fifty years or more.”²⁵⁹ Of these, “there are nearly 2,000 women serving life without parole sentences in the United States.”²⁶⁰

Overall, “[b]etween 1980 and 2021, the number of incarcerated women increased by more than 525%, rising from a total of 26,326 in 1980, to 168,449 in 2021.”²⁶¹ In 2021, there were 83,349 women in prisons; in state prisons in 2020, 45% were there based on convictions for crimes considered to be “violent.”²⁶² Because of the COVID releases, there was “a substantial downsizing” in 2020,²⁶³ but “this trend reversed with a 10% increase in 2021.”²⁶⁴ The growth of “female imprisonment has been twice as high as that of men since 1980.”²⁶⁵ In

Decarceration: The Role of Law School Clinics, Panel 3 – Decarceration and the Problem of Gender Violence: Representing Criminalized Survivors, held by the University of Maryland Journal of Race, Religion, Gender and Class and University of Maryland Francis King Carey School of Law Clinical Program (Mar. 31, 2023) (on file with school Media Services). When speakers are quoted, they were given a chance to make non-substantive edits after the Symposium. Also, ellipses are not used to show deletions of excess text, and the words in recordings were sometimes not entirely clear. The substance of the quotes, and the words as nearly as possible, are that of the attributed speaker.

²⁵⁵ Director of the Criminal Defense & Advocacy Clinic and Professor of Clinical Law at Brooklyn Law School. BROOK. L. SCH., <https://www.brooklaw.edu/Contact-Us/Mogulescu-Kate> (last visited Sept. 13, 2023).

²⁵⁶ Justice Policy Institute, Advocacy Associate. *About Us*, JUST. POL’Y INST., <https://justicepolicy.org/about-us/> (last visited Nov. 11, 2023). Ms. Braveheart was an excellent panelist who made many important contributions to the discussions. Ms. Braveheart’s words are not reported here, however, because she did not authorize us to make her contributions public.

²⁵⁷ Law & Social Work Services Program Manager, University of Maryland Francis King Carey School of Law. See *Rebeca Bowman-Rivas*, UNIV. MD. FRANCIS KING CAREY SCH. L., <https://www.law.umaryland.edu/faculty—research/directory/profile/index.php?id=308> (last visited Sept. 23, 2023).

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* See ASHLEY NELLIS, SENT’G PROJECT, *IN THE EXTREME: WOMEN SERVING LIFE WITHOUT PAROLE AND DEATH SENTENCES IN THE UNITED STATES* 5 (2021).

²⁶¹ NIKI MONAZZAM & KRISTEN M. BUDD, SENT’G PROJECT, *INCARCERATED WOMEN AND GIRLS* 1 (2023).

²⁶² *Id.* at 1, 4.

²⁶³ *Id.* at 1.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

state prisons, over half of women—58% in 2021—”have at least one child under the age of eighteen.”²⁶⁶ Others were the sole caretakers of family members.²⁶⁷

The reasons many women are in prison make the data even worse. Many women, Professor Goodmark said, have been convicted of crimes related to their own victimization.²⁶⁸ That victimization includes “intimate partner and sexual violence,” “other forms of gender violence,” and “human trafficking.”²⁶⁹ This is true also of many transgender or gender nonconforming people, she said.²⁷⁰ She added: “The criminologist Beth Richie has said, ‘I’ve never met a Black woman in prison who wasn’t a victim of trauma in some way.’”²⁷¹ “That’s been my experience as well,” Professor Goodmark said.²⁷² Other experts agree:

Despite the criminal legal system’s espoused goal of securing justice for crime victims, all too often, survivors of domestic violence are arrested, prosecuted, and punished. For instance, survivors may be criminalized for coerced criminal acts or for protecting themselves or a loved one. Victimization can also result in long-term destabilization that also leads to prosecution: loss of housing, income, and savings push individuals into committing crimes to meet basic survival needs. Coping with the effects of trauma can also lead individuals to substance use and arrest.²⁷³

²⁶⁶ *Id.*

²⁶⁷ Comments of Rebecca Bowman-Rivas, Panel 3, *supra* note 254.

²⁶⁸ Comments of Leigh Goodmark, Panel 3, *supra* note 254.

²⁶⁹ *Id.* See LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM 12-13 (2023).

²⁷⁰ Comments of Leigh Goodmark, Panel 3, *supra* note 254.

²⁷¹ *Id.*

Beth E. Richie is Head of the Department of Criminology, Law and Justice and Professor of African American Studies at The University of Illinois at Chicago. The emphasis of her scholarly and activist work has been on the ways that race/ethnicity and social position affect women’s experience of violence and incarceration, focusing on the experiences of African American battered women and sexual assault survivors.

See *Beth E. Richie, Phd*, UNIV. CHI. ILL., <https://clj.uic.edu/profiles/beth-e-richie/> (last visited Sept. 13, 2023).

²⁷² Comments of Leigh Goodmark, Panel 3, *supra* note 254.

²⁷³ KOMAR ET AL., SENT’G PROJECT & SURVIVORS JUST. PROJECT, SENTENCING REFORM FOR CRIMINALIZED SURVIVORS: LEARNING FROM NEW YORK’S DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT I (2023).

Thus, a dominant pathway to prison for women involves their own victimization. Other “pathways” often involve childhood abuse, including sexual abuse, and other trauma, according to Ms. Bowman-Rivas.²⁷⁴ “Many incarcerated women were run-aways, had children at an early age, and became dependent upon men, including abusive men,” she said.²⁷⁵

“What women experience in prison mirrors the gender-based violence they’ve experienced outside of prison,” Professor Goodmark added.²⁷⁶ “Abusive correctional officers are no different than an abusive partner in a different context.”²⁷⁷ She gave strip-searches as an example. “When women are regularly strip-searched before they are able to have visitation with their families, that is a form of state-sanctioned rape that mirrors the rapes that people have experienced on the outside.”²⁷⁸ She said that this reinforces the trauma-induced psychological conditions that women have brought to prison.²⁷⁹

In prison, women’s unique needs, including for reproductive health care, often are ignored as well. Ms. Bowman-Rivas said that “medical care for women in prison is absolutely abysmal,” and added that Maryland had to pass a law “to make it illegal to shackle women during childbirth.”²⁸⁰ “I don’t know anybody who has given birth,” she said, “who in the middle of having a child wanted to get up and run out of the room.”²⁸¹

Professor Goodmark questioned whether the rehabilitation model is appropriate for women who are incarcerated for self-protective or innocent acts. “We literally have clients who didn’t do anything,” but who are in prison through “the misapplication of the felony murder rule or through ‘failure to protect’ laws, which usually hold mothers responsible for the abusive behavior of their partners.”²⁸²

There is intergenerational damage from incarceration as well. One of the consequences of incarcerating women, Ms. Bowman-Rivas pointed out, is that their children often wind up going into foster care or to live with a family member who is not interested in being a parent,

²⁷⁴ Comments of Rebecca Bowman-Rivas, Panel 3, *supra* note 254.

²⁷⁵ *Id.*

²⁷⁶ Comments of Leigh Goodmark, Panel 3, *supra* note 254.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ Comments of Leigh Goodmark, Panel 3, *supra* note 254.

²⁸⁰ *Id.* See MD. CODE ANN., CORR. SERVS. § 9-601(e) (2014) (“A physical restraint may not be used on an inmate while the inmate is in labor or during delivery, except as determined by the medical professional responsible for the care of the inmate.”).

²⁸¹ Comments of Rebecca Bowman-Rivas, Panel 3, *supra* note 254.

²⁸² Comments of Leigh Goodmark, Panel 3, *supra* note 254.

frequently repeating the cycle that led to the incarceration of the mother.²⁸³

The panel then turned to law school clinics' roles in representing women in prisons. Professor Goodmark pointed out that in addition to her clinic,²⁸⁴ there are a number of other clinics around the country representing incarcerated women in release proceedings, including in parole, pardon, sentencing modification, commutation and vacatur proceedings.²⁸⁵

Professor Mogulescu teaches the Criminal Defense and Advocacy Clinic at Brooklyn Law School. She began by praising the "hope and optimism" that marked the presentations, adding, that "as a New York cynic, it is not usually my thing, hope or optimism, but I'm really feeling it today."²⁸⁶

She described a new sentencing law that has been a focus of her clinic's recent work: the Domestic Violence Survivors Justice Act (DVSJA).²⁸⁷ "[It] allows the sentencing court to resentence a domestic violence survivor who suffered sexual, psychological or physical abuse that contributed to his or her conviction if certain, specific criteria are

²⁸³ Comments of Rebecca Bowman-Rivas, Panel 3, *supra* note 254. The panelists agreed that women face special and difficult reentry problems, and the available programs are wholly inadequate. Rebecca Bowman-Rivas said: "Women are often going back to child care and family responsibilities. Getting a job might not be the primary goal for them, although they do need support." *Id.* Therefore, "it's really important that there's an infrastructure for providing assistance to people coming home who are responsible for caring for their children, for helping them to reconnect with their children." *Id.* Ms. Bowman-Rivas added that unlike men, "women can't come out and get a job doing demolition or some of the things that men do physically. And that applies to older folks as well. We found in the Unger Project that most of the programs that are oriented to reentry are around work and a lot of times it's around manual labor." *Id.* For the Unger Project, see Millemann et al., *Digging Them Out Alive*, *supra* note 182. Generally, she said, "there need to be more reentry programs that focus on women's needs." Comments of Rebecca Bowman-Rivas, Panel 3, *supra* note 254. Ms. Bowman-Rivas also stressed that "peer support" in reentry is very important. *Id.* "There needs to be a sense of community. This is another lesson we learned in the Unger Project." *Id.*

²⁸⁴ Professor Goodmark teaches the Gender, Prison, and Trauma Clinic. UNIV. OF MD. FRANCIS KING CAREY SCH. OF L. <https://www.law.umaryland.edu/academics/clinics/gender-prison-and-trauma-clinic/> (last visited Sept. 15, 2023). Professor Goodmark mentioned that, in addition to many other clients, her clinic represents some of the sixteen women sentenced to life without parole in Maryland. Comments of Leigh Goodmark, Panel 3, *supra* note 254.

²⁸⁵ Professor Goodmark mentioned that this non-exclusive list includes clinics at the University of Baltimore School of Law, Brooklyn Law School, Cornell Law School, the University of Georgia School of Law, The University of Texas School of Law, Tulane University School of Law, The University of Tulsa School of Law, Pepperdine Caruso School of Law, the Southern Methodist University-Dedman School of Law, and the University of Minnesota Law School. Comments of Leigh Goodmark, Panel 3, *supra* note 254.

²⁸⁶ Comments of Kate Mogulescu, Panel 3, *supra* note 254.

²⁸⁷ Domestic Violence Survivors Justice Act, N.Y. CRIM. PROC. LAW § 440.47 (Consol. 2023). See also N.Y. PENAL LAW § 60.12 (Consol. 2023).

met.”²⁸⁸ “It basically says if your participation in the offense for which you were convicted was connected to your experience with domestic violence, you are eligible for a departure from mandatory minimum sentencing.”²⁸⁹ Noting the day’s conversations about the importance of making new release laws retroactive, Professor Mogulescu said, “[t]here is a retroactive resentencing provision that is part of the DVSJA.”²⁹⁰ This applies to people who were sentenced to eight years or more for most crimes before August 12, 2019.²⁹¹

Professor Mogulescu told the story about how the DVSJA became law. “For us at the Survivors Justice Project,” Professor Mogulescu said, “we mark that history” back to “1985 in the Bedford Hills Correctional Facility, which is the women’s maximum security prison in New York.”²⁹² There was a public hearing attended by elected officials in that prison that the “women on the inside organized.”²⁹³ The purpose was to “explore the connections,” in the experiences of the women, between domestic violence and “their arrests, prosecutions and punishment.”²⁹⁴ This led to “three decades of organizing” and advocacy to get the DVSJA passed, an effort led by “the Coalition of Women for Women Prisoners” beginning in 1994.²⁹⁵

²⁸⁸ N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., WHAT IS THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT? 1, <https://www.ils.ny.gov/files/NYC%20-%20What%20is%20DVSJA.pdf> (last visited Sept. 16, 2023).

²⁸⁹ Comments of Kate Mogulescu, Panel 3, *supra* note 254.

²⁹⁰ *Id.*

²⁹¹ N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., *supra* note 288, at 1. Almost all crimes are included; only a select few are excluded. *Id.*

²⁹² Comments of Kate Mogulescu, Panel 3, *supra* note 254. The Survivors Justice Project, which is housed at Brooklyn Law School, “is a collective of activists, lawyers, social workers, students, and researchers—many of whom are survivors of domestic violence and long-term incarceration.” SURVIVORS JUST. PROJECT, <https://www.sjpnny.org> (last visited Sept. 16, 2023). The project is “[r]ooted in participatory ethics” and has “a strong, paid advisory group of women who have survived incarceration and are leading advocates to ground the framework, methods, analysis and the organizing” work of the Project. *SJP History*, SURVIVORS JUST. PROJECT, <https://www.sjpnny.org/about/sjp-history> (last visited Sept. 16, 2023).

²⁹³ Comments of Kate Mogulescu, Panel 3, *supra* note 254.

²⁹⁴ *Id.*

²⁹⁵ *Id.* “The Coalition for Women Prisoners is a statewide alliance of more than 1,000 individuals from over 100 organizations dedicated to making the criminal justice system more responsive to the needs and rights of women and their families.” *Coalition of Women Prisoners*, NAT’L INST. OF CORR.: JUST. INVOLVED WOMEN PROGRAMS, <https://info.nicic.gov/jiwp/node/147> (last visited Sept. 16, 2023). This truncated version of this fascinating history does not capture all of what Professor Mogulescu had to say. One colorful part of her account was that the draft bills were contraband in the prison, and were smuggled in by Sister Mary Nerney, a Roman Catholic nun who was a nationally known advocate for women prisoners, especially those who were survivors of domestic violence. See Comments of Kate Mogulescu, Panel 3, *supra* note 254; Margalit Fox, *Sister Mary Nerney, Advocate for Women in Prison, Dies at 75*, N.Y. TIMES

Professor Mogulescu's basic point, which other speakers reiterated throughout the day, is that incarcerated and formerly incarcerated people are essential leaders of prison reform campaigns, and their powerful experiences are the core of an effective advocacy strategy.

Professor Mogulescu emphasized that the scope of the DVSJA is broad. Abusers can include family members and members of a household, but also "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time."²⁹⁶ Professor Mogulescu said there have been a couple of DVSJA cases involving abuse by foster care and congregate care staff.²⁹⁷ There must be a connection between the abuse and the crime, but the DVSJA includes crimes in which the abuser is not the victim of the defendant's crime, but rather "the crime might seem completely unrelated," e.g., "a robbery or felony murder, as long as there is some connection to the domestic violence that the person experienced."²⁹⁸

Professor Mogulescu said that to implement the law in 2019, "we formed the Survivors Justice Project to think through what implementation could look like."²⁹⁹ The Project got a list of everyone in custody who "fit eligibility for resentencing."³⁰⁰ There were "487 people in women's facilities and 11,889 people in men's facilities."³⁰¹ To assess eligibility:

[W]e started with the 487 people in women's facilities. Why? Because our advisory group that leads the Survivors Justice Project,³⁰² who collectively spent over 150 years at Bedford, looked at this list; it was not merely a list to them, it was people that they knew, that they had lived with, and had left behind.³⁰³

(Dec. 5, 2023), <https://www.nytimes.com/2013/12/06/nyregion/sister-mary-nerney-advocate-for-women-in-prison-dies-at-75.html>.

²⁹⁶ N.Y. CRIM. PROC. LAW § 530.11(1)(e) (Consol. 2023), This definition is incorporated by reference in N.Y. PENAL LAW § 60.12 (Consol. 2023) and N.Y. CRIM. PROC. LAW § 440.47 (Consol. 2023) which comprise the New York Domestic Violence Survivors Justice Act.

²⁹⁷ Comments of Kate Mogulescu, Panel 3, *supra* note 254.

²⁹⁸ Comments of Kate Mogulescu, Panel 3, *supra* note 254.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² See SURVIVORS JUST. PROJECT, *supra* note 292.

³⁰³ Comments of Kate Mogulescu, Panel 3, *supra* note 254.

In addition, “so many reform efforts leave women out. Women are the afterthought. And here, that would not be right.”³⁰⁴

As a result of the DVSJA and its implementation in forty-three cases, “it saved 105 years from [the incarcerated persons’] earliest possible release dates. If they had been sentenced under the structure that the law provides now, it could have avoided 318 years of incarceration.”³⁰⁵

Five of the forty-three successful petitioners are men, and “three were convicted for the death of a parent or a stepparent,” Professor Mogulescu said.³⁰⁶ “It has been a real effort to try to dig into the 11,889 people in men’s prisons, but we’re starting to do that now.”³⁰⁷

Professor Goodmark asked whether there are any risks in enacting a law like the DVSJA, and if so, what they might be.³⁰⁸ In effect, this is a Second Look law for a special population.³⁰⁹ There are other special populations that advocates have tried to include in Second Look bills, like emerging adults.³¹⁰

One argument is that these types of “special population laws” are both good in and of themselves, and act as possible “wedges” that open the prison gates more broadly. Once judges get used to releasing special populations of prisoners, and they demonstrate that they pose limited recidivism risks,³¹¹ decision-makers will be more comfortable with including more prisoners in Second Look laws, so the argument goes.³¹²

The counter-argument, which Professor Goodmark identified, is that “if you start taking more sympathetic populations of folks off the table, at some point” you have communicated that there “is a group of

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ Comments of Leigh Goodmark, Panel 3, *supra* note 254.

³⁰⁹ *Id.*

³¹⁰ *See, e.g., supra* Section II.A., Panel 1 discussion of D.C. Second Look Act (which includes emerging adults).

³¹¹ Recidivism rates are very low for offenders who have served long sentences for violent crimes. *See, e.g.,* ROBERT WEISBERG, DEBBIE A. MUKAMAL & JORDAN D. SEGALL, STANFORD L. SCH., LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA 4, 17 (2011) (“While data is limited, interim information suggests that the incidence of commission of serious crimes by recently released lifers has been minuscule”); *infra* Section II.E (discussing the 3-4% recidivist rate of Unger population, all convicted of violent crimes).

³¹² Comments of Kate Mogulescu, Panel 3, *supra* note 254.

people who everyone can agree shouldn't" get out.³¹³ Professor Goodmark said this issue evoked Ruth Wilson Gilmore's abolitionist position, and the tensions between the arguments of prison reformers and abolitionists.³¹⁴ This is an issue for which "we need to have eyes wide open," Professor Mogulescu said, and the panelists agreed.³¹⁵

D. Panel 4: Race and Over-Incarceration: Overcoming Racism to Decarcerate

Professor Michael Pinard ("Professor Pinard") moderated this panel.³¹⁶ Panelists were Professor Vincent Southerland ("Professor Southerland"),³¹⁷ Professor Kristin Henning ("Professor Henning"),³¹⁸ and Professor Olinda Moyd ("Professor Moyd").³¹⁹

Professor Pinard began by commenting on Maryland's shocking Black incarceration rate. Maryland "incarcerates the greatest percentage of its Black population than any other state in this country. We are the very best at being the absolute worst in this regard."³²⁰ "[As of] July 2018, more than 70 percent of Maryland's prison population was Black,

³¹³ Comments of Leigh Goodmark, Panel 3, *supra* note 254. It may be relevant to this discussion that New York has not enacted a broader Second Look law, either before or after enacting DVSJA. Comments of Kate Mogulescu, Panel 3, *supra* note 254.

³¹⁴ Comments of Leigh Goodmark, Panel 3, *supra* note 254. Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (April 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html>. See also, Rachel E. Barkow, *Promise Or Peril?: The Political Path Of Prison Abolition In America*, 58 WAKE FOREST L. REV. 245 (2023) for the abolitionist/reformer debate.

³¹⁵ Comments of Kate Mogulescu, Panel 3, *supra* note 254.

³¹⁶ Francis & Harriet Iglehart Professor of Law, faculty director of the Gibson-Banks Center for Race and the Law, and Director of the Youth, Education, and Justice Clinic at the University of Maryland Francis King Carey School of Law. *Michael Pinard*, UNIV. OF MD. FRANCIS KING CAREY SCH. OF L., <https://www.law.umaryland.edu/faculty—research/directory/profile/index.php?id=093> (last visited Feb. 16, 2024).

³¹⁷ Assistant Professor of Clinical Law for the Criminal Defense and Reentry Clinic, and the Co-Faculty Director of the Center on Race, Inequality, and the Law at New York University School of Law. *Vincent M. Southerland*, N.Y. UNIV. SCH. OF L., <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=46246> (last visited Oct. 14, 2023).

³¹⁸ The Blume Professor of Law and Director of the Juvenile Justice Clinic and Initiative at Georgetown University Law Center. *Kristin Nicole Henning*, GEO. UNIV. L. CTR., <https://www.law.georgetown.edu/faculty/kristin-nicole-henning/> (last visited Dec. 26, 2023).

³¹⁹ Distinguished Practitioner-in-Residence and Director of the Re-Rentry Clinic at American University Washington College of Law, former adjunct Instructor at Howard University School of Law, and former Chief Attorney of the Parole Division at the D.C. Office of Public Defender. *Olinda Moyd*, AM. U. WASH. COLL. OF L., <https://www.wcl.american.edu/community/faculty/profile/moyd/bio> (last visited Oct. 14, 2023).

³²⁰ Comments of Michael Pinard, Panel 4, *supra* note 13.

compared to 31 percent of the state population,” the worst rate in the country.³²¹ “It gets worse,” Professor Pinard said, referring to racialized extreme sentencing.³²² “Nearly eight in ten people who were sentenced as emerging adults and have served ten or more years in a Maryland prison are Black. This [again] is the highest rate of any state in the country.”³²³ Professor Pinard added: “We cannot leave children out. We charge more Black children in adult court than any state outside of Alabama. Over 80 percent of children charged as adults in Maryland are Black.”³²⁴

The panelists began by discussing what they understood “decarceration” to mean, and within this topic offered suggestions both about how to reduce incarceration, including by preventing it, and why the incarceration data is so racially disproportionate.

Professor Southerland, who teaches in N.Y.U.’s Criminal Defense and Reentry Clinic and co-directs the school’s Center on Race, Inequality, and the Law, said decarceration is more than its “technical definition” of getting and keeping people out of prison.³²⁵ In this narrow sense, we should be “supporting people who are seeking release” and

³²¹ JUST. POL’Y INST., RETHINKING APPROACHES TO OVER INCARCERATION OF BLACK YOUNG ADULTS IN MARYLAND, 3 (2019), https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/Rethinking_Approaches_to_Over_Incarceration_MD.pdf. Contributing factors are “[p]unitive sentencing policies and restrictive parole release practices in Maryland,” which “have resulted in a deeply racially disproportionate criminal justice system that is acutely impacting those serving the longest prison terms.” *Id.* The extraordinary disparities exist “despite a declining prison population and state leadership in Maryland having undertaken criminal justice reform in recent years.” *Id.* “These disparities are rooted in decades of unbalanced policies that disproportionately over-police under-resourced communities of color, and a criminal justice system focused on punitive sentencing and parole practices.” *Id.* Another aspect of racialized incarceration is the national pattern of building prisons in rural predominantly white areas, guaranteeing a prison staff that is disproportionately white. PETER WAGNER & DANIEL KOPF, PRISON POL’Y INITIATIVE, THE RACIAL GEOGRAPHY OF MASS INCARCERATION (2015), <https://www.prisonpolicy.org/racialgeography/report.html>. To a great extent, “mass incarceration is about sending Blacks and Latinos to communities with very different racial/ethnic make-ups than their own.” *Id.* This means not only that many “states struggle to hire sufficient Black and Latino correctional staff,” but also that in effect, there is “prison gerrymandering — the practice of using U.S. Census counts of incarcerated people as residents of the prison location for legislative districting purposes,” which has “a disproportionate racial impact in particular states[.]” *Id.*

³²² Comments of Michael Pinard, Panel 4, *supra* note 13.

³²³ Comments of Michael Pinard, Panel 4, *supra* note 13. See JUST. POL’Y INST., *supra* note 321, at 4.

³²⁴ Comments of Michael Pinard, Panel 4, *supra* note 13. See Rachel Baye, *Maryland Tries Hundreds of Juvenile Defendants as Adults. One Annapolis Bill Tries to Change That*, WYPR - 88.1 FM BALT. (Feb. 17, 2023, 5:12 PM), <https://www.wypr.org/wypr-news/2023-02-17/maryland-tries-hundreds-of-juvenile-defendants-as-adults-one-annapolis-bill-tries-to-change-that>.

³²⁵ Comments of Vincent Southerland, Panel 4, *supra* note 13.

have been released.³²⁶ He said a broader approach would be to help people “avoid the clutches of the criminal legal system in the first place.”³²⁷ To think about decarceration, one must have “a rigorous understanding of the ways in which racial inequality is in the fabric of this country and casts a shadow over every institution that touches our lives,” he said.³²⁸ We also need “to think about the media hysteria and the political pandering” that underly much of criminal law and many prison policies.³²⁹

Professor Henning, who directs Georgetown’s Juvenile Justice Clinic and Initiative, focused on children. “It is about removing children, not only from youth detention facilities but also from adult jails and adult prisons and making sure they have an opportunity to stay where they belong in schools, in parks, in recreation,” or, when necessary to “address the issues that allegedly lead them into the legal system,” mental health programs and facilities.³³⁰

Professor Henning shared Professor Southerland’s view that we overuse the criminal legal system. We need to “relinquish our overreliance on traditional law enforcement strategies for everything, from public safety to getting my cat out of the tree to having a mental health or drug overdose intervention.”³³¹ Part of this, is to “push back” on the reliance “on punishment and control to raise children, to make sure children come to school on time, to make sure children dress appropriately for school, to make sure children do all the things that we want them to do to be productive adults.”³³² She added that, “we let white kids be kids, right? To experiment, test boundaries and do what they need to do to become these courageous, thoughtful adults who’ve experimented and made mistakes and learned from those mistakes.”³³³ But, “with Black kids, we regulate [them] from the first day pretty much.”³³⁴ “It is just so incredibly important to let Black kids just be kids, Brown kids to just be kids.”³³⁵

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ Comments of Kristin Henning, Panel 4, *supra* note 13. Professor Henning expounds on these ideas in KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* (2021).

³³¹ Comments of Kristin Henning, Panel 4, *supra* note 13.

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

Professor Henning added that “whenever I talk about the arrest, prosecution, and incarceration of children, people really assume that I must be talking about serious violent offenses, but the data is absolutely clear that very few children of any race, in any class, are engaged in the type of violent crimes that we fear most,” such as, “carjackings, gun crimes, and homicide.”³³⁶ “The reality is juvenile courts across the country are populated by children who are engaged in behaviors . . . consistent with all of the key features of normal adolescence.”³³⁷ As neuroscience explains, teenagers are “impulsive,” “boundary-testers,” subject to “peer group pressures,” “reactive,” and emotional.”³³⁸

We need to “decriminalize normal adolescent behaviors,” Henning said. For example, “imposing school discipline for children, for Black girls in particular, who wear [their] hair in a certain way,” or “defining ‘talking back’ as being threatening and aggressive when it involves Black and Brown children,” or allowing criminal prosecutions “for the basic school fight.”³³⁹ When “Black and Brown children do commit serious offenses, we automatically treat them as if they are beyond redemption. [They] don’t get the mitigating benefits warranted by the adolescent developmental research.”³⁴⁰

Professor Moyd, Distinguished Practitioner In Residence at Washington College of Law and Director of the Decarceration and Re-Entry Clinic at the American University Washington College of Law, said, “for me, decarceration is opening the prison doors and releasing” many prisoners.³⁴¹ In this country, “it is so easy to walk into the prison door that’s wide open, but the door to get out barely squeaks open, and that certainly needs to change.”³⁴² She agreed that “we need to

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.* One instructive example is to compare the treatment of white Kyle Rittenhouse, *id.* who killed two protestors and wounded a third with a semi-automatic rifle. Nathan Lane, *Vigilante Killer or Scared Kid? Two Pictures of Rittenhouse at Wisconsin Trial*, REUTERS (November 2, 2021, 9:43 PM) <https://www.reuters.com/world/us/opening-arguments-set-trial-us-teen-charged-fatal-protest-shootings-2021-11-02/>. In a Reuters’ article titled “Vigilante killer or scared kid?,” the reporter said: “Jurors heard two very different portrayals of U.S. teenager Kyle Rittenhouse on Tuesday as prosecutors described him as a vigilante . . . and defense attorneys depicted him as a scared kid who protected himself from a mob.” *Id.* The jury bought the “scared kid” version, acquitting him of all charges. Nathan Layne, *Kyle Rittenhouse Found Not Guilty of All Charges in Wisconsin Murder Trial*, REUTERS (Nov. 20, 2021, 1:43 AM), <https://www.reuters.com/world/us/jury-rittenhouse-murder-trial-deliberate-fourth-day-2021-11-19/>.

³⁴¹ Comments of Olinda Moyd, Panel 4, *supra* note 13.

³⁴² *Id.* See generally, Olinda Moyd, *Racial Disparities Inherent in America’s Fragmented Parole System*, 36 CRIM. JUST. 6 (2021).

discontinue our overuse of incarceration.”³⁴³ “Incarceration should be narrowly tailored to serve a specific goal, and once that goal is served, then the person should be released from incarceration.”³⁴⁴

A 2021 national assessment of different types of recent justice reform initiatives that limit, or seek to limit, the reaches of the criminal legal system and of prisons, indicates that many in the public share the speakers’ views in these respects.³⁴⁵ The goal of one set of reforms is to “[e]liminat[e] racial disparities across the justice system,” with the effect of limiting the reach of the criminal system.³⁴⁶

[These] jurisdictions are directly confronting racial disparities in policing by calling for an end to practices that target communities of color, such as stop and frisk. And importantly, policymakers are looking upstream to disrupt systems that contribute to disparities within the justice system. Many localities are starting to remove police officers from schools in an effort to disrupt the school-to-prison pipeline—the practice of pushing students out of educational systems and into the justice system, which disproportionately criminalizes young people of color for disciplinary violations at school.³⁴⁷

Unfortunately, as the panelists discussed, there are many more regressive than progressive laws. Professor Pinard pointed out that in

³⁴³ Comments of Olinda Moyd, Panel 4, *supra* note 13.

³⁴⁴ *Id.*

³⁴⁵ Kenny Lo et al., *5 Discussions That Shaped the Justice Reform Movement in 2020*, CTR FOR AM. PROGRESS (Mar. 18, 2021), <https://www.americanprogress.org/article/5-discussions-shaped-justice-reform-movement-2020/>.

³⁴⁶ *Id.*

³⁴⁷ *Id.* The other four sets of reform initiatives were: (1) “[i]nvesting in safety beyond policing,” which means “[i]nvestments in community-building resources—including high-quality health care, child care and education, access to affordable housing, and other supportive services—are integral to building safer and stronger neighborhoods”; (2) “[p]romoting police accountability,” including by “establishing use-of-force guidance to proactively prevent misconduct and creating processes to hold officers accountable when misconduct occurs”; (3) “[e]nding unjust punishments,” including by “renounc[ing] the war on drugs, a punitive policy agenda that has exacerbated mass incarceration by imposing excessive punishments for substance use, particularly for communities of color”; and (4) “[r]emoving barriers facing individuals affected by the justice system,” which includes “expanding reentry services and voting rights to issuing pardons and sealing old criminal records to provide people with a clean slate.” *Id.*

Maryland, disturbing a school is a crime,³⁴⁸ and advocates have not been able to persuade the legislature to repeal it.

The conversation then turned to the use of technologies in the criminal system and their racial effects. Professor Southerland has done extensive work in this field.³⁴⁹ Several of these tools are predictive, for example, predicting behaviors of those released pre-trial³⁵⁰ or after incarceration on a specific term-of-years sentence.³⁵¹

Other tools are for surveillance.³⁵² These are tools of racial control, Professor Southerland said, tracing one example back to eighteenth century “lantern laws in New York City.”³⁵³ The lantern laws, he said, “required a person of color, if they were not in the company of a white person after dark, to carry with them a lantern so that people in the streets—police, and just regular folks walking around—would be able to know there’s a Black person here.”³⁵⁴ The

³⁴⁸ Comments of Michael Pinard, Panel 4, *supra* note 13. See MD. CODE ANN., EDUC. § 26-101 (West 2019). Laws like this, and the assignment of police officers to schools, “contribute to the ongoing criminalization of Black children and the persistence of the school-to-prison pipeline,” and have both racially discriminatory histories and purposes. Patrick Cremin, *School Policing was Designed to Criminalize Black Students. We Must Follow Black Voices Calling for its Abolition*, HARV. CR-CL L. REV. (July 8, 2020), <https://journals.law.harvard.edu/crcl/school-policing-was-designed-to-criminalize-black-students-we-must-follow-black-voices-calling-for-its-abolition>.

The use of police in schools originated during the 1950s when white communities feared that Black children would disrupt newly-integrated schools. Subsequently, Black students were depicted as ‘dangerous delinquents’ by the New York City Police Department. In Oakland, school policing was used to monitor and contain the Black Power movement and the Black Panther Party. Increased police presence in schools, and racialized associations between Black students and delinquency, linked student behavior with the criminal justice system. Today, the use of ‘school resource officers’ is informed by these deeply rooted anti-Black policing practices.

Id.

³⁴⁹ See, e.g., Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in The Criminal Legal System*, 80 MD. L. REV. 487 (2021).

³⁵⁰ Examples are risk-assessment algorithms like PSA (Public Safety Assessment). *Id.* at 516.

³⁵¹ Comments of Vincent Southerland, Panel 4, *supra* note 13.

³⁵² Southerland, *supra* note 349, at 497. Examples include helicopters, facial recognition technology, automatic license plate readers, cell phone tracking devices, closed circuit television cameras, and “ShotSpotter” technology (designed to detect gunshots and dispatch police). ACLU, COMMUNITY CONTROL OVER POLICE SURVEILLANCE: TECHNOLOGY 101, https://www.aclu.org/sites/default/files/field_document/tc2-technology101-primer-v02.pdf (last visited Oct. 17, 2023).

³⁵³ Comments of Vincent Southerland, Panel 4, *supra* note 13.

³⁵⁴ *Id.*

white person could then “interrogate whether that person was free or was in the place that they should be.”³⁵⁵

Today’s “predictive policing tools” also are like the lantern laws, Professor Southerland said. They determine how to allocate “police forces in particular communities.”³⁵⁶ The data they rely upon in an area, like the arrest and crime rates, types of crimes, locations of crimes, times of crimes, and past police conduct and actions, are “completely tainted by racism.”³⁵⁷ They “drive more and more police into particular communities,” thereby “opening the pathway, the doorway, to incarceration.”³⁵⁸ When other “data points,” like “housing, employment, education, and family stability, are touched by race and inequality,” the instruments will create even more “tainted predictions and forecasts about people,” leading to “terrible decisions by judges, prosecutors and other law enforcement actors informed by these types of tools.”³⁵⁹

The challenges are to “stop the use of these tools, resist them as much as possible, or in some instances, try and figure out ways to intervene and hopefully take advantage of them and use them to your advantage.”³⁶⁰

The panel then turned to the “back end of the system,” parole. Professor Moyd said that, although getting the Maryland governor out

³⁵⁵ *Id.* Others have connected those old laws to today’s surveillance technology:

In the 18th century, lantern laws in New York City demanded that Black, mixed-race, and Indigenous enslaved people carry candle lanterns with them if they walked around the city after sunset and without the company of a white person. Over the last few years, there has been a resurgence of this colonialist practice where minority communities are constantly being targeted and tracked through the use of technology, rather than a lantern.

Alba Ribera Martínez, *The New Lantern Laws: The Mainstream Bias of Facial Recognition Technology*, THE DIGIT. CONSTITUTIONALIST (July 7, 2022), <https://digi-con.org/the-new-lantern-laws>.

³⁵⁶ Comments of Vincent Southerland, Panel 4, *supra* note 13.

³⁵⁷ *Id.*

³⁵⁸ *Id.* Others agree that there is:

the possibility that algorithms could reinforce racial biases in the criminal justice system. These concerns, combined with independent audits, have led leading police departments, including in Los Angeles and Chicago, to phase out or significantly reduce the use of their predictive policing programs after auditing them.

Tim Lau, *Predictive Policing Explained: Attempts to Forecast Crime with Algorithmic Techniques Could Reinforce Existing Racial Biases in the Criminal Justice System*, BRENNAN CTR. FOR JUST. (April 1, 2020), <https://www.brennancenter.org/our-work/research-reports/predictive-policing-explained>.

³⁵⁹ Comments of Vincent Southerland, Panel 4, *supra* note 13.

³⁶⁰ *Id.*

of the parole system was “great,”³⁶¹ the parole system in Maryland and elsewhere “is broken.”³⁶² She compares her clients on parole today to freed slaves carrying their “freedom papers” to prove their manumission.³⁶³ Her clients tell her when “the cops are called,” they will ask a group “who is on papers” as a way of seeing who is on parole and who “has been in trouble before.”³⁶⁴

The parole risk assessment tools are “inherently racially biased,” Professor Moyd said.³⁶⁵ One data point is “how many contacts you have had with law enforcement,” but her clients were raised in neighborhoods that were overpoliced, so it was inevitable that they would have many prior contacts with police.³⁶⁶

The parole tribunal in Maryland also is weighted heavily in favor of law enforcement. In Maryland, six of ten commissioners have prior law enforcement experience, Professor Moyd said.³⁶⁷ The double effect on mass incarceration is that fewer incarcerated persons than are ready to leave prisons are let out, and more of those released on parole (and probation) are returned for violations.³⁶⁸ “[T]he tripwires . . . leading to incarceration . . . include burdensome conditions imposed without providing resources; violations for minor slip-ups; lengthy incarceration while alleged violations are adjudicated; flawed procedures; and disproportionately harsh sentences for violations.”³⁶⁹

Parole practices lead to despair and damage incarcerated people, their families, and their communities, Professor Moyd said.³⁷⁰ Being denied parole “over and over” and being told in order to get paroled “you need to get your GED or a certain program,” but they “are not offered at your facility,” take a toll on prisoners and their families.³⁷¹

³⁶¹ Comments of Olinda Moyd, Panel 4, *supra* note 13. See Ovetta Wiggins & Rebecca Tan, *Maryland Revokes Governor’s Authority to Overturn Parole Decisions Involving People Serving Life Terms*, WASH. POST (December 7, 2021, 8:28 PM), <https://www.washingtonpost.com/dc-md-va/2021/12/07/maryland-parole-governor-criminal-justice-prison/>.

³⁶² Comments of Olinda Moyd, Panel 4, *supra* note 13.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.* The new more dynamic risk assessment tool in Maryland is an improvement over the static one parole authorities used for years. See generally *History of Risk Assessment*, BUREAU OF JUST. ASSISTANCE, <https://bja.ojp.gov/program/psrac/basics/history-risk-assessment> (last visited Sept. 22, 2023).

³⁶⁶ Comments of Olinda Moyd, Panel 4, *supra* note 13.

³⁶⁷ *Id.*

³⁶⁸ See generally ALLISON FRANKEL ET AL., ACLU & HUM. RTS. WATCH, *REVOKED: HOW PROBATION AND PAROLE FEED MASS INCARCERATION IN THE UNITED STATES 2-7* (2020).

³⁶⁹ *Id.* at 2.

³⁷⁰ Comments of Olinda Moyd, Panel 4, *supra* note 13.

³⁷¹ *Id.*

These denials are aggravated by “the costs of prison phone calls [and] the cost of going to visit loved ones,” which “are borne primarily by communities of color.”³⁷²

Revising criminal law also can prevent unnecessary and unfair incarceration. This issue arose when Professor Pinard asked Professor Henning to talk about her work around “the reasonable Black child and the Fourth Amendment” and “its implications for decarceration.”³⁷³ Henning responded that “the legal standards” in criminal law are “pathways to incarceration,” and “the reasonable person standard” is a particularly powerful pathway because “so much of the criminal law is rooted in” this standard.³⁷⁴ The reasonable person in the standard is “a reasonably well educated, adult white male” because that is who writes most Fourth Amendment opinions.³⁷⁵ “This reasonable person framework that operates in so much of criminal law,” however, “fails to take into account racial bias, fails to take into account the traumatic effects of policing in communities of color, and fails to take into account everything that we know about adolescent development.”³⁷⁶

For example, the factors that police use to determine whether there is “reasonable articulable suspicion” that someone is committing a crime or has a weapon include whether someone looks anxious, is nervous, is fidgeting, or is avoiding eye contact.³⁷⁷ If an innocent adult is likely to have some of these mannerisms when confronted by a police officer, “how about a Black child” who is innocent?³⁷⁸ Maybe that child “was shaking uncontrollably because they live in Washington, D.C. and Black children have been shot and killed by police not just in D.C. but across the country.”³⁷⁹

The racially flawed “reasonable person” standard not only infects Fourth Amendment law; it significantly undermines the fairness of determinations about the mens rea requirements for crimes. “Is it really an assault on a police officer, or is it self-defense,” when a child’s actions “arise out of that extreme fear [of police] that Black and Brown children have? Is it resisting arrest when I lock up my body and refuse

³⁷² *Id.*

³⁷³ Comments of Michael Pinard, Panel 4, *supra* note 13. Pinard was referring to Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1529-33 (2018).

³⁷⁴ Comments of Kristin Henning, Panel 4, *supra* note 13.

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.*

to cooperate?”³⁸⁰ Professor Henning asked: “What would a reasonable Black child standard look like throughout all the stages of the juvenile and criminal legal system?”³⁸¹

In this panel, in other panels, and in subsequent audience comments, the abolitionist issue arose; faculty noted a generational gap, with several students more supportive of abolition than faculty. There was a consensus view that faculty and students in clinics doing decarceration work should reserve time to discuss and analyze the pros and cons of the abolitionist position.³⁸²

At Professor Pinard’s invitation, Hernandez Stroud, from the Brennan Center, ended the panel discussions by describing the just-released “Proposal to Reduce Unnecessary Incarceration.”

. . . [I]n August 2022, as part of his 2023 budget proposal to Congress, President Biden unveiled a grant program called Accelerating Justice System Reform, which would dedicate \$15 billion over ten years for

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² In the introduction to a recent article, *Promise Or Peril?: The Political Path Of Prison Abolition In America*, Professor Rachel E. Barkow identifies the competing arguments. Barkow, *supra* note 314, at 245-47. She asks “whether prison abolition as a movement will, on net, lead to more productive changes to criminal justice punishment practices or instead produce a backlash that hinders reform efforts.” *Id.* She says, “[t]he most optimistic take is that the movement could improve the conversation around crime policy to include bolder initiatives that dislodge the central role of prisons and punishment and shift attention to root causes of harm.” *Id.* This might encourage mainstream thinkers “to embrace much broader downsizing of prisons and investment in communities than would take place without the abolitionist challenge. Moreover, the call for abolition is just the kind of simple, powerful rhetorical move that draws people to embrace it and helps mobilize grassroots efforts for change.” *Id.* On the other hand, for two reasons, “there is the possibility that calls for abolition could lead to more harms than they prevent.” *Id.* First, “there is the risk that approach will frighten segments of the public who would otherwise support decarceration, even radical decarceration, but are not prepared to rule it out entirely.” *Id.* This might lead elected officials and candidates for office “to avoid being associated with an abolitionist framing that is politically unpopular and resist reforms they would otherwise support.” *Id.* Barkow says, “[w]e have seen just such a dynamic with abolitionist calls to Defund the Police.” *Id.* Second, “an abolitionist framing may ultimately produce more harm than good [because] some who seek abolition often use that goal as the yardstick for deciding what policy changes to support. They reject what they call ‘reformist reforms’ that do not contribute to dismantling the existing legal order.” *Id.* Thus, “many abolitionists reject calls to invest in improvements to prisons or put in place greater staffing, even if doing so would improve the lives of currently incarcerated people, on the view that this additional funding ultimately expands the role of prisons in society . . .” *Id.* Barkow also argues that some abolitionists “have also rejected laws that would release certain groups of incarcerated people—such as those serving offenses that do not involve violence—because of a concern that those laws exclude others.” *Id.* The ultimate concern is that “[t]he abolitionist framing . . . runs the risk of sacrificing too many reforms that would benefit people currently suffering from incarceration for a utopia that will ultimately not materialize.” *Id.*

jurisdictions to implement crime prevention and public health approaches to public safety. Building on this momentum, the Brennan Center for Justice calls on Congress to enact a new, \$1 billion federal funding program, called the Public Safety and Prison Reduction Act, to channel money to states with the goal of reducing unnecessary incarceration while promoting humane and fair criminal-justice policies that preserve public safety. The proposal, based on a previous Brennan Center policy solution — the Reverse Mass Incarceration Act — was crafted in consultation with a variety of stakeholders, including formerly incarcerated individuals.³⁸³

In sum, it is clear that overincarceration is driven by pervasive racism, and to significantly decarcerate, we will have to confront this honestly. The panelists offered examples of creative reforms, including in education, policing, juvenile and criminal law and processes, and parole, that are good steps in the right direction.

E. Lunch Panel: The Inspiring Unger Story Told by Four Formerly Incarcerated Leaders

Professor Michael Millemann (“Professor Millemann”) moderated this panel.³⁸⁴ The panelists were Walter Lomax (“Mr.

³⁸³ Hernandez D. Stroud, Lauren-Brooke Eisen and Ram Subramanian, *A Proposal to Reduce Unnecessary Incarceration*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/policy-solutions/proposal-reduce-unnecessary-incarceration#:~:text=Building%20on%20this%20momentum%2C%20the,fair%20criminal%2Djustice%20policies%20that> (last visited March 14, 2023).

³⁸⁴ Panel Recording: Decarceration: The Role of Law School Clinics, Luncheon Panel – The Inspiring Unger Story told by four formerly incarcerated leaders, held by the University of Maryland Journal of Race, Religion, Gender and Class and University of Maryland Francis King Carey School of Law Clinical Law Program (Mar. 31, 2023) (on file with school Media Services). When speakers are quoted, they were given a chance to make non-substantive edits after the Symposium. Also, ellipses are not used to show deletions of excess text, and the words in recordings were sometimes not entirely clear. The substance of the quotes, and the words as nearly as possible, are that of the attributed speaker. Professor Millemann is the Jacob A. France Professor of Law, and Director of the Post-conviction and Sentencing/Legal Theory and Practice course at the University of Maryland Francis King Carey School of Law. *Michael Millemann*, UNIV. OF MD. FRANCIS KING CAREY SCH. OF L., <https://www.law.umaryland.edu/faculty—research/directory/profile/index.php?id=082#:~:text=Michael%20Millemann%20graduated%20from%20Dartmouth,which%20strongly%20shaped%20his%20career> (last visited Dec. 18, 2023).

Lomax”),³⁸⁵ Karriem El-Amin (“Mr. El-Amin”),³⁸⁶ Kareem Hasan (“Mr. Hasan”),³⁸⁷ and Etta Myers (“Ms. Myers”).³⁸⁸

In way of background, the Supreme Court of Maryland³⁸⁹ decided *Unger v. State* in 2012.³⁹⁰ “As the result of *Unger* and two subsequent decisions, all Maryland prisoners who were convicted by juries before 1981 were entitled to new trials.”³⁹¹ This was so “because, as grossly unfair and absurd as it may seem today, prior to 1981 State law required judges in criminal cases to instruct juries that they—*the juries*—had the ultimate responsibility *to determine the law*.”³⁹² Rather than telling jurors that the instructions were binding on them, “judges told jurors that what they—*the judges*—said about the law was *advisory only*. This instructional error was not just an erroneous application of law; it nullified the rule of law itself.”³⁹³

“What followed the *Unger* decision was one of the most interesting and important unplanned criminal justice experiments in Maryland and national history.”³⁹⁴ Rather than retrying most of these old cases, prosecutors and defense counsel negotiated agreements that resulted in the releases of “200 of these older prisoners . . . on probation. The great majority were serving life with parole sentences.”³⁹⁵ The group has been extraordinarily successful. “The vast majority of the released prisoners, 97%, have been successful, defined by not being reincarcerated.”³⁹⁶

It is important to note that “the 200 who were released had not been approved individually by a parole authority as ‘safe’ to release.

³⁸⁵ Executive Director of the Maryland Restorative Justice Initiative, a criminal justice reform leader, and a leader of the Unger reentry community. Maryland Restorative Justice Initiative - Mission Statement, MARYLAND RESTORATIVE JUST. INITIATIVE, https://www.mandalaenterprise.org/maryland_restorative_justice_initiative (last visited Dec. 18, 2023).

³⁸⁶ Career Coach at Living Classrooms and a leader of the Unger reentry community. Comments of Michael Millemann, Luncheon Panel, *supra* note 384.

³⁸⁷ Community leader, juvenile counselor, and a leader of the Unger reentry community. Comments of Michael Millemann, Luncheon Panel, *supra* note 384.

³⁸⁸ Community leader, a leader in criminal justice reform, and a leader of the Unger reentry community. Comments of Michael Millemann, Luncheon Panel, *supra* note 384.

³⁸⁹ *See supra* note 75.

³⁹⁰ 48 A.3d 242 (Md. 2012) (applying retroactively a 1980 decision invalidating a jury instruction given in all criminal trials before the 1980 decision).

³⁹¹ Millemann et al., *Digging Them Out Alive*, *supra* note 182, at 367-68.

³⁹² *Id.* at 368 (emphasis in original).

³⁹³ *Id.* (emphasis in original).

³⁹⁴ Michael Millemann, et al., *Releasing Older Prisoners Convicted of Violent Crimes*, *supra* note 40, at 186.

³⁹⁵ *Id.*

³⁹⁶ *Id.*

Rather, they were 84% of *all* state prisoners in Maryland convicted by juries of murder, rape, and other violent crimes before 1981, some of whom the parole commission had recommended for parole, some it had not.”³⁹⁷ Maryland’s governors had refused to approve any of the commission’s parole-release recommendations for the Unger Group.³⁹⁸

It might help to create a visual picture to put this in perspective. Imagine a prison, any prison in the country, that has created a special wing with multiple tiers in which it confines all of its prisoners who have been convicted of committing murder or rape, and are serving life or *de facto* life sentences. To qualify for this wing, a prisoner also must be at least fifty-one years old and have served at least thirty-three years.³⁹⁹ Now assume the warden walks down the tiers one day and opens 84 of every 100 cells on each tier, allowing the prisoners to go free. What would be the impact on public safety? The Unger experiment proves there would be virtually no negative effect. Indeed, it is likely, for reasons discussed *infra*, that the releases would *enhance* the public safety of some troubled communities.

Mr. Lomax was the first speaker. He was wrongly convicted of murder in 1968. In fact, he was innocent. It took him thirty-eight years

³⁹⁷ *Id.* (emphasis in original).

³⁹⁸ See Millemann, et al., *Digging Them Out Alive*, *supra* note 182 at 425-26.

The pathway to parole for lifers in Maryland in the 1960s, 70s, and 80s, was to move from maximum to medium to minimum security prisons. The last leg out was a successful period in work release . . . That all ended in 1993 when a lifer on work release killed a woman and himself. All prisoners on work release, including many of the 237 Unger prisoners, were immediately loaded on buses and shipped back to maximum security prisons, regardless of how well they were doing. Thereafter, they were made ineligible for minimum security and most prison programs. In 1995, Governor Paris [sic] Glendening announced to great fanfare that ‘life means life,’ failing to point out that life with the possibility of parole always meant there was a real possibility of parole. He rejected all of the recommendations by his Parole Commission that a lifer be paroled. Governor Martin O’Malley continued this policy during his two terms. This virtual end-of-parole-for-lifers policy was the major reason there were so many in the Unger group.

Id. Glendening later admitted his no parole policy was a “serious mistake,” saying: “I know now that my statement in 1995 that ‘life means life’ was completely wrong. It meant that people whose sentences promised a chance at parole were denied it for decades, regardless of how thoroughly they worked to redeem themselves and make amends to those they harmed.” Parris N. Glendening, *I Made a Serious Mistake as Maryland Governor. We Need Parole Reform*, WASH. POST (March 1, 2021, 1:36 PM), <https://www.washingtonpost.com/opinions/2021/03/01/i-made-serious-mistake-maryland-governor-we-need-parole-reform/>.

³⁹⁹ These are the characteristics of the youngest prisoner in the Unger group, Kareem Hasan, who was on the luncheon panel. “In 2012, on average, those in the Unger group were in their early sixties (fifty-two to eighty) and had been locked up for over thirty-five years (thirty-three to sixty).” Millemann, et al., *Digging Them Out Alive*, *supra* note 182, at 384.

in prison to gain his release, eight more years before his formal exoneration, and then five more years before the State awarded him approximately \$3,000,000 in “compensation” for his almost four decades of wrongful incarceration.⁴⁰⁰

Mr. Lomax was a leader of the Unger Group inside and continues to be a leader outside prison as well. During the Unger Project, he was the Executive Director of the Maryland Restorative Justice Initiative and chaired the Unger Project Advisory Committee, which had members from the various programs that helped provide reentry services to the Unger Group.

In discussing the success of the Unger Group, Mr. Lomax praised the social workers and social work students for their reentry and follow-up work with this group.⁴⁰¹

The members of the Unger group knew each other in prison and carried these relationships into free-world communities upon their releases. One of the many remarkable parts of this story is the way that, with Mr. Lomax’s leadership, the Unger group built an advocacy and support network from prison. Mr. Lomax explained: “while I was incarcerated, we organized the prisons. We had coordinators in every institution. They organized their family members and friends.”⁴⁰² Each year, they decided what prison reforms they would propose and lobbied in support of them in Annapolis, Maryland, the seat of Maryland’s Legislature.

“Every legislative session, we put together position statements and we would have every prisoner write every legislator in Annapolis,” Mr. Lomax said.⁴⁰³ We had the prisoners’ “family members and friends do the same.”⁴⁰⁴ He recalled, laughing, that once “I got a call from one of the chiefs of staff in Annapolis. He asked: ‘Can I speak to Mr. Turner-Bey? We got some information from him I want to ask him a question

⁴⁰⁰ Michael Millemann, Elliott Rauh, & Robert Bowie, Jr., *Teaching Professional Responsibility Through Theater*, 17 HASTINGS RACE & POVERTY L.J. 399, 413-15 (2020).

Mr. Lomax was convicted of a robbery murder during a crime wave in Baltimore—a time of widespread public anger and fear. The police predetermined that Mr. Lomax was guilty, supported that erroneous conclusion with suggestive cross-racial eyewitness identifications obtained in outrageous “en masse” line-ups, and concealed the extensive evidence of his innocence.

Id.

⁴⁰¹ Comments of Walter Lomax, Luncheon Panel, *supra* note 384. For more details on the work of the social workers and students, see Millemann, et al., *Digging Them Out Alive*, *supra* note 182.

⁴⁰² Comments of Walter Lomax, Luncheon Panel, *supra* note 384.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

about.”⁴⁰⁵ Mr. Lomax answered “Mr. Turner-Bey is in prison, and he can’t answer the phone right now.”⁴⁰⁶ “That’s how effective we were [at] organizing on the inside.”⁴⁰⁷

Mr. Lomax mentioned one of the most important reforms, taking the governor out of the parole process, and said “it took us almost thirty years to be successful. We got it done because we organized while we were on the inside.”⁴⁰⁸ Mr. Lomax said the Chairman of the Parole Commission recently had told him that since the new law, the Commission has paroled over twenty-five lifers.⁴⁰⁹

Talking about the successful lobbying efforts, Mr. Lomax said: “We weren’t confrontational. We always presented the facts. We were able to answer every question.”⁴¹⁰ Then, laughing again, he paused to praise the lobbying work of Professor Meadows and her students.⁴¹¹ He prefaced it with, “Everybody in here is over eighteen, right?”⁴¹² Describing a contentious legislator who was seeking to wring concessions out of Professor Meadows, Mr. Lomax said: “Lila lit his ass up. When she got finished, he didn’t ask any more questions.”⁴¹³

After making these points, Mr. Lomax introduced “one of our strongest, strongest inside coordinators,” now released, who was in the Symposium audience.⁴¹⁴

To support the developing Unger community, Mr. Lomax and the social workers and students helped to organize monthly meetings. “At these events, there is dinner, a time for fellowship (which social workers or students facilitate), and a different speaker each month who talks about an important post-release topic, for example, available services and jobs, use of Internet and online privacy, personal relationships, or budgeting.”⁴¹⁵ In some meetings, there is a “group activity like a writing workshop. Sometimes, there is a break-out session for family members and friends.”⁴¹⁶ Mr. Lomax “usually speaks at these events.”⁴¹⁷

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.* See *supra* note 105 for summary description of Professor Meadows.

⁴¹² Comments of Walter Lomax, Luncheon Panel, *supra* note 384.

⁴¹³ *Id.*

⁴¹⁴ *Id.* (referring to Anthony Mohammad).

⁴¹⁵ Millemann et al., *Digging Them Out Alive*, *supra* note 182, at 419-20.

⁴¹⁶ *Id.* at 420.

⁴¹⁷ *Id.*

“[T]hese events have been important to the successes of those released. They help to create a strong sense of community, reinforce the friendships many formed in prison, and provide a meeting place at which those released can offer assistance when needed to each other.”⁴¹⁸ In addition, “these events build a sense of responsibility among those released.”⁴¹⁹

The most important reason for the good success of the Unger Group, is the work members did in prison, over decades, to improve themselves and help others. The obstacles were overwhelming at times, with the most formidable being the steps governors took to destroy any hope this parole-eligible group had for parole.⁴²⁰ Each of the other three panelists told their distinctive stories, including how they had maintained, or tried to maintain, hope.

Ms. Myers, the only one of the 237 in the Unger Group who is a woman, was sixty-one years old when she was released, and had served thirty-six years of a life sentence for murder. “The state locked her up in 1977, when she was 22 and struggling with a heroin addiction.”⁴²¹ The State’s theory was that she gave some unidentified assistance to “her ex-boyfriend [who] shot and killed a man during a robbery. The only evidence linking her to the scene was the testimony of three men who thought they saw her walk away and who admitted to being on drugs that day. She swore she was never there.”⁴²²

“I didn’t know what I was going to do when I went to jail,” she said, “because I didn’t know what jail consisted of. I was twenty-two when I went into prison. However, I was a little girl. And I saw little girls coming into prison all the time.”⁴²³ As I got older, “I became a sister and a mother” to them, “and a brother and an uncle, and whatever it was that you needed. That’s who I became.”⁴²⁴

Initially, she focused on her education. “I didn’t have my GED. So, the first thing I thought to do was to get my GED. Then my A.A. degree, and then my bachelors. I thought education was the way.”⁴²⁵

As she developed a better sense of herself, she began helping others. She helped “the ladies that were there” to develop some sense of

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 424-26.

⁴²¹ Jason Fagone, *Meet the Ungers*, HUFFINGTON POST, <https://highline.huffingtonpost.com/articles/en/meet-the-ungers/> (last visited Dec. 18, 2023).

⁴²² *Id.*

⁴²³ Comments of Etta Myers, Luncheon Panel, *supra* note 384.

⁴²⁴ *Id.*

⁴²⁵ *Id.*

“direction in their life so that they could become better people. In the process, I was growing as a person as well, not knowing that I was growing or becoming better.”⁴²⁶

Ms. Myers was a leader, recognized as such by both prison staff and the women. “While I was in prison, I developed a lot of groups.”⁴²⁷ The warden had asked her to do something with “the youth, the gang members,” but she had not been familiar with gangs on the street.⁴²⁸ “We just had our little cliques to deal with in the neighborhood or in school. They weren’t violent. I didn’t know anything about that [gangs]. So, I didn’t know what I was going to do.”⁴²⁹

She talked the warden into giving her “a classroom,” in which she “invite[d] all these young ladies to be part of [her] group.”⁴³⁰ In that room, “they were allowed to be who they were, to cry, make jokes, cuss each other out.”⁴³¹ However, there were limits. “Anything that went on in that room, stayed in that room.”⁴³² The rule was that “whatever you do when you go out, you maintain the respect and the integrity that you had in that room. That starts to become who you are, and that’s how the change takes place.”⁴³³

Ms. Myers said she also devised a program for the lifers “because we didn’t have anything for lifers. We live in a different kind of world. We don’t know if we’re ever going to go home. So how do you keep hope alive? How do you get relaxed? It’s real hard to get relaxed in jail.”⁴³⁴

She talked the warden into another room, “a multi-purpose room, where you could watch a movie, cry, read a book, exercise, and communicate with other people. Or you could be alone by yourself.”⁴³⁵ She emphasized that it is “very rare that you could find time alone in jail. And that’s what we needed—some time away. When you were in the multipurpose room, you had an opportunity to become who it was that you were looking for.”⁴³⁶

A reporter who interviewed her summarized her prison life:

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.*

Myers spent 36 years in a women's prison. Over the decades she became a leader there, the co-founder of a therapy group and a manager in the sewing shop, a multimillion-dollar business that made flags and uniforms. The Maryland Parole Commission tried to release her twice, but governors blocked the commission both times.⁴³⁷

In the 1990s, she was moved into the community into a work-release program, which was the last step before parole. She lived quasi-independently, going out of the facility to work during the day and returning to the minimum-security unit at night. Then, the rug was pulled out from under her and many others. All the incarcerated folks in work release were loaded on buses and taken back to prisons because one of them had killed a woman and then himself. Lifers thereafter were ineligible for work release or even minimum security prisons. She would remain in prison until 2013.⁴³⁸

In May 2013, “when they came and told me that I was going home, I can’t tell you the joy, the unthinkable joy that I felt. I didn’t know how to prepare for going home Luckily for me, I was going to the Marion house, a place that accepted women, in a safe place,” and made you feel “that you could become whoever it was that you wanted to become.”⁴³⁹

Today, Ms. Myers is a criminal justice reformer and an “[Alternatives to Violence Project] facilitator.”⁴⁴⁰ In the latter respect, “I teach people how not to be violent.”⁴⁴¹ Here, in her own words, is a description of one of the most important reforms she worked on upon release:

The first step I took after my release was to fight for legislation that would restore the right to vote for 40,000 men and women on probation and parole in Maryland. We’ve already waited long enough to be a part of the American democracy, we’ve paid our dues, and we need our citizenship rights restored upon leaving prison. That is how a fair and democratic American society ought to work. On Thursday, a few weeks before next month’s

⁴³⁷ Fagone, *supra* note 421.

⁴³⁸ *Id.*; Millemann et al., *Digging Them Out Alive*, *supra* note 182, at 425.

⁴³⁹ Comments of Etta Myers, Luncheon Panel, *supra* note 384.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

Maryland primary, our right to vote will be restored. The Maryland House and Senate restored the right to vote for residents on probation and parole in a bill passed last year. Gov. Larry Hogan vetoed it last spring, but we didn't give in. I didn't wait all these years to come this close to voting, only to let a governor overrule the majority of the Maryland House and Senate. So, we organized — fellow ex-offenders, community groups, grassroots organizers and champions in the legislature — and state lawmakers overrode that veto last month.⁴⁴²

In 2016, Ms. Myers happily voted for the first time in her life.

Mr. El-Amin and his wife Joann are leaders of the Unger community, as well. He began his presentation by describing the terrifying experience of entering the Maryland Penitentiary on a life sentence for felony murder when he was nineteen years old.⁴⁴³ “I didn't even have a mustache.”⁴⁴⁴ This was before there were “computers, iPhones and microwaves,” he said.⁴⁴⁵ “I was in line with a whole lot of other guys. All of us were naked. All of us had to take a shower, three at a time.” There were “guys throwing white dust on you, to kill lice I think.”⁴⁴⁶

Another more experienced prisoner in the line “said, ‘Give me a bag. Put your feelings in this bag and then put the bag in the trash can.’ I didn't understand none of this stuff. I was still numb. I came to learn later on,” years later, “he meant we got no time for feelings in here.”⁴⁴⁷

⁴⁴² Etta Myers, *I'm Going to Cast My First Vote at 62*, USA TODAY (last updated March 9, 2016, 6:29 PM), <https://www.usatoday.com/story/opinion/2016/03/09/first-time-voter-felon-age-62-maryland-column/81535722/>.

⁴⁴³ Comments of Karriem El-Amin, Luncheon Panel, *supra* note 384. The Maryland Penitentiary was an antiquated (built in 1811), violent, dirty prison that finally was torn down in 2020. It was “a symbol of oppression. Of cells overcrowded with men, of violence and filth.” Tim Prudente, *With Regret and Satisfaction, Baltimore Watches the Infamous Maryland Penitentiary Tumble Down*, BALT. SUN (Sept. 25, 2020, 6:00 AM), <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-penitentiary-demolition-20200925-ui3vldqwnfbrtgodeqrhiexh7a-story.html>. In 1984, the Attorney General of Maryland, Stephen H. Sachs, called its punishment wing, “the South Wing,” “the innermost circle of hell.” *Report Calling Pen ‘Hell’ Leads to Ouster of Top Officials*, BALT. SUN (Nov. 18, 1984), <https://www.proquest.com/hnpbaltimoresun/docview/535729128/BCA0924227344B5APQ/12?accountid=37826>.

⁴⁴⁴ Comments of Karriem El-Amin, Luncheon Panel, *supra* note 384.

⁴⁴⁵ Comments of Karriem Saleem El-Amin, Luncheon Panel, *supra* note 384.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

Mr. El-Amin remembers being “groomed to be a criminal” by “so-called buddies, the hip guys, the con artists.”⁴⁴⁸ Fifteen years in, Mr. El-Amin had a parole hearing. Up to this time, “the only thing I spent my time doing was writing letters to [my] mom, [as] a grown man, telling [my] mom get me out of here.”⁴⁴⁹ His “buddies” gave him a sheet of paper which looked like a GED certificate, which Mr. El-Amin had not earned, and said “take this to the parole people; it will help you make parole.”⁴⁵⁰ When he handed it to the commissioners, one asked “What’s this white stuff on the paper?”⁴⁵¹ It was white-out, used to cover up the first names on the paper. “I must have been number three or number four, and I paid \$10 for it.”⁴⁵² The parole commissioner “just looked at me,” and asked: “You want us to take this, or you want to take it back?” I put it back in my folder. He said: “I am not going to waste your time, come back in five years.”⁴⁵³

Mr. El-Amin went back up for parole “at least nine times.”⁴⁵⁴ Although over four decades he had an array of extraordinary prison accomplishments and was recommended for parole by the Parole Commission, no governor ever approved his parole.⁴⁵⁵ He “ended up doing forty-two years, six months, and six days” before his Unger release.⁴⁵⁶

What helped Mr. El-Amin make better decisions was the friendship he developed with Mr. Lomax and other older prisoners, and the advice Mr. Lomax gave him, including to get rid of his old “friends” and to get an education. “So, I got my GED. Then I got an A.A. degree. Then a bachelor’s degree.”⁴⁵⁷ “I said man this stuff really works. I almost, for a minute, forgot that I was in prison.”⁴⁵⁸ He went on to compile an extraordinary prison record and was the leader in creating a prison organization called “Getting Something Done,” which raised money for charitable contributions. Recognizing these and other

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

accomplishments, in 2011, the Parole Commission recommended that the governor commute El Amin's life sentence. The governor refused.⁴⁵⁹

For Mr. El-Amin, "his conversion to Islam in 1980 was the motivating force that changed his life."⁴⁶⁰ In prison, he was "active in the Muslim community and affiliated with the Islamic Way Mosque in Baltimore City."⁴⁶¹ He taught "Arabic (which he learned while incarcerated)," gave "sermons," and acted "as a mentor to younger inmates."⁴⁶² Today, he is a leader in his Mosque.

He is, justifiably, proud of his job today, working for Living Classrooms, a reentry program, as a Career Coach.⁴⁶³ He stressed that this is "a paid training program, so participants get paid the \$13.50 per hour minimum wage" to learn.⁴⁶⁴

He ended his remarks with a "little piece of humor. I've been gone forty-two years."⁴⁶⁵ I know "nothing about electronics."⁴⁶⁶ I am on a "long transit bus. I hear a voice saying 'next stop Saratoga Street.' It is a man's voice, but it's a woman driving" the bus.⁴⁶⁷ When Mr. El Amin asked "one of the young guys" about this, the passenger says "Where are you from Homes? They got a satellite in the sky and it tells them by GPS which way to go."⁴⁶⁸ Mr. El-Amin responded with disbelief: "I know you making this stuff up."⁴⁶⁹ The world had changed a lot in forty years.

Mr. Hasan was born Karl Brown on September 4, 1958.⁴⁷⁰ He was arrested for murder when he was seventeen, convicted, and

⁴⁵⁹ *Id.* Settlement Agreement at 4, William Sylvester Collins, AKA Karriem Saleem El-Amin v. State of Maryland, Case Nos. 1616-17-18, 1620/1971 (Balt. City Cir. Ct., 2013) (on file with author). The Settlement Agreement recited other accomplishments, e.g., he was a member of the Alternatives to Violence Program ("AVP") and its affiliate, the Maryland Restorative Initiative, through which he worked within prisons and with schools, and communities to educate at-risk children on non-violent conflict management and constructive methods of dealing with anger. *Id.* He trained inmates to be counselors in the AVP and was the institutional director for the Restorative Initiative at Patuxent. *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *Id.*

⁴⁶³ Comments of Karriem El-Amin, Luncheon Panel, *supra* note 384.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ Settlement Agreement at 1, Karl D. Brown v. State of Maryland, Case Nos. 57614641-42 (Balt. City Cir. Ct., 2013) (on file with author).

sentenced to life in 1976.⁴⁷¹ He was in prison for thirty-seven years until released in 2013.⁴⁷² He and his wife, Annette, are leaders of the Unger community too.⁴⁷³

He said: “I was scared to death” when “I went to prison.”⁴⁷⁴ His reaction, like the initial reaction of many scared juveniles in adult prisons, was to talk and act tough. Mr. Hasan quickly got a disciplinary punishment of “ten years in lock up because [he] was fighting [with] correctional officers,” but a terrific incarcerated advocate got that reduced to “like three months.”⁴⁷⁵ This older, wise prisoner said to him “if you want to stay in prison, keep doing what you’re doing that’s on you; but if you want to go home, you got to change, educate yourself and get prepared” for the street.⁴⁷⁶ “Another leader in that world,” named Malik, reinforced this advice, and after Mr. Hasan enrolled in school, Malik would “check” Mr. Hasan’s “homework” to make sure he got it right.⁴⁷⁷

Mr. Hasan said when “I got my GED,” that was one of “my most proud” moments.⁴⁷⁸ When he told his mother, “she started crying.”⁴⁷⁹ “She was so happy for me because I did something positive.”⁴⁸⁰ He then realized that “all this time I have been hurting” her, and “now I feel what that love was about.”⁴⁸¹ He went on to take college courses and would earn “substantial credits towards a bachelor’s degree from Coppin State College.”⁴⁸² With the educational courses and counseling programs, he said “we turned the prison system into a college, a long-term college, but it was college.”⁴⁸³

⁴⁷¹ *The Right to a Fair Trial: Coming Home*, OSI BALT., <https://www.osibaltimore.org/2014/06/the-right-to-a-fair-trial-coming-home/> (last visited Dec. 18, 2023). ; WALTER LOMAX & SONIA KUMAR, ACLU OF MD., *STILL BLOCKING THE EXIT* 24 (2015), https://www.aclu-md.org/sites/default/files/field_documents/stillblockingtheexit_final.pdf.

⁴⁷² Comments of Kareem Hasan, Luncheon Panel, *supra* note 384.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* The wise prisoner was Robert Morgan, AKA “Manchild,” since released.

⁴⁷⁷ Comments of Kareem Hasan, Luncheon Panel, *supra* note 384.

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² Settlement Agreement at 3, *Karl D. Brown v. State of Maryland*, Case Nos. 57614641-42 (Balt. City Cir. Ct., 2013) (on file with author). Mr. Hassan earned a place on the Dean’s list in 1989. *Id.*

⁴⁸³ Comments of Kareem Hasan, Luncheon Panel, *supra* note 384; Andrea Cantora, *The Conversation: Congress Lifts Long-Standing Ban on Pell Grants to People in Prison*, PBS

Mr. Hasan described the joy he felt when he became a leader in developing in-prison programs for at-risk youth, a passion that he continues to find outlets for today.⁴⁸⁴ Through this program, he “met with and counseled many juveniles referred through several outside agencies, including the Baltimore County Alternative Sentencing Program, the Anne Arundel County Department of Juvenile Services, and middle and high schools.”⁴⁸⁵

He talked about the emotional roller coaster in trying to maintain hope and losing hope after Governor Parris Glendening made his “life means life” statement.⁴⁸⁶ “I was two weeks from prerelease and work release, and the parole board told me if you have work release at the time you come back up for parole, ‘we’re going to give you parole,’ and I’m two weeks from that.”⁴⁸⁷

In a moving story, he explained how Governor Glendening’s no-parole policy drained him of all hope and led him to divorce the wife he loved. “That’s when I divorced my wife.”⁴⁸⁸ He told her he was “never coming home,” “you have no future with me” and you should “go enjoy your life.”⁴⁸⁹ It was “one hundred percent,” he emphasized, that he was not “coming home.”⁴⁹⁰ “She fought me all the way,” but he got the divorce in the end.⁴⁹¹

NEWSHOUR (Dec. 29, 2020, 1:45 PM), <https://www.pbs.org/newshour/education/congress-lifts-long-standing-ban-on-pell-grants-to-people-in-prison>.

When Congress decided in 1994 to ban federal student aid for people behind bars, it was part of a wider political agenda to ‘get tough on crime’ – even though crime rates had begun to fall in the 1990s. . . . On Dec. 21, 2020, Congress moved to lift the long-standing ban on federal student aid – specifically, the Pell grant – for those who are incarcerated. The decision comes after a long push for prison reforms that included calls for a greater emphasis on rehabilitation, reducing prison populations and making prison sentences less harsh.

Id.

⁴⁸⁴ *Id.* He described “Project Choice,” a counseling program for youth referred by the Department of Juvenile Justice. “We [would] take the juvenile, give them a tour of the prison, and then sit down and have a counseling session with them.” *Id.*

⁴⁸⁵ Memorandum from Jerry Deise and Mike Millemann in support of Kareem Hasan’s Unger Release to Tony Gioia, ASA for Balt. City 1 (Mar. 26, 2013) (on file with author). This was but one set of Hasan’s many accomplishments in prison. *Id.* For example, he founded “Creating Responsible Youth,” a prevention and alternative program for juveniles; created another juvenile counseling program called “IMPACT;” and was trained as a mediator, in conflict resolution, and in alternatives to violence. *Id.*

⁴⁸⁶ Comments of Kareem Hasan, Luncheon Panel, *supra* note 384. *See also* Millemann et al., *Digging Them Out Alive*, *supra* note 182, at 425.

⁴⁸⁷ Comments of Kareem Hasan, Luncheon Panel, *supra* note 384.

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.*

Then he told the happy ending to the story. When he got out, they were remarried. (Annette was in the Symposium audience when he told this story and confirmed the extraordinary emotional turmoil and sadness this loss of hope caused and the happiness when they remarried.)

A reporter summarized a small part of what Mr. Hasan has done since his release in 2013:

Now 57, Hasan has achieved a lot in the short time he has been out: a steady job with the city of Baltimore, a car, a marriage to a registered nurse named Annette, a business plan for a youth mentoring nonprofit. He functions as a constant positive presence in the group, a connector and a joker. Just before his release, he called Annette and said, “Mmm-hmm. Mmm-hmmm. I hope your shit is in order. I’m coming home.” She was elated. “I’m at peace of mind with him, you know?” she says. “I never gave up on him.”⁴⁹²

This is one of many wonderful love stories in the lives of those in the Unger group.

Mr. Hasan also is the proud patriarch of an extended family and a neighborhood counselor and mediator. He told a story about a fourteen-year-old child selling drugs on the corner, whose functionally absentee parents are addicted. The child “feeds his little brother” and gets his sister “ready to go to school.”⁴⁹³ He “hustles all day to get his siblings something to eat.”⁴⁹⁴ “I go around my old neighborhood,” he says, and talk to another child selling drugs.⁴⁹⁵ Mr. Hasan tells both “you will end up in prison or in the grave yard, so it is up to you to change.”⁴⁹⁶

In 2016, Mr. Hasan described the core principles of the Unger community: an expectation of success and a shared responsibility for making sure everyone succeeds. “You don’t mess up, so you don’t mess up the chances of the guy behind you comin’ out . . . That’s one of the things we stress when we get everybody together. That’s why we try to grab them right when they come out the door.”⁴⁹⁷

⁴⁹² Fagone, *supra* note 421.

⁴⁹³ Comments of Kareem Hasan, Luncheon Panel, *supra* note 384.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*

“In this community . . . there are group dinners, bowling trips, and barbeques in local parks, support for friends at funerals, visits to those who are hospitalized, and support for those still inside.”⁴⁹⁸ The members of this community “answer late night phone calls of frustration and doubt; they share hardships and triumphs, and they hold each other accountable to their new freedom.”⁴⁹⁹ Some in the community “speak, write, and rally in support of proposed criminal justice reforms.”⁵⁰⁰

This community has a motto: “failure is not an option.”⁵⁰¹ Many in this community “seem to share a bond that’s reflected in language. Often they refer to themselves as part of ‘the Unger family,’ or sometimes just as ‘Ungers.’”⁵⁰² “They realize they’re a part of something bigger than themselves.”⁵⁰³

Many others have recognized that the Ungers are part of something bigger than themselves.⁵⁰⁴

III. CLINICS IN THIS FIELD PROVIDE RICH EDUCATION TO STUDENTS AND EXCELLENT LEGAL SERVICES TO CLIENTS

Throughout the panelists’ presentations, they discussed the important roles that clinics, clinical faculty and law students play in this field.⁵⁰⁵ Professor Mahadev noted one important role clinics can play: clinics can pick test cases and design law reform strategies in

⁴⁹⁸ Millemann, et al., *Releasing Older Prisoners Convicted of Violent Crimes*, *supra* note 40, at 221.

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.* at 221-22.

⁵⁰¹ *Id.* at 222.

⁵⁰² Fagone, *supra* note 421.

⁵⁰³ *Id.*

⁵⁰⁴ *See, e.g.*, JUST. POL’Y INSTITUTE, *THE UNGERS, 5 YEARS AND COUNTING: A CASE STUDY IN SAFELY REDUCING LONG PRISON TERMS AND SAVING TAXPAYER DOLLARS 3* (2018) (They proved that “[w]e can safely release people who have committed a serious, violent offense”); Baltimore Sun Editorial Board, *Maryland should release more elderly inmates*, BALT. SUN (updated July 23, 2019, 6:06 PM), <https://www.baltimoresun.com/opinion/editorial/bs-ed-0718-elderly-inmates-20190718-nkf7be7nfg5hlqqr7j2oj7xq-story.html> (recommending expansion of geriatric parole, saying “[s]tate officials don’t have to look far to see that releasing elderly patients is the right way to go. Just look at the Ungers . . .”); Jane Murphy, *Ending Mass Incarceration: Lessons from the ‘Ungers’*, BALT. SUN (updated June 7, 2019, 9:37 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-1203-unger-incarceration-20181130-story.html> (“The Ungers provide the blueprint. Let us take the lessons from this remarkable story and begin a new, more meaningful conversation about criminal justice reform.”).

⁵⁰⁵ Throughout the panel discussions, there were many examples of the exciting and varied types of work students do and the excellent and important results their work can produce. For example, *see* notes 142-44, 160-69, 198-220, 282-86, 296-307, and accompanying texts. Some of what I say in this section is based not only on the panelists’ comments, but also on my own experiences teaching criminal justice clinics.

coordination with other partners. She emphasized the special ability of clinics to identify clients who have differing issues and to rationally select and develop law reform strategies from these factual variations.

Professor Mahadev also described, with the help of a Power Point, the range of educational experiences available to students in decarceration clinics. Since 2011, her center has fully involved law students in individual representation and law reform and policy work. Law students are staffing and winning *Miller*-based resentencing cases, and in the process are interviewing clients and witnesses (including family members), reviewing documents, drafting pleadings, preparing and working with experts, arguing and conducting examinations in court, and working with social workers to prepare clients for reentry.

Students have prepared and filed amicus briefs in cases in which the Illinois Supreme Court has answered questions left open in *Miller*, and interpreted state law and the state constitution in ways that expand the rights of incarcerated persons.

Students have worked on legislation including a bill that reinstitutes parole for incarcerated people younger than twenty-one.

They also have helped draft clemency petitions during the COVID-19 pandemic for youthful offenders, and in the process, negotiated with prosecutors and made presentations before the Prisoner Review Board.

In all of this, students have had important relationships not only with their clients and families, but also with members of coalition organizations, and they have seen the importance of coalition-building.

All of the other clinical faculty described what their students do in similarly expansive ways. All praised the quality of the students' work and their commitments to their clients.

At the core of all the work are the client and storytelling and ensuring that the most compelling account of the client is presented to the decision-maker. As Professor Mahadev said: "it's really understanding who somebody is before that terrible moment occurred, what happened during that moment, what has happened after, and really, what would happen if they came home."⁵⁰⁶

Students learn an enormous amount in these clinics. They learn about and experience the many diverse lawyering skills that are parts of the above-described array of legal activities, including the foundational skill of working with clients to develop and execute the theory of the case. They observe and develop the behaviors, endurance, creativity, and commitments that client-centered lawyers in this field must have.

⁵⁰⁶ Comments of Shobha Mahadev, Panel 1, *supra* note 108.

In coalitions, they participate in crafting and executing the strategies that produce social and legal change.

There are, however, other societal and personal lessons. Many students are appalled at the conditions in which their clients, as children, grew up. They are shocked by the conditions of many prisons. They often initially are amazed at the mature and impressive person they see before them. (First interviews provide many important teaching moments.) They initially struggle with a form of imposter syndrome, doubting their competency to represent someone in such an important matter, and then—as the semester goes on—discover that they are competent and feel good helping a person in great need, both essential steps in forming their professional identity. Part of this is learning that their clients have confidence in them, usually after multiple visits, many communications and kept promises, extensive fact investigation, and exchanges of drafts of pleadings. In many of the cases, sometime during the semester or year, they will have become the best lawyer their client has ever had, and they may come to understand this, as well. If and when they experience the joy of walking their client out of prison, they will have helped to accomplish one of the most important goals a lawyer can achieve.

The panelists on several panels also discussed the educational value of confronting the big issues: how one works within deeply flawed legal systems, whether to do individual representation or law reform work (or perhaps, to see how they might be connected), and what to do with one's commitment to the Abolition Movement.

In the end, the best teachers are their (and our) clients. I can talk best about what our Unger clients taught us, faculty and students, but all the panelists expressed the same sentiments about their clients.

Our clients have taught us that redemption is possible, and about the decades of hard work at self-improvement that is required to achieve it. They have taught us about the courage it takes to maintain hope in the face of apparently hopeless obstacles, and not to give into despair, even in the very worst, most despairing circumstances. They and their families have taught us the power of families and the life-sustaining love and support families can provide. They have taught us the enduring power of good friendships in environments that cripple friendship, and they have taught us the importance of community, a community in which there is mutual care, support, nurturing and love.

That is a powerful education!

CONCLUSION

There were twenty-three people on the five panels, law professors who teach clinics and often other courses, a retired judge, a social worker, leaders of national criminal justice organizations and formerly incarcerated people. In the aggregate, the presentations and conversations established a number of points.

We lock up far too many people in this country, including grossly disproportionate numbers of people of color, as well as “criminalized survivors” (primarily women convicted and incarcerated in “response to [the] survivors’ efforts to defend themselves or otherwise address gender-based violence.”)⁵⁰⁷ The explosive growth of our prison population is the product of the last half-century. During the last decade, however, policymakers have taken modest steps to reduce the prison population, including by enacting laws and adopting policies that authorize “second looks” at the extreme sentences of some incarcerated people convicted of violent crimes, especially juvenile offenders.

The panelists described a broad range of activities to seek releases of incarcerated folks. These include implementing new state and federal release laws and policies (e.g., Second Look, compassionate release, and domestic violence laws), as well as parole, commutation, and clemency laws. The panelists also described participating in “test case” litigation and legislative advocacy aimed at expanding existing release laws and enacting new ones.

The panelists also discussed ways in which to prevent incarcerations, indeed, to limit the reaches of the criminal system, including by challenging the growing uses of technologies based on racially skewed data, the criminalization of normal adolescent behaviors (especially of Black and Brown children), and criminal law and procedure doctrines based on assumptions that are wholly inconsistent with the worlds of most Black and Brown children.

Throughout the day, the panelists emphasized the importance of coalitions, the agency of incarcerated and formerly incarcerated people, and the essential nature of their stories and storytelling.

This is a dynamic field in which panelists described projects applying new laws and principles and the encouraging results, including, in the aggregate, releases of hundreds of people convicted of violent crimes and given extreme sentences.

⁵⁰⁷ LEIGH GOODMARK, *IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM 2* (2023).

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In sum, it was a day of both hope and celebration and realization of how far we still have to go.