PREFACE

PRISON BRAKE: RETHINKING THE SENTENCING STATUS QUO

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ABSTRACT

This Preface provides an overview of NACDL's 2020 Presidential Summit and Sentencing Symposium, produced in partnership with the Georgetown University Law Center and the American Criminal Law Review.**

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** This Preface introduces this Symposium Issue of the *American Criminal Law Review*, summarizes the events of the October 2020 Summit and Symposium, and frames NACDL's policy positions regarding the dire need for sentencing reform in this country. Explanatory footnotes and citations have been provided for references to specific statutes, cases, and statistics. In other places, the Preface draws support from the Author's long career as NACDL's Executive Director and as a criminal defense attorney.

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INTRODUCTION

Carlos F. served approximately fifteen years of a sentence of twenty-five years to life in a maximum-security state prison on a legally flawed conviction for felony murder. It took multiple levels of appeal until, finally, a federal judge set aside the conviction. One week after he was released from custody, he visited his lawyer's office—the first time they had ever met outside of prison walls. When his lawyer asked him how he was enjoying his return to freedom, Carlos said it was wonderful, except for one problem: eating. Whenever he ate, he would puncture his tongue. It seemed that in prison, where he had been denied the privilege of having metal utensils, he lost a skill that for most people is as effortless as breathing.

That lawyer Carlos visited was me. And despite having been a defense attorney for more than twenty-five years, it was at that moment, listening to Carlos tell me that he had lost the ability to use a fork, that I viewed the inhumanity of the American approach to punishment with a fresh perspective. Any defense attorney who regularly visits clients in holding cells, local jails, and state and federal prisons sees the walls and the razor wire and experiences the deplorable squalor of the nation's detention facilities. One can see, hear, and feel the heartbreak of the visitation room where loved ones gather, often only once every few weeks, to visit either through plexiglass or in crowded, noisy communal rooms under the watchful eyes of guards. And, of course, just to get into that room to have that occasional visit, the prisoner will usually be subjected to an invasive, humiliating body cavity search before and after the visit. Indeed, the entire American approach to incarceration revolves around complete control, degradation, and dehumanization. Every aspect of a prisoner's life is controlled by jailors who determine when and under what circumstances the prisoner can eat, use a toilet, access a shower, communicate with loved ones, sleep, work, rest, exercise, and see daylight. American imprisonment is total subjugation of every aspect of an individual's humanity.

Beyond that, inhumane, unsanitary prison conditions are prevalent—as the COVID-19 virus vividly demonstrated.[1] Violence is common, and abuses such as predatory sexual practices are so prevalent that special legislation was needed to

1. *See* Brendon Derr, Rebecca Griesbach & Danya Issawi, *States Are Shutting Down Prisons as Guards Are Crippled by Covid-19*, N.Y. TIMES (Jan. 1, 2021), https://www.nytimes.com/2021/01/01/us/coronavirus-prisons-jails-closing.html ("There have been more than 480,000 confirmed coronavirus infections and at least 2,100 deaths among inmates and guards in prisons, jails[,] and detention centers across the nation, according to a New York Times database."); Beth Schwartzapfel, Katie Park & Andrew Demillo, *1 in 5 Prisoners in the U.S. Has Had COVID-19*, MARSHALL PROJECT (Dec. 18, 2020), https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19 ("While the nationwide infection rate among prisoners is four times the rate in the general U.S. population, . . . the mortality rate for COVID-19 among prisoners is 45 percent higher than the overall rate.").

address it.[2] These deplorable facts are well known to anyone who pays any attention whatsoever to conditions of confinement in the United States.

But there is something about the interference with the simple act of eating that underscores the banal, routine inhumanity of the American approach to incarceration.

Then too, there is the brutal length of sentences. The United States did not become the leading incarcerator in the world—both per capita and in sheer numbers, with more than two million people behind bars at any given time—by accident.[3] It was quite deliberate. For decades, politicians of all stripes lined up to outdo one another in pushing for ever harsher sentencing policies: increased maximum statutory sentences, compulsory sentencing guidelines, abolition of parole, mandatory minimums, three-strikes laws, and the list goes on and on. In fact, a study found that as of 2016, more than 200,000 people are serving some form of life sentence, with about 45,000 serving the equivalent of life without parole.[4]

But life sentences are only part of the story. Double-digit sentences are routinely handed out in this country for all manner of crimes, including non-violent and victimless crimes. Ten, twenty, thirty-year sentences are routine. And these draconian sentences are often imposed without regard to the age of the offender, their capacity for growth, or a full appreciation of the factors that led to the offending behavior and what steps might be available to address those factors.[5]

The defense lawyer lives with the brutality of sentence length and what a prison sentence means to the client and the client's family every day. To a significant extent, harsh sentencing is the omnipresent cloud that casts a shadow over every aspect of defense advocacy. Indeed, the threat of these draconian sentences has so distorted the system as to render trials virtually obsolete. The threat of a trial penalty, a geometrically increased sentence for those who assert fundamental rights, including the right to challenge the legality of the prosecutor's evidence or even the question of guilt or innocence, induces the overwhelming majority of accused

2. See Prison Rape Elimination Act of 2003, 34 U.S.C. §§ 30301–30309.

3. Since at least 2003, the incarcerated population has exceeded two million people. Recently, in the wake of declining pretrial detention and early releases related to the COVID-19 pandemic, the number has dropped below two million. *See* JACOB KANG-BROWN, CHASE MONTAGNET & JASMINE HEISS, VERA INST. OF JUST., PEOPLE IN JAIL AND PRISON 2020, at 3 (2021), https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-2020.pdf ("The total number of people incarcerated in state and federal prisons and local jails in the United States dropped from around 2.1 million in 2019 to 1.8 million by late 2020."); C.J. Ciaramella, *U.S. Incarcerated Population Dropped Below 2 Million Last Year for First Time Since 2003*, REASON (Jan. 27, 2021), https://reason.com/2021/01/27/u-s-incarcerated-population-dropped-below-2-million-last-year-for-first-time-since-2003/ ("The total incarcerated population of the U.S. fell dramatically last year amid the COVID-19 pandemic, dipping below 2 million for the first time since 2002, according to a new report by the Vera Institute of Justice.").

4. ASHLEY NELLIS, SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 7 (May 3, 2017), https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf.

5. *See, e.g.*, Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113 (2018).

persons to plead guilty.[6] And those who do not succumb, including the least culpable and arguably innocent, will upon conviction suffer the crushing blow of the trial penalty hammer. Sentencing is no longer a peripheral aspect of the system. It *is* the U.S. criminal legal system in 2021.

Thus, it was a great gift when the incoming President of the National Association of Criminal Defense Lawyers ("NACDL") announced that he wanted a signature aspect of his term leading the nation's criminal defense bar to focus on sentencing. And it was a fortunate opportunity that this president's alma mater is Georgetown University Law Center, home of the *American Criminal Law Review* ("*ACLR*"). With the support of key faculty and the editors of *ACLR*, a concept evolved which led to the publication of this Issue and to the 2020 NACDL Presidential Summit and Sentencing Symposium—*Prison Brake*: *Rethinking the Sentencing Status Quo*.[7] The program was conceived as a vehicle to bring together practitioners, theorists and academics, activists and innovators, and representatives of impacted communities to completely rethink sentencing in the United States. Additionally, several of the program participants expanded on their presentations with articles that appear in this Issue of the *ACLR*.

This Preface summarizes the fifteen presentations that were conducted in a virtual conference held over four days in October 2020[8] and offers some thoughts about the need to embark on a path toward a new sentencing paradigm.

I. SETTING THE SCENE

Georgetown University Law Center Executive Vice President and Dean William Treanor opened the program with the following observation that set the overarching tone for the Symposium:

> At no moment in the past fifty years has there been a greater consensus that the American criminal legal system is broken. Practitioners, scholars, and activists from across the ideological spectrum agree that our nation over-

6. *See* NACDL, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT (2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct; Norman L. Reimer & Martín A. Sabelli, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, 31 FED. SENT'G REP. 215 (2019).

7. The Summit and Sentencing Symposium was conceived and planned by the following: Chris Adams, NACDL President; Professor Douglas Berman, Newton D. Baker-Baker & Hostetler Chair in Law, Executive Director of the Drug Enforcement and Policy Center, Ohio State University Moritz College of Law; Teressa Hamsher, *ACLR* Senior Symposium Editor; Shon Hopwood, Associate Professor of Law and *ACLR* Faculty Advisor, Georgetown University Law Center; Jordan Hughes, *ACLR* Editor-in-Chief; Kyle O'Dowd, NACDL Associate Executive Director for Policy; and Norman L. Reimer, NACDL Executive Director.

8. The Summit and Sentencing Symposium was conducted October 19 through October 22, 2020. The conference, which was originally planned as an in-person event, was converted to a virtual event due to the COVID-19 pandemic. The program attracted a total of over 1,400 registrants, with average daily attendance of close to 500. The proceedings may be viewed in their entirety at https://www.nacdl.org/Content/PrisonBrakeRethinkingtheSentencingStatusQuoSummit and https://www.law.georgetown.edu/american-criminal-law-review/american-criminal-law-review-symposium/.

> prosecutes, over-charges, and over-incarcerates. Critics argue that the United States has some of the cruelest and most inflexible sentencing practices in the world, rivaled only by the practices of some totalitarian regimes. Mass incarceration is no longer a fringe issue. It sits at the center of an ongoing debate that intersects with systemic bias, economic disparity, and a national fixation with incarceration as the punishment of choice.

NACDL President Chris Adams underscored the central role of sentencing in the current criminal legal system and lamented the nation's dubious distinction as the world's leading incarcerator. On the latter point, Mr. Adams noted that while the national crime rate has remained consistent over the past forty years, the incarceration rate has skyrocketed. While there were approximately 316,000 people in the country's prison and jail cells in 1980, there are now approximately two million. Mr. Adams highlighted that the U.S. incarceration rate exceeds that of El Salvador, Rwanda, and Russia—the countries that rank second through fourth.[9]

With respect to the central role of sentencing, Chris Adams noted that ninety percent of all criminally accused persons will eventually face sentencing. Thus, it is incumbent upon the skilled advocate to have sentencing considerations top-of-mind in their approach to any case. As a capital defense attorney, Mr. Adams explained how, of necessity, the prospect of a death sentence informs every aspect of a lawyer's approach to their case. So too, he urged that lawyers in all cases should plot an effective sentencing strategy long before reaching that stage. Mr. Adams said that in designing a program that would help lawyers challenge prevailing assumptions to achieve a better outcome for clients, the original concept for the Symposium grew and evolved. Ultimately, rather than focus solely on sentencing advocacy, the program was designed to bring together multiple groups to "fundamentally change basic [sentencing] assumptions, remove some blinders, and arm us, empower us, and inspire us to do more."

Prison Brake met the challenge articulated by Chris Adams with a cornucopia of panels and presentations from practitioners representing both the defense and prosecution functions, scholars, advocates, impacted individuals, and prison officials. The discussions and presentations spanned the gamut from cutting-edge advocacy techniques to policy reforms, and challenged the basic notion of how society imprisons and whether it should.

II. THE ADVOCACY PRESENTATIONS

Effective sentencing advocacy hinges upon a lawyer's capacity to creatively marshal both the law and the facts. The advocate must artfully push legal boundaries and carefully strip away the preconceived notions that inhere when a person is adjudged guilty of a crime—notions that inevitably obscure the frailties that are at

9. *Criminal Justice Facts*, SENT'G PROJECT, https://www.sentencingproject.org/criminal-justice-facts/ (last visited Jan. 21, 2021).

the core of the human being upon whom judgment will be pronounced. The advocacy panels explored both of those strands, suggesting how various laws and constitutional provisions can provide avenues to ameliorate harsh sentences and how creative, informed, and inspired advocacy can illuminate the innate humanity of every client. These panels were *The Death Penalty and Sentencing: Applying the Lessons Learned from Capital Sentencing and the* Graham-Miller *Resentencing in All Cases*; *Mitigation: Framing Sentencing at Every Stage*; *Mental Illness: Misconceptions and the Multiplier Effect*; *Juvenile Sentencing Reform: Law, Policy and Prevention*; *Fifth, Sixth & Eighth Amendments: Innovative Constitutional Sentencing Arguments*; *Stepping-Up Implementation of the First Step Act*; and *Client Perspectives: Centering Impacted Persons in Reform*.

A. The Death Penalty and Sentencing: Applying the Lessons Learned from Capital Sentencing and the Graham-Miller *Resentencing in All Cases*

The advocacy panels were best contextualized by a discussion that reflected Chris Adams's original concept for a program that would illuminate the value of applying capital defense sentencing advocacy techniques to all criminal cases. *The Death Penalty and Sentencing: Applying the Lessons Learned from Capital Sentencing and the* Graham-Miller *Resentencing in All Cases* featured presentations by Professor Stephen Bright[10] and Susan Marcus, a former mitigation specialist.[11] Professor Bright explained that after the reinstitution of capital punishment in the United States following a brief hiatus when the Supreme Court had put a halt to death sentences,[12] the entire focus of capital defense advocacy shifted from the guilt/innocence phase to the sentencing phase of the case. The reality that the jury that determines whether the client lives or dies is the *same jury* that just decided that the client committed the heinous act charged makes it essential that the lawyer present a coherent, consistent portrait of the client's life that would inform the entire presentation of the case, laying the groundwork for a non-death outcome from the very start.

The overarching point of this panel was to underscore the need for prompt and thorough investigation to understand every aspect of the client's history to enable the sentencing authority—be it a jury in capital cases, or a judge in all other cases—to put what the client did in the perspective of her entire life. It is essential to garner all the details of a client's life history to be an effective advocate at sentencing. It is in the myriad records of a client's life, from schooling, immigration history, military history, work performance, juvenile proceedings, and the like, that the skilled advocate will uncover the various factors that may account for the current criminality: trauma, abuse or neglect, brain damage, intellectual disability, malnutrition, or other relevant conditions.

10. Visiting Professor of Law, Georgetown University Law Center.
11. Founder, Law Firm of Susan K. Marcus, LLC.
12. Furman v. Georgia, 408 U.S. 238 (1972).

These underlying pathologies often cause a communication barrier between lawyer and client. Indeed, both Professor Bright and Susan Marcus recognized that lawyers often struggle to communicate effectively with clients, but as Professor Bright put it, "There are no difficult clients, just clients for whom it is difficult for them to understand what is going on." Ms. Marcus sharpened this with a point that was central to her presentation, observing that, "The way you experience your client as difficult is a window into their impairment. It is rich information to capture." It is the ability and willingness of the lawyer to bring a sense of urgency to capturing that information and effectively presenting it that can make all the difference in the world at sentencing.

B. Mitigation: Framing Sentencing at Every Stage

Several panels built on the general concept of the need to humanize the client. After all, if the sentencing judge focuses only on the crime and its impact, rather than the individual and her life story, one cannot expect anything but the harshest outcome. Beyond that, there are other system actors whose role cannot be underestimated in shaping the contours of what is before the judge and many points along the way that can materially and positively impact the sentence. *Mitigation: Framing Sentencing at Every Stage* explained how effective, client-centered advocacy from the very beginning, and at every stage of the case, is critical to the ultimate sentencing outcome. The panel was moderated by James Felman[13] and featured Yasmin Cader,[14] Vivianne Guevara,[15] and JaneAnne Murray.[16]

In an interactive discussion, the panelists explained the vital importance of pretrial advocacy, starting with the pretrial release determination and continuing throughout the case. All the client's history that can be brought to bear to argue for the client's release, as well as all the factors that can be marshalled to persuade a court that the client is neither a risk of flight nor a danger to the community, lay the foundation for a comprehensive mitigation strategy. Similarly, resources that can be brought to bear to deal with mental health issues, addiction, the need for shelter or stable housing, job training, or educational advancement can inform release considerations and may later serve as the building blocks for sentencing recommendations.

The panelists also explained how pre-trial litigation and informed plea negotiations offer opportunities to provide the prosecutor with an alternative view of the client and begin to educate the judge that there is much more to the case than just the charged crime. This advocacy should continue in any post-plea or conviction phase to ensure that the official who prepares the presentence report for the court also has a complete view of the client's life story—so that the report is not

13. Partner, Kynes, Markham & Felman, P.A.
14. Founder, Cader Adams Trial Lawyers LLP.
15. Director of Social Work and Mitigation, Federal Defenders of New York in the Eastern District.
16. Professor of Practice, University of Minnesota Law School.

dominated by the government's account of the crime and a dry recitation of the client's criminal history without explanation and context.

Finally, an advocate's actual sentencing presentation, beginning with a comprehensive sentencing memorandum (perhaps augmented with a video), and culminating with the oral presentation—including, when possible, a statement by the client—must be shaped to complement the overall mitigation story. As James Felman observed, virtually every judge comes to the sentencing phase with two questions in mind: why did you do it and how do I know you will not do it again? The most effective sentence presentation provides cogent and satisfactory answers to those questions.

C. Mental Illness: Misconceptions and the Multiplier Effect

The mitigation construct was further elucidated in two panels that addressed two common, highly specific areas in which focused advocacy is crucial: mental health issues and juvenile status. The first, *Mental Illness: Misconceptions and the Multiplier Effect*, provided an overview of how the treatment of mental health issues in the criminal context has evolved over recent decades and acts as a window into how the defense attorney's capacity to confront and remediate misconceptions can significantly alter outcomes. Bonnie Hoffman[17] moderated the panel that featured Akin Adepoju,[18] Deborah Denno,[19] and E. Lea Johnston.[20]

Bonnie Hoffman set the stage for the discussion by noting that one in five individuals in the nation's jails have serious mental illness, as do one in ten in the nation's prisons.[21] While some appropriately recognize mental illness as a mitigating factor that should reduce culpability and replace punishment with treatment, the sad reality is that misconceptions held by many, including judges, prosecutors, jurors, and even defense counsel, can lead to greater punishment, especially for those facing the death penalty. Indeed, Professor Johnson shared research that shows that jurors uniformly have serious misconceptions about the insanity defense, reflected in a pervasive belief that it is merely a subterfuge to evade legal responsibility. There is also an exaggerated belief as to the frequency with which the defense is asserted, as well as evidence that jurors who are seated in capital cases are far more dismissive of the defense than those who oppose capital punishment. All of this suggests that, especially in capital cases, attorneys should be permitted to conduct extensive voir dire on juror attitudes and misconceptions about mental illness.

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17. NACDL Director of Public Defense Reform and Training.

18. Assistant Federal Defender & Attorney Advisor, Defender Services Office, Training Division.

19. Arthur A. McGivney Professor of Law, Founding Director of the Neuroscience and the Law Center, Fordham University School of Law.

20. University of Florida Research Foundation Professor, University of Florida Levin College of Law.

21. *See* TREATMENT ADVOC. CTR., SERIOUS MENTAL ILLNESS PREVALENCE IN JAILS AND PRISONS 1 (2016), https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/smi-in-jails-and-prisons.pdf. In reality, the number of people in prison with serious mental illnesses may be closer to fifteen percent rather than ten. *Id.*

Professor Denno specializes in neuroscience, which she defines as "the branch of life science that studies the brain and nervous system including brain processes such as sensation, perceptions, learning, memory, and movement." The central point in her presentation was that over the past five decades, while the invocation of the insanity defense has steadily and significantly declined, the use of neuroscience in criminal cases has steadily risen. This evinces a far greater and more nuanced understanding of how neuroscience can be used to destigmatize mental illness, as well as a concomitant increase in the willingness of courts to admit and consider this evidence.

The practical importance of this trend formed the core of Akin Adepoju's presentation. When principles of neuroscience are employed not simply to put a label on a client's condition but to fully explain the client's life story and how underlying illness has informed their behavior, it leads to endless advocacy opportunities. While mental illness is highly prevalent, with some thirty-eight million in the country diagnosed as suffering from some form of it, misconceptions about its impact are prevalent. Mr. Adepoju noted the prevalence of stereotypical depictions that a person with mental illness is different, or violent, or weak, or lazy, and that they are incapable of getting better. But these depictions are misleading. Many, if not most, individuals with mental illness do not exhibit these traits. Mental illness is a continuum and highly treatable. Akin Adepoju characterized the embrace of these misconceptions as "a national stupidity bordering on a disgrace," observing that "it is outrageous and unacceptable how we treat people in this country who are mentally ill in 2020." He echoed earlier themes that prompt a thorough investigation to uncover underlying mental illness and enable the advocate to use that information in myriad ways, such as to negate criminal intent, show diminished capacity, bolster mitigation, and ultimately present alternative sentencing options to eliminate or minimize a sentence of imprisonment.

D. Juvenile Sentencing Reform: Law, Policy and Prevention

The focus of the juvenile justice panel, *Juvenile Sentencing Reform: Law, Policy and Prevention*, was how to address the consequences of a system that has engaged in the massive "adultification" of youth, which has resulted in nearly 50,000 juveniles locked up in the United States on any given day.[22] The panel was moderated by Eduardo Ferrer[23] and featured Cara Drinan,[24] Halim Flowers,[25] and Tyrone Walker.[26] Mr. Flowers and Mr. Walker brought unique perspectives as individuals who themselves were sentenced to long prison sentences as youths.

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22. WENDY SAWYER, PRISON POL'Y INITIATIVE, YOUTH CONFINEMENT: THE WHOLE PIE 2019 (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html.

23. Visiting Professor at the Georgetown Juvenile Justice Clinic and the Policy Director of the Georgetown Juvenile Justice Initiative, Georgetown University Law Center.

24. Professor of Law, The Catholic University of America Columbus School of Law.

25. Artist, Writer, and Activist.

26. Associate and Project Director, Justice Policy Institute.

Professor Drinan noted that while the United States has made some progress in recent years as a result of the so-called *Miller* trilogy,[27] which has ended capital punishment and mandatory life without parole for youthful offenders, the United States is still the only nation in the world that routinely sentences children to terms of incarceration that are effective life sentences. Indeed, Professor Drinan's Article in this Issue argues that the transfer laws and mandatory minimum sentences as applied to youth are unconstitutional.[28] For the purposes of this presentation, however, Professor Drinan compellingly argued for a paradigm shift to stop viewing child offenders as a threat rather than as individuals in need of services and support. Professor Drinan noted the irony that in the nineteenth century, the United States led the world in designing and exporting an enlightened model for addressing juveniles in the legal system, only to abandon that model in the twentieth century.

Tyrone Walker recounted a personal experience that caused him to wholeheartedly embrace a restorative model of justice, a theme that echoed much of what was expressed at various reform panels during the Symposium. Mr. Walker shared the experience of a happenstance meeting with the brother of the person whose life he had taken when he was seventeen years old. When the brother realized who Mr. Walker was and what he had done, he looked at him and said simply "I forgive you." At that moment Tyrone Walker's life took a new trajectory. He decried a government that knew about the problems in his life and his home, but rather than help him, caged him as an adult. He expressed the view that there must be platforms established that enable those creating harm and those harmed to have meaningful dialogue.

Halim Flowers, who uses his artistic talent to mentor and inspire young people to help them avoid encounters with the criminal legal system, said that true reform must focus on culture. Citing the oft-repeated adage that "culture eats policy for breakfast," Mr. Flowers said that incremental changes in law and policy cannot change unless there is a full-throated rejection of the American punitive approach to justice and an embrace of a community-based restorative justice model. He noted that many other societies around the world embrace a justice system that does not focus on incarceration, many of which could be a model for the United States. But he also pointed out that the root cause of crime in this country—especially in gentrified urban communities—is the lack of equal opportunity and the imposition of justice models that ignore community needs. There must be a commitment to equity repair for the African American community to give historically oppressed people the capital and equity that provides a pathway to the kind of educational opportunities that lead to equality and informed civic engagement.

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27. Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012).

28. Cara H. Drinan, *The* Miller *Trilogy and the Persistence of Extreme Juvenile Sentences*, 58 AM. CRIM. L. REV. 1659 (2021).

Professor Drinan echoed that theme and noted that even those who have had access to the best education are ignorant about how inhumanely the criminal legal system treats juveniles. While endorsing systemic reform and embracing restorative justice models, she advocates for three immediate, tangible reforms: (1) get police out of schools to end the practice of shunting minority kids into the criminal legal system; (2) stop viewing youth detention as a solution and recognize that in the long run it undermines public safety; and (3) adopt sentencing reform for minors to end the imposition of overly long sentences. In terms of juvenile advocacy, the panelists urged lawyers who represent youths to gain proximity by building relationships with people in lower-income communities, to always be attentive and responsive to the individual client, and to self-educate to understand how harshly the system treats young people.

E. Fifth, Sixth & Eighth Amendments: Innovative Constitutional Sentencing Arguments

Two other advocacy panels focused keenly on effective and cutting-edge legal advocacy. *Fifth, Sixth & Eighth Amendments: Innovative Constitutional Sentencing Arguments* featured a unique "lightning round" series of presentations offering creative litigation strategies, moderated by Professor Douglas Berman.[29] Professor Berman introduced the conversation—which featured six constitutional law scholars—by suggesting that there is a wide range of innovative, potentially fruitful constitutional arguments to challenge harsh sentencing schemes that, even where they do not prevail, can have a productive impact.

First, Corinna Lain[30] spoke about a very specific aspect of sentencing: lethal injection. She is currently completing a book on the subject. One of her key observations in looking at botched executions in which the individual suffered horrific torment is the role of institutional incompetence, indifference, and intransigence to change. For example, she cited one example in which a state administered one-half of the required anesthetic designed to protect against pain at the start of the execution process, but did not administer the other half until after the subject was already dead. In another instance, a correctional official was pressed on what makes a successful execution and responded only that "success is when the inmate is dead." When this kind of indifference is baked in by institutional design, advocates should be looking at Eighth Amendment challenges.

Next, Meghan Ryan[31] noted the relatively recent expansion of Eighth Amendment jurisprudence with the Supreme Court's abolition of the death penalty for juvenile offenders and for non-homicide offenses and the proscription on

29. Newton D. Baker-Baker & Hostetler Chair in Law, Executive Director of the Drug Enforcement and Policy Center, The Ohio State University Moritz College of Law.

30. S.D. Roberts and Sandra Moore Professor of Law, University of Richmond School of Law.

31. Associate Dean for Research, Altshuler Distinguished Teaching Professor, and Professor of Law, Southern Methodist University Dedman School of Law.

mandatory life without parole for juveniles. Although recent Supreme Court appointments raise concerns about whether this trend will continue, Professor Ryan believes that advocacy centered upon the Eighth Amendment's historical grounding in the recognition of basic human dignity offers hope that arguments favoring individualized sentencing may be fruitful. Her presentation previewed her Article published in this Issue.[32]

William Berry III[33] also previewed the Article he authored for the Journal.[34] Professor Berry recognizes that the "gross disproportionality" standard in non-capital, non-juvenile life without parole sentences creates a virtually insurmountable barrier to challenging even the harshest of prison sentences. He notes, however, that some states have found that state punishments violate the Eighth Amendment or their state constitutional analogue. Professor Berry urges expanded reliance upon state constitutions to advance both systemic and case-based arguments to challenge non-capital state punishments.

Michael Mannheimer[35] also noted the significant bar posed by the disproportionality requirement of the Eighth Amendment. But, by focusing on the "unusual" as opposed to "cruel" component, Professor Mannheimer poses the question, "unusual as to what?" He suggests that an analogy to Fourth Amendment analysis may provide a fruitful avenue for advocacy in litigating Eighth Amendment claims. Both the "unusual" aspect of the Eighth Amendment and the "unreasonable" aspect of the Fourth Amendment implicate federalism interests in that the concepts may be defined by reference to state practices. Thus, Professor Mannheimer suggests that an advocate may have some success in challenging a federal sentence by skipping the comparison to other federal sentences to assess whether there is gross disproportionality and instead comparing the sentences to the punishment that would be imposed in other states, or to the state sentence that could be imposed where the crime occurred.

John Stinneford[36] is a proponent of originalist construction. Historically, the Eighth Amendment was designed to preclude punishments that were unjustly harsh in light of longstanding practice. With that as a benchmark, Professor Stinneford suggests that reference to the traditional rule of strict construction offers an avenue for advocates to urge courts to construe penal statutes narrowly where failing to do so would result in an unjustly harsh sentence.

Jelani Jefferson Exum[37] also previewed an Article she has written for this Journal.[38] Professor Exum contextualizes the phenomenon of mass incarceration

32. Meghan J. Ryan, *Framing Individualized Sentencing for Politics and the Constitution*, 58 AM. CRIM. L. REV. 1747 (2021).

33. Montague Professor of Law, The University of Mississippi School of Law.

34. William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627 (2021).

35. Professor of Law, Northern Kentucky University Chase College of Law.

36. Professor of Law, Assistant Director of Criminal Justice Center, University of Florida Levin College of Law.

37. Professor of Law, University of Detroit Mercy School of Law.

38. Jelani Jefferson Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*, 58 AM. CRIM. L. REV. 1685 (2021).

with its well-documented racially disparate impact as the latest iteration of the Black Codes that arose in the Reconstruction Era to bolster white supremacy. Similarly, the War on Drugs, which began in the 1970s, has essentially been a war on Black and Brown communities, featuring the weaponization of mandatory minimums to perpetuate racial disparity in sentencing. Professor Exum urges resorting to the Reconstruction Amendments, including the Thirteenth and Fourteenth Amendments, to reinvigorate constitutional protections and rectify the damage caused by the War on Drugs.

In a lively discussion among the panelists, there was consideration of how in individual cases prosecutors may be effectively challenged to recognize and ameliorate harsh sentencing practices and that in all situations it is essential to get all of the system actors to see the humanity of each person. There was also discussion of the importance of raising issues related to irrational internal proportionality, either by reference to situations in which individuals convicted of certain lesser offenses receive harsher sentences than those convicted of greater offenses, or by reference to sentencing disparities with respect to certain offenders. For example, does a judge, a court, or a circuit have a pattern of sentencing certain classes of defendants, perhaps based upon race or ethnicity, harsher than others?

Professor Berman concluded this exploration of creative constitutional strategies with a call to action:

> Keep pressing these frontiers, including against really bad precedent that may seem like it's not going anywhere, because at the end of the day what is a critical foundation for the start of a new constitutional jurisprudence is people saying we need a new constitutional jurisprudence.

F. Stepping-Up Implementation of the First Step Act

Another advocacy panel featured a focused look at one of the most important federal criminal justice reform enactments in many years, the expansive, bipartisan First Step Act of 2018 ("FSA").[39] The FSA was the subject of *Stepping-Up Implementation of the First Step Act*. This panel, which was moderated by Elizabeth Blackwood[40] and featured Davina Chen,[41] Judge John Gleeson,[42] and Mary Price,[43] in part presented a practice-oriented look at how advocates can make the most of the FSA to obtain sentencing relief for a wide range of individuals convicted under federal law. The FSA reduces some penalties, provides new

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39. Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person ("First Step") Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018) (codified in scattered sections of 18 and 34 U.S.C.).

40. NACDL Counsel & Project Director, First Step Act Resource Center.

41. National Sentencing Resource Counsel, Federal Public and Community Defenders.

42. Partner, Debevoise & Plimpton LLP, and former U.S. District Judge for the Eastern District of New York.

43. General Counsel, Families Against Mandatory Minimums (FAMM).

opportunities for good time and earned time credits, and relaxes some mandatory consecutive sentencing provisions.

First, Davina Chen provided a broad overview of key sentencing provisions of the Act, including retroactivity of the FSA,[44] which provides an opportunity for individuals sentenced prior to 2010 for crack cocaine offenses to seek a sentence reduction; reform of the laws that required mandatory consecutive sentences (stacking) for certain gun offenses;[45] expanded "safety valve" provisions (which provide for a court to sentence below a mandatory minimum);[46] and reductions to mandatory minimums for drug offenses. These reforms have provided significant relief for many federal prisoners. Ms. Chen noted that just the retroactive application of the FSA had resulted at the time of her presentation in 3,470 reduced sentences with an average reduction of seventy-one months, saving more than 20,000 years of imprisonment.

Next, Mary Price addressed the groundbreaking federal compassionate release provisions in the FSA. Ms. Price discussed the history of the compassionate release provisions, which were intended to provide a means for terminally ill or seriously debilitated prisoners to secure their release. Unfortunately, the program vested sole discretion to seek release with the U.S. Bureau of Prisons ("BOP"), which rarely invoked the provisions. During the life of the program, only 306 prisoners were released out of more than 2,400 applications, and 81 prisoners died while their requests were pending. The FSA revolutionized the process by affording prisoners an opportunity to seek release from the court if the BOP does not act upon a request within thirty days. The program was primarily designed for the very ill and infirm. From the time the FSA was enacted in December 2018 until February 2020, 166 prisoners were granted compassionate release. The advent of COVID-19, however, saw a vast expansion of the Act's reach. Under provisions of the Act that provide for release for "extraordinary and compelling circumstances," it was available for prisoners at high risk of serious illness or death from the virus. From March through mid-October 2020, 1,700 compassionate release applications were granted. Thus, the FSA has not only enabled the extremely ill and infirm to secure their freedom for their final days, but has actually proved to be a lifesaver for hundreds.

Finally, John Gleeson described a pro bono project he has led to employ the FSA to seek relief for prisoners who were sentenced under the mandatory gun stacking provisions, which were reformed by Section 403 of the FSA, but whose sentences were not reduced by the reforms. The reform provisions were to be applied prospectively and were only effective as to cases pending when they were adopted. In essence, this is a category of prisoners who are serving sentences that

44. First Step Act § 404, 132 Stat. at 5222.
45. *Id.* § 403, 132 Stat. at 5221–22.
46. *Id.* § 402, 132 Stat. at 5221–22.

are in many cases geometrically longer than the sentences they would receive under current law.

The pro bono project is named for Francoise Holloway, a defendant whose case was before John Gleeson during his tenure as a judge. Mr. Holloway was offered a plea for nine years, but declined it, went to trial, was convicted, and was sentenced to fifty-seven years and seven months in prison. The sentence was compelled by mandatory stacking provisions. After more than twenty years, Judge Gleeson was able to prevail upon the U.S. Attorney to agree to vacate two of the three convictions, which resulted in Mr. Holloway's release. Judge Gleeson pointed out that these stacking provisions are particularly egregious because numerous reports have definitively shown that they were invoked disproportionately against Black defendants. His project relies upon the "extraordinary and compelling" basis for compassionate release to argue that the fact that the sentence would be substantially lower if imposed today qualifies for relief under those provisions. Thus far, of the thirty-one clients in the project, seven have won their release, five were denied, and the rest are still pending. Of the seven whose motions were granted, six have been released. The government is appealing in most of those cases, and the ultimate outcome is far from certain, but at least one circuit has upheld the court's authority.[47]

As a postscript to his presentation, Judge Gleeson observed that these draconian stacking cases provide a window into so much that is now askew in the criminal legal system. He noted that it is ironic that in fighting to prevent these defendants from obtaining relief under the FSA, the government has argued that it will promote disparity in sentencing. But Judge Gleeson cited several cases, like the Holloway case, where the prosecution wielded its unchecked charging power to produce the most extreme disparities. He cited several cases in which defendants received an extreme penalty—often more than thirty or forty years of additional time than was offered in plea negotiations pre-trial—simply for exercising their Sixth Amendment right to a trial. This trial penalty has essentially eviscerated the right to a trial and underscores the need for fundamental sentencing reform.[48]

G. Client Perspectives: Centering Impacted Persons in Reform

Perhaps the most important component of advocacy is the lawyer's capacity to cultivate and nurture clear and consistent communication with the client. *Client Perspectives: Centering Impacted Persons in Reform* featured an extraordinary panel of individuals now working in the criminal defense sphere who themselves had been prosecuted and served time in prison. Shon Hopwood[49] moderated the

47. United States v. Brooker, 976 F.3d 228, 236 (2d Cir. 2020) (holding that BOP guidelines about what constitutes extraordinary and compelling circumstances "cannot constrain district courts' discretion to consider whether *any* reasons are extraordinary and compelling" (emphasis added)).

48. *See* NELLIS, *supra* note 4.

49. Associate Professor of Law & *ACLR* Faculty Advisor, Georgetown University Law Center.

panel. Professor Hopwood served eleven years in federal prison, during which he successfully assisted other prisoners with legal matters, and after release earned his law license and a faculty appointment, and now practices criminal defense. He opened the discussion by observing that there is a reason why lawyers are called "counselor." The foremost function of a criminal defense lawyer is to counsel the client and the client's family. It is essential that a lawyer guide her clients through the process, walking them through what will likely be an emotional roller coaster, with sensitivity, patience, and candor. Each of the panelists related their respective experiences to some of the devastating consequences that can arise when there has been inadequate attorney-client communication.

Sekwan Merritt, now an electrician and the owner of Lightning Electric, who was also trained as a paralegal at Georgetown University's Pivot Program,[50] was the victim of the most egregious consequences of failed communication. Although Mr. Merritt's case involved a charge of possession with intent to distribute only 2.4 grams of heroin, his lawyer failed to adequately explain to him that because of prior offenses, he faced a mandatory sentence of twenty-five years without parole, which, in fact, the judge imposed, lamenting that she lacked the power to go below that figure. It was only several years later that Mr. Merritt discovered that his lawyer had received a memorandum from the prosecutor indicating that if he waived his motion to suppress evidence, the prosecutor would take twenty-five years off the table.[51] Subsequently, Mr. Merritt obtained post-conviction relief based on Supreme Court precedent that requires counsel to effectively communicate a plea offer and, without objection from the prosecution, the sentence was reduced to ten years.[52]

But inadequate communication that does not rise to the level of ineffective assistance can have equally devastating consequences. Joshua Boyer, a criminal justice reform advocate, prison consultant, and paralegal, was charged with participation in a stash-house sting operation engineered by the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). These dubious operations involve ATF agents recruiting people in a community to participate in the robbery of drugs and monies from purported stash houses, which are purely a law enforcement fiction. Among other communication problems with a lawyer who was appointed to represent him on the eve of trial, the lawyer did not thoroughly review and discuss the facts provided in the Presentence Investigation Report ("PSR"). The

50. The Pivot Program is a certificate program offered by Georgetown University specifically for formerly incarcerated individuals. *Pivot Program*, GEO. UNIV. MCDONOUGH SCH. OF BUS., https://pivot.georgetown.edu/ (last visited Jan. 22, 2021).

51. The tactic of extracting waivers of fundamental rights to avoid a vastly increased penalty if one asserts those rights underscores the systemic abuse of excessive sentences wielded by prosecutors and is another compelling example of the trial penalty mentioned by Judge Gleeson in his presentation. *See supra* Section II.F.

52. Lafler v. Cooper, 566 U.S. 156, 174 (2012) (holding that the petitioner was prejudiced by his counsel's deficient performance in advising him to reject a plea offer and go to trial, and that the proper remedy for his counsel's ineffective assistance was to order the State to reoffer the plea agreement).

information in the PSR not only informs a judge's sentencing decision, but it is also used by the BOP throughout a person's incarceration for myriad purposes. In Mr. Boyer's case, erroneous information that could have been excised had his lawyer better communicated with him led to a higher security classification, negatively impacting Mr. Boyer's conditions of confinement for seventeen years.

Professor Hopwood underscored that attorney involvement in preparing the client for the pre-sentence interview in fully and accurately documenting and verifying the client's history in the PSR is critical, especially with the passage of the First Step Act. Qualification for certain programming can reduce the time a person must serve, and various facts in the PSR can determine risk categorization and eligibility for earned-time credit. Generally, it is vital for the lawyer to recognize that the length of the sentence, which is always a key focus, is not the *only* thing that will impact a client's life. Various collateral consequences must also be considered, including restitution provisions and conditions of supervised release.

Brandon Sample[53] was prosecuted for an economic crime when he was nineteen years old. Mr. Sample's lawyer, who apparently did not understand or effectively communicate the U.S. Sentencing Guidelines ("Guidelines") calculation to him, recommended that Mr. Sample plead guilty anticipating a sentence of between two and three years. In fact, Mr. Sample, who was sentenced when the Guidelines were mandatory, was stunned to receive a sentence of fourteen years, of which he served twelve. From that experience, and now with the experience he has gained as a practicing criminal defense lawyer, his advice is simple: "under-promise and over-deliver." Mr. Sample said that it is imperative that a lawyer cultivate a meaningful relationship with each client by maintaining regular communication and doing so in an accessible, non-technical manner.

All the panelists expressed the view that consistency and reasonable availability are the keys to developing the kind of relationship that will foster far better outcomes. Consistency and candor minimize surprises and better enable the client to adapt to new developments as they arise. It is important for the lawyer, who obviously has the benefit of an advanced legal education, to communicate in a non-condescending, relatable way and to always remember that no client, even those who have prior experience with the legal system, will fully understand the evolving nuances of their case and their options unless their counselor-at-law fully embraces the counseling aspect of defense advocacy.

III. THE REFORM PRESENTATIONS

In addition to the presentations described above that focused on strategies for advocates to fight for better outcomes for their clients in our broken sentencing system, the Summit and Symposium also featured a series of discussions highlighting avenues for reform of that system. These included *Prison Abolition, and a Mule*;

53. Federal Criminal Defense Lawyer, Brandon Sample PLC.

Enlightened Prosecutors and Reform: Re-Envisioning Justice; *Back-End Advocacy: Second Chances and Second Looks*; *The Future of Sentencing Reform: Leveling Up and Ratcheting Down*; *Rethinking Prison*; and *Is Prison Necessary?*

A. *Prison Abolition, and a Mule*

In a keynote address, Paul Butler[54] offered a clarion call for fundamental reform.[55] Contrasting the extraordinarily outsized incarceration rates in the United States with declining global rates of crime, he rejected any notion that mass incarceration has worked. Rather, American prisons are places of cruelty, dehumanization, and violence. They subordinate by race, class, and gender. And they traumatize, potentially irreparably. Professor Butler called for a reduction in criminalization and incarceration through the implementation of sociologically-informed alternatives to criminal law intervention.

B. *Enlightened Prosecutors and Reform: Re-Envisioning Justice*

Prosecutorial exploitation of severe sentencing provisions lies at the core of mass incarceration in the United States. *Enlightened Prosecutors and Reform: Re-Envisioning Justice* provided an opportunity to showcase the potential for progressive prosecutors to promote reform and a platform for several present and former prosecutors to articulate how much more can be done by the prosecutorial class. Somil Trivedi[56] moderated the discussion. Mr. Trivedi launched the conversation noting that in recent years, there has been a modest downward trend in jail and prison populations, in part due to reforms that can be viewed as low-hanging fruit, such as some movement away from the use of cash bail and a reduction in charges related to simple possession of controlled substances. He then challenged the panelists to describe how much more prosecutors could do to tackle the deeply engrained problem of excessive sentencing and to what extent prosecutors will continue to use the threat of excessive sentences to extract guilty pleas.

Larry Krasner[57] explained how progressive policy changes were able to address both of those issues. He noted that in less than three years, new policies in his office reduced future years of incarceration by fifty percent. Key initiatives included diversion of cases away from prosecution, making better sentencing recommendations, and declining to prosecute certain cases, such as marijuana offenses and prostitution. Mr. Krasner attributed this to several policies he instituted. First, the prosecutors must advise judges what the jail costs will be for any recommendation and why those costs are worth it for the community. For example, Mr. Krasner said that this analysis is straightforward and compelling when recommending twenty to

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54. Albert Brick Professor in Law, Georgetown University Law Center.

55. Please note that Professor Butler's remarks are not available on the recording of the Symposium per his request. *See supra* note 8.

56. Senior Staff Attorney, Criminal Law Reform Project, American Civil Liberties Union.

57. District Attorney of Philadelphia.

twenty-five years for a serial rapist, but it is hard to justify recommending six months for a homeless person stealing food at a cost of $25,000. Second, prosecutors routinely recommend sentences below what is prescribed in the Pennsylvania Sentencing Guidelines. Those guidelines, which are not grounded in science, saw Pennsylvania's prison population increase by 700 percent while the average national increase was 500 percent. Mr. Krasner explained that it makes no sense to rely on guidelines that were based on nothing more than averaging sentences from around the state. Third, he indicated that his office does not extract a trial tax (penalty). They bring only the charges that are warranted and do not seek significantly enhanced penalties for those who go to trial. Mr. Krasner acknowledged that many judges still impose increased sentences on those who are convicted after trial, even if the defendant did not proffer phony evidence, which would be a legitimate basis for enhancement. But as he pointedly noted, "That's because judges want to be done by noon. And that's disgusting. You have a constitution that gives you a right. You should be able to exercise that right."

Brett Tolman[58] confirmed that the trial penalty is prevalent in the federal system as well. Mr. Tolman gave as an example a case he prosecuted involving a non-violent first-time offender who, because of various required stacking provisions, would have required a sentence of more than seventy-five years. He had to petition senior Justice Department officials for permission to offer thirty-five years instead. But he noted that if the accused goes to trial in the federal system, they most certainly will get a longer sentence. Further, if the accused testifies, the sentence will generally be enhanced for obstruction, perjury, or both. Additionally, a sentence may be enhanced for uncharged conduct as well as for acquitted conduct. If a defendant is acquitted on 99 out of 100 charges, he may well be sentenced as if convicted on all the charges.

Arthur Rizer[59] said the problem of prosecutorial excess can be summed up in one word: "prestige." Prestige, he explained, is time. It is routinely instilled in young prosecutors that their success is measured and often rewarded by how much prison time defendants receive. Mr. Rizer said that reform hinges upon changing the mindset that longer sentences are the best sentences. Specifically, to move away from the weaponization of prosecutors, there is a need to reform charging and bail decisions, which set up the eventual sentencing framework, and to redefine what victory looks like for prosecutors. It should be doing justice, not long sentences.

Miriam Krinsky[60] completely endorsed the prior comments and, echoing a refrain heard several times during the Symposium, said the key to reform is changing tone and culture. Tone is set at the top of an office. Line prosecutors should not be rewarded for convictions or long sentences. If that is the prevailing culture in an

58. Former U.S. Attorney for the District of Utah and Founder of the Tolman Group.
59. Director, Criminal Justice & Civil Liberties, Resident Senior Fellow, R Street Institute.
60. Executive Director, Fair and Just Prosecution.

office, all other reform efforts will fail. Ms. Krinsky agreed with the observation that individuals are punished for going to trial, especially in the federal system. She called for greater use of individual prosecutorial discretion not to use all the tools that may be available to enhance sentences, such as those described by the prior speakers. Beyond that, Ms. Krinsky stressed the need to look backwards to undo the ongoing harm of past decades by affording second looks for those who are still serving extreme sentences. She noted that Larry Krasner is doing that, as are the elected district attorneys in Brooklyn[61] and San Francisco.[62] Beyond that, prosecutors should use the prestige of their offices to support repeal of mandatory minimums and various enhancements. Further, they should educate the public that it is not possible to rely on incarceration to address such social ills as mental health and addiction problems. Long sentences neither solve those problems nor make the public safer, but they do squander billions that could be used to more productively address those problems.

All the panelists also agreed that a paradigm shift should include a reduction in prosecutors' budgets, which would be a natural outgrowth of a reduced reliance upon criminal law enforcement to address social ills. Money and budgets reflect values, and so long as funding levels remain high, the message is that jail is an acceptable means of addressing problems that are not fundamentally criminal in nature. Larry Krasner cautioned, however, that reformers should be wary of selective efforts to reduce funding for progressive prosecutors, while leaders allocate additional funding for policing.

The panelists identified several other areas in which there is an urgent need for prosecutors to lead reform:

1. Prosecutors should hold police accountable for misconduct, not just through prosecution in egregious cases, but by dismissing cases when appropriate and reporting misconduct for disciplinary action;
2. Prosecutors should not reflexively oppose applications for early release where those opportunities exist, such as under the federal First Step Act and the CARES Act;
3. Prosecutors should track and report all data points that can empirically demonstrate racially disparate practice and then take corrective action. Additionally, prosecutors should hire and train their staffs to advance diversity;
4. Prosecutors themselves must be held accountable to disciplinary authorities when acts of misconduct are discovered and qualified immunity must be amended;
5. Prosecutors should become proximate to the communities they serve and the individuals who are impacted by prosecutorial charging and sentencing policies; and
6. Prosecutors must be willing to move away from easy reforms and tackle the big ones such as addressing the false violent/non-violent dichotomy that often results in disproportionately harsh sentences.

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61. Eric Gonzalez is the Kings County Attorney in Brooklyn, New York.
62. Chesa Boudin is the District Attorney of the City and County of San Francisco, California.

Larry Krasner summed up the thrust of this presentation with an observation about the need for cultural change and the hope that recent tragedies may provide the impetus for that change:

> There is always a significant danger that progressive prosecutors will be pushed back in our corner if culture does not shift with us. Right now, after George Floyd, you just look at the video. Keep looking at the video. You can't stop looking at that video. It goes on too long. But it says something. It says something to a lot of people. We have a moment here when we can recognize that we have to communicate at the level of culture. We progressive prosecutors have to view ourselves as technicians for a bigger movement. And once that movement has its way, there will be absolutely no stopping us.

C. Back-End Advocacy: Second Chances and Second Looks

The extent to which post-sentence initiatives are essential to address mass incarceration was a central, although not exclusive, theme in *Back-End Advocacy: Second Chances and Second Looks*. I was privileged to moderate this panel, which featured Rachel Barkow,[63] Patricia Cummings,[64] and David Singleton.[65] This panel was designed to highlight creative and ambitious projects that are either underway or could be undertaken immediately to free long-serving, deserving prisoners even before broad systemic reforms can be implemented.

David Singleton leads the Beyond Guilt Project at the Ohio Justice and Policy Center. The objective of the project is to identify prisoners convicted of the most serious crimes and serving life sentences who either admit or do not contest guilt, have served a significant portion of their sentence, and have demonstrated noteworthy rehabilitation. The Project then seeks opportunities for re-sentencing, generally by soliciting support from prosecutors around the state. Since April 2019, twenty-five individuals have been released—including several convicted of homicide—who still had years to go before they would ever appear before a parole board. They have chosen to pursue relief for those convicted of serious offenses because of the underlying view that it will be impossible to significantly reduce mass incarceration if the focus is limited to non-violent offenses. The overarching goal of this innovative project is to profile those who are released and use their stories to help generate momentum for a "Second Look" statute that would provide a formal mechanism to revisit lengthy sentences.[66] Mr. Singleton argued that people

63. Vice Dean and Segal Family Professor of Regulatory Law and Policy, Faculty Director, Center on the Administration of Criminal Law, New York University School of Law.

64. Supervisor, Conviction & Special Investigations Unit, Philadelphia District Attorney's Office.

65. Executive Director, Attorney at Law, Ohio Justice & Policy Center.

66. "Second Look" statutes are laws that offer incarcerated individuals a mechanism by which their sentences could be reviewed—or given a second look—to consider their fairness and consistency, and hopefully to result in a reduction. *See* JANEANNE MURRAY, SEAN HECKER, MICHAEL SKOCPOL & MARISSA ELKINS, NACDL, SECOND LOOK = SECOND CHANCE: THE NACDL MODEL "SECOND LOOK" LEGISLATION (Dec. 10, 2020), https://www.nacdl.org/Document/SecondLookSecondChanceNACDLModelSecondLookLegis?_zs=iHDgM1&_zl=EAN56.

should not be forever defined by what they may have done years ago. He noted, "People change over time. Many of our clients were convicted when they were teens before their brains were fully developed. Decades later they are different people."

Patricia Cummings defined two similar initiatives that have been launched from within a prosecutor's office. In 2018, Philadelphia District Attorney Larry Krasner directed his office's Conviction Integrity Unit to expand its focus beyond cases of actual innocence and wrongful conviction to include sentencing injustices and inequities. Because there is presently no vehicle in Pennsylvania to reconsider an unjust sentence, one approach seeks to find problems in the guilt/innocence determination to find a path back into court and then offer the defendant an opportunity to replead and receive an appropriately reduced sentence. Four of six such applications have been successful. Ms. Cummings's office is also using the commutation process to reverse excessive sentences. Philadelphia has produced an extraordinarily high percentage of cases where the defendant was sentenced to life without parole. The office is reviewing cases, especially those where the conviction hinged on a felony murder theory or accomplice liability, and conducting a holistic reconsideration. As of this writing, nine such cases have been granted commutations and six more have been approved by the reviewing authority and are awaiting action by the governor.

Of course, the programs described by Mr. Singleton and Ms. Cummings depend upon the support or acquiescence of enlightened prosecutors. A logical question is how to ensure that such initiatives can endure after the elected prosecutor who initiates such a program leaves office. Patricia Cummings pointed out that "prosecutors have an ethical, legal, and moral obligation to not just look at claiming innocence and wrongful conviction, but must do the same with unjust sentences." She further noted that there was initial skepticism about whether Conviction Integrity Units would be institutionalized, but those concerns were misplaced as there was only one such unit in 2007 and now there are at least seventy-five.

Professor Barkow compellingly made the case that retroactive sentencing adjustments must be institutionalized. She characterized the notion that a lengthy sentenced imposed on a given day should never be revisited, even decades later, as "insane." No other significant life decision is never revisited, whether it is refinancing a mortgage, deciding where to live, whether to stay married; it would be unacceptable if such decisions could never be revisited. But that is largely the approach to sentencing in this country. That must change. Opportunities for regular reconsideration of the original sentence based on new information must be a central part of any sentencing reform. Indeed, there should be a presumption of retroactive application any time a determination is made to reduce penalties.

Further, based on Professor Barkow's experience serving on the U.S. Sentencing Commission, she noted there is hard data to support the notion that reducing sentences does not pose any threat to public safety. The Commission retroactively applied certain sentencing provisions over the past decade, reducing the

sentences of thousands of prisoners by an average of two years. A study of the data raised no concerns about recidivism.[67] Further, to the extent that legislatures do not provide opportunities for retroactive review, the clemency power should be used far more extensively and routinely. Where there has been a legislative sentence reduction for certain offenses but no provision for retroactive application, there should be categorial clemency, perhaps with some safety checks to ensure that the recipient does not have recent conduct that would cause a public safety concern. Additionally, Professor Barkow advocated for expanded use of compassionate release, parole, and the adoption of Second Look statutes.

In discussing how to calibrate whether an individual is a good candidate for early release, Patricia Cummings cautioned against reliance upon risk assessment tools that are driven by static, as opposed to dynamic, factors. Static factors relate solely to information that cannot be changed, such as prior arrests or convictions, age at the time of the offense, and nature of the offense. But those factors may make no sense decades later. And in many cases, they can perpetuate racial and ethnic disparity because of such things as over-policing in certain neighborhoods. Appropriate risk determinations must look at how the individual has adapted and evolved over time.

A final issue is how to deal with inevitable negative reaction when someone who has been granted relief commits a heinous act and opponents of reform seek to exploit it, such as the famous Willie Horton case that was successfully exploited politically in the 1980s.[68] Professor Barkow's response was that there is simply no other policy decision that is driven by a limited aberration. By analogy, she noted that, occasionally, planes crash, but that does not cause society to abandon air travel. Or, in a searingly timely example, Professor Barkow noted that if there are a few adverse reactions to a vaccination, that would not be reason to stop administering a vaccine that can save millions of lives. Society cannot afford to let some failures block overwhelmingly successful reforms. Reformers must instead do what David Singleton does in Ohio: put a human face on the ninety-nine percent that are successful. In the end, it is the human connection, the proximity, that will end mass incarceration. There are so many people now who have friends, neighbors, and family members touched by the nation's failed sentencing policies that it is no longer a remote problem. For that reason, Rachel Barkow expresses optimism that "mass incarceration will be the cause of its own demise."

D. The Future of Sentencing Reform: Leveling Up and Ratcheting Down

Beyond specific back-end relief mechanisms, what are the global reforms that can lead to a new sentencing paradigm? That was the focus of *The Future of Sentencing Reform: Leveling Up and Ratcheting Down*. This panel was moderated

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67. *See* U.S. SENT'G COMM'N, RETROACTIVITY & RECIDIVISM: THE DRUGS MINUS TWO AMENDMENT (2020).

68. *See, e.g.*, Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh*, N.Y. TIMES (Dec. 3, 2018), https://www.nytimes.com/2018/12/03/us/politics/bush-willie-horton.html.

by Vida Johnson.[69] Professor Johnson bluntly defined the problem: The United States is not only the world's leading incarcerator locking up more than 2.2 million of our brothers, sisters, and neighbors in a manner with racial dimensions that are impossible to ignore. She noted that Latino men are twice as likely to be imprisoned as white men, and Black men are six times more likely. Professor Johnson invited the panel to "strategize about the racial injustice and the humanitarian crisis that is our criminal legal system."

Mark Holden[70] observed that it is no longer possible to continue to tinker with a broken system—instead, it needs a complete overhaul. Our criminal justice system may be adjudged legal in its present form, but it is not just. There needs to be a renewed focus on rehabilitation, reformation, restoration, and redemption. Mr. Holden traced the roots of the mass incarceration problem to the initiation of the War on Drugs in 1971 by President Richard Nixon. Presidents who followed Nixon continued the same polices and every year, "drugs win the War on Drugs." Mr. Holden noted that this failed war is the "original sin." Its focus, which should have been on large-scale manufacturers and distributors—as was the approach to alcohol during the Prohibition—was instead on low-level users. Its malevolent intent was unmistakable. Mr. Holden noted that Nixon's chief domestic advisor, John Ehrlichman, years later candidly admitted the Nixon administration adopted these polices to destabilize communities of color and other groups they saw as enemies. Mr. Holden quoted Ehrlichman's retrospective admission: "Did we know we were lying about drugs? Of course, we did. We would arrest their leaders, raid their homes, and break up their meetings." This is a weight the nation carries to this day.

Mr. Holden characterized the modern criminal justice system as the classic example of a failed big government program. He singled out three principal areas that must be transformed: (1) the oppressive use of cash bail, which improvidently jails people or induces them to plead guilty even if they are not just to gain their release; (2) the abuse of forfeiture provisions that strips people of assets even without a criminal adjudication; and (3) prosecution domination of the system to impose huge penalties even on low-level offenders as retribution for exercising their right to a trial. On the final point, the trial penalty, Mr. Holden cited the case of Alice Marie Johnson, who recently had her sentence commuted after more than twenty years. Ms. Johnson was a non-violent, first-time offender who turned down an offer of three to five years, exercised her constitutional right to a trial, and was sentenced to life without parole—plus twenty-five years—consecutively.

Professor Shon Hopwood stepped out of his moderator role from earlier in the program to participate in this panel as an advocate for Second Look sentencing. He noted that the United States is an outlier in that it sentences people to prison for many more things than any other country, and does so for far longer. The irresolvable problem is getting Congress or state legislatures to revisit their entire penal

69. Associate Professor of Law, Georgetown University Law Center.

70. Former Senior Vice President and General Counsel of Koch Industries, Inc.

codes or to get them to reduce mandatory minimums or statutory maximums. Second Look legislation is an alternative approach that avoids that challenge by giving judges the authority to revisit sentences. Professor Hopwood put it bluntly: "We put too much on a judge's plate to figure out in the first instance who has the capacity to turn their life around, rehabilitate, and no longer be a danger to public safety." Reflecting on his own experience, he related that the judge who sentenced him when he was a young man later said in reflecting upon the sentence, "I would have bet the farm and all the animals on it that Shon Hopwood would never be a productive citizen. Shon has shown me that my sentencing instincts suck."

Professor Hopwood noted that very few people can evaluate who in the future will be able to turn things around. For that reason, it is essential to give judges the power to reevaluate their sentences after the fact. He noted that some of those tools are available in the federal system, as was addressed in some of the advocacy previously described.

Amy Fettig[71] offered that the goal must be to radically shift the punishment paradigm. The current approach fails from the perspectives of public policy, practicality, and humanity. Worse even than the statistics that the United States comprises 5% of the world's population but imprisons 25% of the world's prisoners is the staggering percentage of life sentences. The United States currently has 80% of the world's prisoners serving life sentences—a total of roughly 200,000, which is equal to the *total* jail and prison population in 1970. And this extreme punishment paradigm reflects stark racial injustice. Two-thirds of life sentences are currently imposed on people of color, 50% of which are Black men. The nation must deal with lengthy sentences if it is to end mass incarceration. Ms. Fettig observed that the evidence does not support the reliance on harsh prison sentences to advance deterrence or promote public safety. Most violent crime is committed by individuals between the ages of fifteen and twenty-four. When those individuals reach ages thirty, forty, fifty, or beyond, they are very unlikely to commit new crimes. Thus, any meaningful reform must look at prospective sentencing. Specifically, habitual offender statutes, which provide enhancements based on prior convictions, should be revisited. According to Ms. Fettig, there are 17,000 individuals serving life sentences for property and drug crimes resulting from these enhancement statutes. And they are generally wielded in the discretion of prosecutors, which contributes to racial injustice.

Amy Fettig also strongly endorsed Second Look legislation, citing several incipient initiatives on the federal and state levels.[72] She also referenced then-pending

71. Executive Director, The Sentencing Project.

72. *See, e.g.*, Second Look Act of 2019, S.2146, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/senate-bill/2146/text; Omnibus Public Safety and Justice Amendment Act of 2020, B23-0127, Council Period 24 (D.C. 2020), https://lims.dccouncil.us/Legislation/B23-0127; An Act Relating to Limiting the Sentence of Life Without the Possibility of Parole, S.261, Gen. Assemb., 2019–2020 Sess. (Vt. 2020), https://legislature.vermont.gov/bill/status/2020/S.261; An Act Relative to Life Without Parole, H.1542, 2019–2020 Leg., 191st Sess. (Mass. 2019), https://malegislature.gov/Bills/191/H1542.

legislation in Washington, D.C., that would extend a Second Look statute that currently affords those who commit their offense at eighteen-years-old or younger an opportunity to seek re-sentencing to include those whose offense was committed up to the age of twenty-five. That legislation was in fact passed by the D.C. Council two months following the Symposium.[73] Additionally, there must be parole reform, to both provide for earlier eligibility and to deal with the established fact that parole boards tend not to grant parole. In short, reform must include both front- and back-end approaches as well as alteration of the fundamental culture in which policymakers divert resources to imprisonment that could be better spent on education, public health, and community development. This latter point was reinforced by Mark Holden, who observed that the nation spends three to four times more on incarceration than on K–12 education.

The panelists also addressed the problem of how prisoners are treated and the degree to which punishment beyond imprisonment is prevalent. Professor Hopwood noted the collateral consequences of a conviction, which impact all sorts of rights including eligibility for public benefits, employment opportunities, voting rights, and more. And Mark Holden stressed that meaningful programming should be made available to all prisoners, not just those nearing the end of the term or serving shorter sentences. On the federal level, other agencies besides the BOP should be involved, including the Departments of Labor, Health and Human Services, and Education. Amy Fettig, who prior to assuming her current position headed up the Prison Project for the American Civil Liberties Union, noted that in America, "Prison is brutal and nasty. It is astonishing that so many people can transform their lives in such horrible conditions."

E. Rethinking Prison

Prisons need not necessarily be brutal, nasty places. Two successive panels made this point. *Rethinking Prison: Lessons from Scandinavia* and *Rethinking Prisons: Implementing Reform at Home and Abroad* explored an approach to imprisonment that differs radically from the prevailing approach in the United States. The first of these two panels was moderated by Steven Chanenson.[74] Panelists included Dr. Jordan Hyatt[75] and Dr. Synøve Andersen.[76] The second panel was moderated by Dr. Hyatt and also included Dr. Andersen, as well as Kenneth Eason,[77] Patricia

73. Colleen Grablick, *D.C. Council Gives Final Approval to Second Look Act*, DCIST (Dec. 15, 2020), https://dcist.com/story/20/12/01/dc-council-approves-criminal-justice-reform-bill/.

74. Professor of Law, Director of the Villanova Sentencing Workshop, Villanova University Charles Widger School of Law.

75. Associate Professor, Department of Criminology & Justice Studies, Drexel University.

76. Postdoctoral Fellow, Department of Sociology and Human Geography, University of Oslo.

77. Superintendent, State Correctional Institution–Chester, Pennsylvania Department of Corrections.

Connor-Council,[78] and Are Høidal.[79]

The intent of these panels was to showcase an alternative to this nation's punitive approach to imprisonment by featuring the markedly different and more humane approach that has been implemented in Scandinavia. Professor Chanenson introduced the subject by noting that America has a prison-centric view which holds that, in effect, anything other than imprisonment is not punishment. More than that, conditions in U.S. prisons are notably deplorable. The Scandinavian approach, which treats crime as a sickness and recognizes that it is a social rather than an individual problem, employs the "Normality Principle." Under that approach, the fact of imprisonment *is* the punishment. Beyond that, life inside the prison should resemble life on the outside, without the loss of other rights, such as voting, education, health, and visitation, in the context of a humane environment that deemphasizes institutionalization. Additionally, these prisons apply a dynamic security model in which officers and prisoners are together for meals and recreation, fostering more humane, non-confrontational interaction. Prison officers are expected to help prisoners and not simply guard and control them. The Scandinavian approach has led to sharply lower recidivism rates.

Professor Chanenson explained that the success of the Nordic approach led to the creation of the Scandinavian Prison Project, a correctional exchange primarily between Pennsylvania and Norway through which an experimental project has been launched in a state prison, SCI–Chester in Pennsylvania. The two panels discussed the genesis of the program, the challenges to its implementation, the profound cultural shift that it required, and the impact on prisoners and correctional officers.

This Issue of the *ACLR* includes an Article which examines the Scandinavian Prison Project and provides insight into how transnational exchanges can inform domestic policymaking.[80] Additionally, as a companion to that Article, a Transcript of the second of the two panels, which featured a fascinating discussion among prison officials from Norway and Pennsylvania, is also included.[81]

F. Is Prison Necessary?

In addition to considerations of the outsized length of prison sentences in the United States and the inhumane way in which people are imprisoned, the Symposium also featured a panel on whether there are viable alternatives to prison

78. Unit Manager, Little Scandinavia Unit, State Correctional Institution–Chester, Pennsylvania Department of Corrections.

79. Governor, Halden Prison, Norway.

80. Jordan M. Hyatt, Synøve Andersen, Steven L. Chanenson, Veronica Horowitz & Christopher Uggen, *"We Can Actually Do This": Adapting Scandinavian Correctional Culture in Pennsylvania*, 58 AM. CRIM. L. REV. 1716 (2021).

81. Annotated Transcript, *"Ice in the Stomach": Implementing Reform at Home and Abroad*, 58 AM. CRIM. L. REV. 1775 (2021).

altogether. *Is Prison Necessary?* was moderated by Susan Marcus[82] and featured Jorge Antonio Renaud,[83] Anne Oredeko,[84] and sujatha baliga.[85]

Anne Oredeko contextualized the consideration of whether prisons are necessary by providing the historical context for mass incarceration, which falls most heavily on communities of color. She suggested that the current network of criminal codes and city ordinances that underpin modern jails, prisons, and policing practices grew out of the Slave Codes and the Black Codes instituted after the end of slavery. Ms. Oredeko noted that slavery did not just involve the kidnapping and trafficking of people of African descent, but also was a manifestation of an economic system that depended upon the availability of cheap and expendable labor to expand profit. The enslavement of Black people was predicated upon the idea that they are inherently prone to violence, are unable to work, and lack cultural stability. Leaders of the political and capitalist class saw Black people as undesirable, and that attitude is still reflected in the criminal legal system today. This injustice was not merely a Southern phenomenon but existed in the North as well, as reflected by the Fugitive Slave Act[86] and early policing in New York that traces its roots to slave catchers.[87] Similarly, inmate labor today mirrors the convict leasing systems where mostly Black people were arrested for petty violations and placed into enforced labor.

Ms. Oredeko's overarching message is that economic motivation and inherent notions of Black inferiority permeate the system today. And current conversations about prison abolition should be viewed as a successor to the conversations in the 1800s about a system of torture that destroys lives, and how to end it.

Jorge Antonio Renaud is part of a movement of formerly incarcerated individuals who are advocating for alternatives to caging people in prisons that is grounded in a restorative justice model, for it was a restorative justice program that essentially saved his own life. At the age of nineteen, he was arrested on drinking charges in South Texas. He was thrown into a county jail, along with twenty-four other individuals, all of whom were already convicted and were awaiting transport to prison. Mr. Renaud was savagely raped over a period of six hours. After they washed blood, urine, and feces off of him, they sent him home. The resulting rage led him to many arrests for which he was in and out of prison for years because he had never resolved the anger and hatred toward himself for what had happened in that county jail. Mr. Renaud left prison for the last time in 2008. A restorative justice program run by Indigenous people finally enabled him to talk about his rape for the first time and cope with the trauma that he had carried with him for all those

82. Criminal Defense Attorney, Law Firm of Susan K. Marcus LLC.

83. Regional Director of Policy and Advocacy, LatinoJustice PRLDEF.

84. Supervising Attorney, Racial Justice Unit, Legal Aid Society.

85. Senior Fellow, Restorative Justice Project. Ms. baliga does not use capital letters in her name.

86. Pub. L. No. 31–60, 9 Stat. 462 (1850).

87. *See, e.g.*, Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police.

years. That led him to the realization that there must be alternatives to imprisonment, that the American preoccupation with putting people in cages evinces an embrace of brutality and a lack of imagination.

sujatha baliga is the survivor of child sexual abuse and numerous rapes and assaults as a young adult who advocates for restorative justice and prison abolition. Putting people in cages does not help people get better. It is illusory to believe that imprisonment deters or rehabilitates. It is purely retributive, but that is not a worthy goal. Further, Ms. baliga echoed Anne Oredeko's analysis that the current criminal legal system embodies an evolved notion of enslavement. In contrast, under a restorative justice model, young felons do not get imprisoned, rather they get diverted. They get to meet their victims in an approach that is grounded in notions of interdependence and harm-healing without causing further harm. If the individual can complete a family- and community-focused plan to repair the harm, no charges are ever filed. Ms. baliga noted that studies of randomized restorative justice programs show they have a 13% recidivism rate (versus 53% for a more traditional approach) and a 91% victim satisfaction rate. These restorative justice precharge felony diversion programs are now operating in partnership with progressive district attorneys in several jurisdictions throughout the country.

Ms. baliga explained that her own experiences during her youth led her to the conclusion that what she wanted more than anything was not to punish those who harmed her, but rather to heal them. In advocating for abolition, she referenced a definition adopted by Critical Resistance, a national grassroots organization building a movement to abolish the prison industrial complex: "Abolition is a political vision with the goal of eliminating imprisonment, policing, and surveillance and creating lasting alternatives to punishment and imprisonment."

Susan Marcus started her career as a mitigation specialist and then earned her law degree, working primarily on the defense of capital cases before expanding to include the defense of other serious crimes. From that perspective, as is well known to all criminal defense lawyers, the minute a person is ensnared in the criminal legal system, the injustice, cruelty, and dehumanization begins. Even if a person ultimately is exonerated, the impact of the arrest alone, as well as possibly months or years waiting for a trial, can have vast consequences, including probation or parole violations, loss of jobs, children, home, and more. And, of course, when a prison sentence is the ultimate outcome, the real costs of prison are incalculable for the individual sentenced and those in the communities, families, and loved ones from whom they are isolated. For these reasons, Ms. Marcus argued there must be another way. She too favors abolition and endorses restorative and transformative justice approaches.

In remarks directed to the many present and future lawyers who attended the Symposium, Ms. Marcus proposed ways to incorporate the reformer's zeal to change the system into passionate client-centered advocacy in the individual case. She urged lawyers to be part of the solution by boldly engaging with judges and prosecutors to ensure that they recognize the harm in perpetuating dehumanizing

practices and that they embrace the shared goal of making things better for all concerned. Ms. Marcus urged that the skillful advocate should shift the focus from the crime to the harm, both the harm possibly inflicted by the client but also the harm inflicted on the client. As she put it, "There are not competing tragedies, only parallel ones." It is the job of the advocate to find the power in each case, and irrespective of whether a restorative model can be employed, to ground their advocacy in notions of healing, dignity, and respect.

IV. THE JUDICIAL KEYNOTE AND SOME REFLECTIONS

A centerpiece of the Symposium was the keynote presentation by the Hon. Colleen McMahon, Chief Judge of the U.S. District Court for the Southern District of New York. Chief Judge McMahon offered compelling observations and analysis primarily focusing upon the opportunity afforded to federal judges by the First Step Act ("FSA") to reconsider a previously imposed sentence. She offered an invaluable judicial perspective on both the possibilities unleashed by the Act and its limitations, which provided critical insight for anyone contemplating compassionate release litigation. Chief Judge McMahon's Remarks are published in their entirety in this Issue.[88]

In looking at the future of sentencing and rethinking the status quo, aspects of Chief Judge McMahon's remarks in some measure underscore fundamental dilemmas that reformers must recognize and overcome. At one point in her keynote, she offered an observation about the role of rehabilitation. In noting that rehabilitation may be considered in a compassionate release application under the FSA, she also acknowledged that rehabilitation alone does not suffice. The mere fact that rehabilitation *can* be considered, however, the judge sees as an extremely positive development. But she continued:

> [R]ehabilitation is supposed to be one of the goals of sentencing under Section 3553 [18 U.S.C. § 3553], so it never made any sense not to give people credit for actually doing it, for actually rehabilitating themselves. In fact, if I were fashioning a second-look statute, it would turn largely on rehabilitation. I would likely do what Congress did not: if I were a legislator, I would probably allow rehabilitation alone to suffice for sentence reduction.

Yet paradoxically, the Chief Judge also explained why until the passage of the FSA she never gave much thought to resentencing individuals. The first reason is that except in the extremely rare circumstances when the BOP moved for compassionate release for a terminally ill client, judges had no authority to revisit a sentence. Indeed, Chief Judge McMahon said that in twenty-two years on the bench, she never received such a motion. But her second reason is truly instructive:

88. Colleen McMahon, *(Re)Views from the Bench: A Judicial Perspective on Second-Look Sentencing in the Federal System*, 58 AM. CRIM. L. REV. 1617 (2021).

> Well, I told you at the outset that there were two reasons I did not spend too much time thinking about resentencing my defendants. The second reason is that there are not very many cases in which I am likely to want to change someone's sentence. You may not want to hear that, but it happens to be true.

Indeed, Chief Judge McMahon went one step further at the conclusion of her remarks when she noted that aside from a required mandatory minimum (which, it must be noted, is a significant exclusion), the current advisory nature of the U.S. Sentencing Guidelines affords judges ample leeway to exercise judgment at the time of sentencing. And therefore, she suggests that since rehabilitation alone cannot be a basis for a finding of extraordinary and compelling circumstances, there will not be many compassionate release motions granted, certainly not after the pandemic ends. Thus, she concluded, "the defense bar would do well to keep its focus on sentencing at the time of sentencing and not expect a do-over at a later date."

This crystalizes the inherent dilemma in a system that embraces long, inflexible sentences. How exactly does even the most skillful defense attorney advocate for a judge to consider future rehabilitation? And how does a judge, who feels that they have ample leeway to set a just sentence know if the person they are locking away for ten, twenty, thirty years or life will become a different person over time? How could the judge who sentenced Shon Hopwood for a series of bank robberies know that he would excel at the law and within years of his release be a distinguished professor, litigator, and reformer? And what if that judge had concluded that Shon's sentence should have been far longer, or if the government had stacked related charges to compel it? What if Shon had exercised his right to a trial and suffered the trial penalty? And how many more Shon Hopwoods remain locked away for decades? While many reforms are essential, the most urgent one surely must be to enact vehicles to revisit harsh sentences at both the federal and state levels.[89]

CONCLUSION

Prison Brake thoroughly exposed the vast injustices inherent in this country's approach to sentencing. That approach, which embraces mind-numbingly long sentences that do virtually nothing to remediate harm, concretizes the injustices that permeate the entire criminal legal system. These injustices, which institutionalize racial and ethnic disparities, are manifested throughout the criminal legal system, from oppressive bail practices to the tyranny of the trial penalty. As foretold in Dean Treanor's opening remarks, it is indeed the case that practitioners, scholars, and activists from across the ideological spectrum agree that the nation's current approach to sentencing is barbaric, discriminatory, and fundamentally flawed.

In her presentation during the panel *Is Prison Necessary?*, Susan Marcus captured a recurring theme that resonated throughout the Symposium when she quoted

89. *See Model "Second Look" Legislation and Report*, NACDL, www.nacdl.org/secondlook. (last visited Jan. 22, 2021).

Ta-Nehisi Coates: "The hammer of the criminal justice system is the perfect tool for a society that has run out of ideas."[90]

Fortunately, the remarkable array of panelists and presenters at the NACDL 2020 Presidential Summit & Sentencing Symposium proved that there are many thoughtful people from all realms of society, reflecting both liberal and conservative ideologies, who have not run out of ideas. They and the hundreds of students, lawyers, and reformers who participated in the Symposium must now translate these ideas into reality. Reform is not only possible. It is imperative. The United States can no longer afford the economic, social, and human costs that come with the dubious distinction of being the world's leading jailer. It is time for a *Prison Brake*.

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90. Ta-Nehisi Coates, *Killing Dylann Roof*, ATLANTIC (May 26, 2016), https://www.theatlantic.com/politics/archive/2016/05/dylann-roof-death-penalty/484274/.