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THE SLOW DRIP OF DECARCERATION: REVERSING THE FLOOD OF MASS INCARCERATION AND ITS RACIST IMPACT

OLINDA MOYD*

ABSTRACT

For the last four decades, the flood of African Americans pouring into our jails and prisons can be likened to a watershed where someone turned on a faucet full force and opened the floodgates to all the prison doors. Despite the multitudinous efforts to secure the release of people unwittingly swept up in this flood, most spending decades behind bars, their releases have been mediocre and only a few have slowly dripped towards freedom. Racism seeps into every facet of American life and nowhere is it more prevalent than in our criminal legal system and the crisis of mass incarceration. Mass incarceration and egregiously long sentences cause irreparable harm, and racial disparities exist in every stage of the criminal legal process, from policing, pretrial, prosecution, sentencing, and incarceration, through the extensive supervision period and collateral consequences that follow.¹ African American families have been ripped apart by these nefarious wars that target African American communities and strip us of valuable resources, remove heads

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¹ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 163–72 (2020) (detailing the vast racial profiling in policing that has been legalized by the Supreme Court); *Collateral Consequences*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/collateral.html#:~:text=who%20are%20incarcerated%2C%20tens%20of,they%20have%20a%20criminal%20record> (last visited Oct. 24, 2023) (collecting reports on how convictions render individuals second-class citizens even after they are released).

of households, interrupt college plans, destroy marriages, and expose children to cycles of incarceration from a young age. Traumatic and oppressive criminal legal encounters are often passed down akin to how generational wealth is passed down in other communities.² Mass incarceration steals dreams and engages future aspirations.

This article examines the efforts to liberate people from over-incarceration, many of whom have been detained long after rehabilitation has been achieved and well beyond the point when punishment has been satisfied. A healthy criminal legal system punishes people no longer than absolutely necessary and leaves room for transformation and rehabilitation. The U.S. criminal legal system, on the other hand, spreads the net so wide that the innocent are unwillingly snatched up and people are found to be detained well beyond the expiration of their sentence.³ Fundamentally, our system creates and exacerbates the very

² Yaa Gyasi powerfully captures the layers of generational harm experienced by so many African American families in her novel, *Homegoing*:

Originally, he'd wanted to focus his work on the convict leasing system that had stolen years off his great-grandpa H's life, but the deeper into the research he got, the bigger the project got. How could he talk about Great-Grandpa H's story without also talking about his grandma Willie and the millions of other [B]lack people who had migrated north, fleeing Jim Crow? And if he mentioned the Great Migration, he'd have to talk about the cities that took that flock in. He'd have to talk about Harlem. And how could he talk about Harlem without mentioning his father's heroin addiction—the stints in prison, the criminal record? And if he was going to talk about heroin in Harlem in the '60s, wouldn't he also have to talk about crack everywhere in the '80s? And if he wrote about crack, he'd inevitably be writing, too, about the "war on drugs." And if he started talking about the war on drugs, he'd be talking about how nearly half of the [B]lack men he grew up with were on their way either into or out of what had become the harshest prison system in the world. And if he talked about why friends from his hood were doing five-year bids for possession of marijuana when nearly all the white people he'd gone to college with smoked it openly every day, he'd get so angry that he'd slam the research book on the table of the beautiful but deadly silent Lane Reading Room of Green Library of Stanford University. And if he slammed the book down, then everyone in the room would stare and all they would see would be his skin and his anger, and they'd think they knew something about him, and it would be the same thing that had justified putting his great-grandpa H in prison, only it would be different too, less obvious than it once was.

YAA GYASI, *HOMEGOING* 289-90 (2016).

³ See Press Release, U.S. Dep't of Just., Justice Department Finds Louisiana Department of Public Safety and Corrections Violates the Constitution by Incarcerating People Beyond their Release Dates (Jan. 25, 2023), <https://www.justice.gov/opa/pr/justice-department-finds-louisiana-department-public-safety-and-corrections-violates>.

harm that its proponents allegedly seek to prevent.⁴ Substantial research has been devoted to racial disparities in the sentencing process, but little attention has been focused on the racial inequities that exist in liberating people from those unjust sentences.

This article will explore the numerous endeavors to correct the harmful impact of mass incarceration by filing petitions for clemency, parole, juvenile lifer release, and compassionate release. In each practice area, we examine the law or statute creating such relief options, review the current landscape, and analyze denials from the courts or government officials involved in the decision-making process. While other avenues for post-conviction relief are available constitutionally, statutorily, and via litigation, this article is limited to these four practice areas.⁵ Emancipating men and women from the watershed flow of incarceration and bringing them home has been a valiant but slow drip effort, especially as compared to the powerful tides that swept them up into the criminal legal system in the first place. This article proposes that the courts and other decision-makers act with a sense of urgency to decarcerate in order to uproot racist policies and practices.

⁴ See e.g., DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM 270-72 (2021) (detailing the layers of systemic harm that led to the murder of sixteen year old Ma'Khia Bryant by Ohio police on April 20, 2021, and observing how “[i]nstead, all of that money, time, and energy could have paid for quality housing in a neighborhood without high concentrations of crime, economic inequality, deindustrialization, and violence; it could help eliminate those neighborhoods altogether.”).

⁵ These other avenues for incarcerated individuals to exercise their rights and seek relief have become just as unattainable as the practice areas discussed in this article. Blocking paths for people to challenge the conditions of their imprisonment and integrity of their conviction or sentence is not accidental—it is part of the same political movement rooted in racism that gives rise to mass incarceration writ large. See, e.g., Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e (restricting incarcerated individuals’ ability to exercise their rights in federal court, including imposing limits on the number of cases that can be brought and requiring exhaustion of administrative remedies); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. 2244(d) (severely curtailing the availability and scope of collateral review for habeas petitioners). Even when individuals do get to the Supreme Court, this body has often refused to use its emergency power as a last resort to protect them from imposition of the death penalty despite strong evidence of innocence, due process claims, *Brady* violations, and intellectual disability or incompetence to be executed. See, e.g., *Johnson v. Missouri*, 143 S. Ct. 417 (2022) (Jackson, J., dissenting) (highlighting the irreparable harm suffered by Mr. Johnson when Missouri executed him despite his meritorious due process claim); *Brown v. Louisiana*, 143 S. Ct. 886, 886 (2023) (Jackson, J., dissenting) (dissenting from a refusal to grant an emergency stay despite strong evidence of a *Brady* violation that could have mitigated Mr. Brown’s death sentence); *Burns v. Mays*, 143 S. Ct. 1077, 1080 (2023) (Sotomayor, J., dissenting) (disagreeing with refusal to exercise review despite strong evidence Mr. Burns was condemned after the jury received incomplete information about his role in the offense); *Johnson v. Vandergriff*, 143 S. Ct. 2551, 2556 (2023) (Sotomayor, J., dissenting) (lamenting how the Court “pave[d] the way to execute a man with documented mental illness before any court meaningfully investigates his competency to be executed.”).

TABLE OF CONTENTS

I.INTRODUCTION: FLOODING OUR PRISONS THEN DAMMING THE PATH TO RELEASE	215
II.COMPASSIONATE RELEASE: AN ILLUSORY PLEA FOR MERCY FOR THE SICK AND DYING	219
A. The Purpose of Compassionate Release and Tools to Seek It	219
1. Federal Law: Decades of Inaction, A Glimmer of Hope, and a Deadly Pandemic.....	221
2. State Law: Inefficiencies and Devastating Consequences	225
B. Judicial Failures to Ensure Compassion and Provide Clear Guidance	231
III.CLEMENCY: A DISCRETIONARY MEANS EXPLOITED FOR POLITICAL GAINS	235
A. Statutory Vesting of Discretion in Political Decision- Makers	235
1. Federal Law: A Longstanding Mechanism With a Checkered Past	236
2. State Law: Models for Reform and Divestment of Executive Authority.....	241
B. Judicial Recognition of This Critical Remedy and Our Failure to Provide It	247
IV.JUVENILE LIFER: THE SLOW UNDOING OF CHILDREN’S CONDEMNATION.....	249
A. The Supreme Court Speaks and the States Listen	249
1. Federal Law: A Long Overdue Yet Imperfect Protection for Children Against Cruel and Unusual Punishment	249
2. State Law: Retroactive Application Begins to Make a Dent.....	253
B. Challenges in State Law Implementation and a Red Alert in Shifting Tides	258
V.PAROLE: A PROCESS PLAGUED BY OPACITY, IMPLICIT BIAS, AND LITTLE DUE PROCESS	265
A. Broken Parole Systems Contribute to Hopelessness	265
1. Federal Law: The Abolition of Federal Parole.....	267
2. State Law: Exponential Barriers to Seeking Release and Arbitrary Denials	268

B. Judicial Recognition of But Failure to Protect Individuals' Liberty Interests.....	274
VI. CONCLUSION: AN URGENT CALL TO REDIRECT THE SHIFTING TIDES TOWARDS DECARCERATION.....	278
I. INTRODUCTION: FLOODING OUR PRISONS THEN DAMMING THE PATH TO RELEASE	

Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations.⁶ *Justice Ketanji Brown Jackson*

Racism has permeated every facet of American life, but it is most remarkable when studying the number of African American men and women herded down the path to incarceration in our country. While African Americans only make up a small fraction of the general U.S. population, we consistently comprise a much higher percentage of persons caged in our jails and prisons. According to the Pew Research Center, “In 2021, there were an estimated 47.2 million people who self-identified as [African American], making up 14.2 percent of the country’s population.”⁷ The Bureau of Justice Statistics reported in 2021 that the rate of incarceration for African American adults was 1,850 per 100,000, while it was 410 per 100,000 for white adults.⁸ “[African Americans] are incarcerated in state prisons at nearly five times the rate of white Americans.”⁹ In some states, the contrast between the numbers of African Americans in the general population, as compared to those who are in prison, is even more astonishing. For instance, in Wisconsin, which “leads the nation in [African American] imprisonment[,] one of every [thirty-six African American] Wisconsinites is in prison.”¹⁰ In 2020, African American individuals made up forty-two percent of the

⁶ *Students for Fair Admission, Inc., v. President of Harvard Coll.*, 600 U.S. 181, 384 (2023) (Jackson, J., dissenting).

⁷ Mohamad Moslimani et al., *Facts About the U.S. Black Population*, PEW RSCH. CTR. (Mar 2, 2023), <https://www.pewresearch.org/social-trends/fact-sheet/facts-about-the-us-black-population/>.

⁸ E. ANN CARSON & RICH KLUCKOW, U.S. DEP’T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2021 – STATISTICAL TABLES 12 (2023), <https://bjs.ojp.gov/document/cpus21st.pdf>.

⁹ See, e.g., ASHLEY NELLIS, THE SENT’G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 5 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

¹⁰ *Id.*

total prison population in Wisconsin.¹¹ In the same year in the same state, African American people made up only 6.4 percent of the total population.¹² “In [twelve] states, more than half the prison population is [African American] . . .”¹³ In most states, prisoners come from racially segregated and disadvantaged communities.¹⁴

Incarceration rates in the United States are unprecedented. In 2021, the custody counts of adults in state and federal prisons and local jails was estimated to be 1,767,200 with 171,600 in federal prisons, 959,300 in state prisons, and 636,300 in local jails.¹⁵ It is important to note that it is not just state and federal prisons and jails where people are incarcerated; people are often kept in hidden places like private prisons (contracted to house state and federal prisoners), juvenile correctional facilities, immigration detention centers, and Indian country jails. Beginning in the early 1970’s until recent years, the United States’ prison population grew by an average of 5.8 percent each year.¹⁶ At the close of the Twentieth Century, U.S. prison populations ballooned to 1,933,503 in 2000, nearly six times the incarcerated population two decades prior.¹⁷ This exponential “prison boom,” a product of the “law and order” and “super predator” political rhetoric which expanded through the 1990s, has resulted in the incarceration of thousands of people of color from poor communities who were sentenced to serve decades in prison.¹⁸ This rhetoric was initiated with Barry Goldwater in 1964, and

¹¹ Jacob Alabab-Moser, *Is the Percentage of Black Inmates in Wisconsin Seven Times Higher Than the Percentage of Black Citizens in The State?*, WIS. WATCH (Oct. 25, 2022), <https://wisconsinwatch.org/2022/10/is-the-percentage-of-black-inmates-in-wisconsin-seven-times-higher-than-the-percentage-of-black-citizens-in-the-state/> (citing CARSON & KLUCKOW, *supra* note 8, at 47).

¹² See America Counts Staff, *Wisconsin Population Increased 3.6 % Since 2010*, U.S. CENSUS BUREAU (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/wisconsin-population-change-between-census-decade.html>.

¹³ These states include Alabama, Delaware, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, South Carolina, and Virginia. See NELLIS, *supra* note 9, at 5.

¹⁴ See generally Lawrence D. Bobo & Victor Thompson, *Racialized Mass Incarceration: Poverty, Prejudice and Punishment*, in *DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY* 322-55 (Hazel R. Markus & Paula Moya, eds., New York, Norton, 2010).

¹⁵ CARSON & KLUCKOW, *supra* note 8, at 14.

¹⁶ NAZGOL GHANDNOOSH, THE SENT’G PROJECT, ENDING 50 YEARS OF MASS INCARCERATION: URGENT REFORM NEEDED TO PROTECT FUTURE GENERATIONS 2 (2023), <https://www.sentencingproject.org/app/uploads/2023/02/Ending-50-Years-of-Mass-Incarceration-Urgent-Reform-Needed-to-Protect-Future-Generations.pdf>.

¹⁷ Compare ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP’T. OF JUST., PRISONERS IN 2000 2 (2001), <https://bjs.ojp.gov/content/pub/pdf/p00.pdf>, with U.S. DEPT. OF JUST., PRISONERS IN 1980 2 (1981), <https://bjs.ojp.gov/content/pub/pdf/p80.pdf>.

¹⁸ See, e.g., ALEXANDER, *supra* note 1, at 163-72; 13TH (Netflix 2016).

gained traction through the Nixon, Reagan, and Clinton administrations.¹⁹ Even former Texas Governor, Ann Richards, who was a liberal democrat, bragged during her reelection against George W. Bush in 1994 about having added 75,000 prison beds.²⁰ People of color, particularly African American men, are disproportionately represented in our incarceration rates.²¹ Hence, mass incarceration has been titled “the New Jim Crow,”²² reminiscent of a time when laws were put in place to enforce racial segregation and oppress formerly enslaved people. America has spent over a trillion dollars waging its war on drugs since President Richard Nixon initially launched this campaign over fifty years ago.²³ This policy, which has continued through today, has not made a significant dent in America’s drug problem.²⁴ But such policies only serve to contribute to the erosion of protection for individual liberties that has resulted from “tough on crime” reforms, including giving law enforcement authority to impose no-knock warrants and odor searches, and requiring that judges adhere to strict mandatory minimum

¹⁹ See ALEXANDER, *supra* note 1, at 52; 13TH, *supra* note 18.

²⁰ See Christopher Hooks, *Who Killed Criminal Justice Reform in Texas?*, TEX. MONTHLY (Oct. 2021), <https://www.texasmonthly.com/news-politics/who-killed-criminal-justice-reform-texas/>.

²¹ See, e.g., NELLIS, *supra* note 9, at 4-5 (detailing how as of 2021, African Americans were incarcerated in state prisons at five times the rate of whites, one in eighty-one African Americans nationally was incarcerated in state prisons, and in twelve states, more than half the prison population was African American); Graham Boyd, *The Drug War Is The New Jim Crow*, ACLU (July 31, 2001), <https://www.aclu.org/documents/drug-war-new-jim-crow> (reporting that as of 2001, the number of African American men incarcerated in U.S. prisons, 792,000, equaled the number of men enslaved in 1820).

²² See generally ALEXANDER, *supra* note 1. In her book, Michelle Alexander shows the evolution from Jim Crow laws of the past to a criminal justice system that unfairly targets communities of color – and especially African American communities. *Id.*

²³ See 13TH, *supra* note 18 (documenting the evolution of the war on drugs during the Nixon Administration through modern day).

²⁴ Jake Horowitz & Julie Wertheimer, *Drug Arrests Stayed High Even as Imprisonment Fell From 2009 to 2019*, PEW (Feb. 15, 2022), [https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/02/drug-arrests-stayed-high-even-as-imprisonment-fell-from-2009-to-2019#:~:text=Data%20shows%20that%20the%20U.S.,totaling%20more%20than%20143%2C000%20individuals](https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/02/drug-arrests-stayed-high-even-as-imprisonment-fell-from-2009-to-2019#:~:text=Data%20shows%20that%20the%20U.S.,totaling%20more%20than%20143%2C000%20individuals.). See also, Louise Arbour, et. al., *Time to End Prohibition*, GLOBAL COMM’N ON DRUG POL’Y, 16 (2021), https://www.globalcommissionon drugs.org/wp-content/uploads/2021/12/Time_to_end_prohibition_EN_2021_report.pdf (visualizing the increase in drug use globally from approximately 185 million people in 1998 to 269 million people in 2018).

sentencing instructions.²⁵ The overreliance on incarceration in order to achieve or maintain public safety has been a mere ruse.²⁶

Despite the valiant efforts of zealous legal practitioners, jailhouse lawyers, and people filing pro se, only a small fraction of men and women have actually been released from the clutches of mass incarceration and gained their freedom, slowly dripping out of the tightly turned faucet.²⁷ Decreasing the number of people in our prisons is a racial justice issue and every piece of artillery must be utilized to right the wrongs and reverse the decades of harm inflicted by mass incarceration. “[B]etween 1972 and 2009, the prison population grew an average of 5.8% annually.”²⁸ Comparatively, the pace of decarceration has been less than half the rate of growth – averaging only 2.3 percent each year.²⁹ We are getting people out of prison at an appallingly slower pace than we incarcerated them. Whether by fighting for freedom at administrative hearings before paroling authorities, before the courts through the filing of clemency and juvenile lifer petitions, or by seeking clemency from our elected officials (governors and the president), our criminal legal system must reverse course to decrease mass incarceration in order to achieve racial justice and heal communities. Many decision-makers often perceive people of color as more threatening and dangerous than white people and these decision-makers are often convinced that young African American men are chronic offenders, do not respond to treatment, and are more likely to recidivate.³⁰ These implicit biases seep into the decision-making process when determining who is granted a second chance at release and allowed to return home versus who is left

²⁵ See, e.g., Brian Mann, *After 50 Years Of The War On Drugs, ‘What Good Is It Doing For Us?’*, NPR (June 17, 2021, 5:00 AM), <https://www.npr.org/2021/06/17/1006495476/after-50-years-of-the-war-on-drugs-what-good-is-it-doing-for-us> (“Despite those concerns, Democrats and Republicans partnered on the drug war decade after decade, approving ever-more-severe laws, creating new state and federal bureaucracies to interdict drugs, and funding new armies of police and federal agents.”); Courtney Kan et al., *What to Know about No-Knock Warrants*, WASH. POST (May 27, 2022, 10:21 AM), <https://www.washingtonpost.com/investigations/2022/04/06/no-knock-warrants/>; Michael Rubinkam, *In Era of Legal Pot, Can Police Search Cars Based on Odor?*, ASSOCIATED PRESS (Sept. 13, 2019, 10:48 AM), <https://ap-news.com/article/0ba2cf617a414174b566af68262ef937>.

²⁶ Todd R. Clear, *The Impacts of Incarceration on Public Safety*, 74 SOC. RSCH. 613 (2007).

²⁷ Wendy Sawyer, *Since You Asked: How Many People are Released from Each State’s Prisons and Jails Every Year?*, PRISON POL’Y INITIATIVE (Aug. 25, 2022), <https://www.prisonpolicy.org/blog/2022/08/25/releasesbystate/>.

²⁸ See GHANDNOOSH, *supra* note 16, at 2.

²⁹ *Id.* at 1.

³⁰ George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOCIO. REV. 554 (1998).

to linger behind prison walls.³¹ The impact of excessive incarceration on African American families is particularly severe. It is estimated that approximately sixty-three percent of African American adults “have had an immediate family member incarcerated and nearly one-third (31%) have had an immediate family member incarcerated for more than one year.”³²

People who are fighting for liberation through the avenues discussed here – compassionate release, grants of clemency, juvenile lifer sentence reductions, or parole releases – wrestle with the reality that these forms of relief are often illusive and unobtainable.³³ This article examines these realities.

II. COMPASSIONATE RELEASE: AN ILLUSORY PLEA FOR MERCY FOR THE SICK AND DYING

A. *The Purpose of Compassionate Release and Tools to Seek It*

Compassionate release mechanisms have been established on the federal and state level in order to allow aging or terminally ill people in prison to have an opportunity for release.³⁴ At best, these mechanisms allow people to die in a setting other than a cold prison cell alone. An individual can petition for early release, after having served a portion of their sentence, for either health reasons (medical parole) or advanced age (geriatric parole).³⁵ Our prison population is aging. It is estimated that “[b]y 2030, prisons will house more than 400,000 individuals who will be 55 and older, making up nearly one-third of the population.”³⁶ This reality exists despite the well documented fact that housing older prisoners is more costly for taxpayers and they pose the lowest risk to

³¹ See generally Olinda Moyd, *Racial Disparities Inherent in America’s Fragmented Parole System*, 36 CRIM. JUST. 6 (2021) [hereinafter Moyd, *Racial Disparities*].

³² BRIAN ELDERBROOM ET AL., FWD.US, EVERY SECOND: THE IMPACT OF THE INCARCERATION CRISIS ON AMERICA’S FAMILIES 29 (2018) <https://everysecond.fwd.us/downloads/everyscond.fwd.us.pdf>.

³³ See *infra* Parts II, III, IV, and V.

³⁴ See *Compassionate Release*, FAMS. AGAINST MANDATORY MINIMUMS, <https://famm.org/our-work/compassionate-release/#about> (last visited Oct. 24, 2023).

³⁵ ALVA POWELL, JUST. POL’Y INST., COMPASSIONATE RELEASE IN MARYLAND: RECOMMENDATIONS FOR IMPROVING MEDICAL AND GERIATRIC PAROLE 1 (2022) <https://justicepolicy.org/research/compassionate-release-in-maryland-medical-and-geriatric-parole-examined/> [hereinafter JPI, COMPASSIONATE RELEASE IN MARYLAND].

³⁶ MARY PRICE, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES, FAMS. AGAINST MANDATORY MINIMUMS 9 (2018), <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf>; George Pro & Miesha Marzell, *Medical Parole and Aging Prisoners: A Qualitative Study*, 23 J. OF CORR. HEALTH CARE 162, 162 (2017).

public safety.³⁷ As people grow older, their risk of committing crime drops significantly,³⁸ but many still find themselves caged in prison serving what seem like slow death sentences. Even dying prisoners are shackled to their beds and often denied family bedside visits at the end of life.³⁹ After the murder of George Floyd at the hands of Minneapolis police officer Derek Chauvin, there were uprisings across the country in protest when we witnessed racist acts of abuse at its worst.⁴⁰ But no outcries erupt when men and women die in cold prison cells hidden from public view.

Compassion is not only a sympathetic understanding of another person's circumstances; it must also include a desire to do something about it. Compassionate release was originally introduced into law by the Sentencing Reform Act of 1984.⁴¹ This was the first statute which created the concept of compassionate release.⁴² Compassionate release typically requires showing particularly extraordinary circumstances which could not reasonably have been foreseen by the court at the time of sentencing.⁴³ The U.S. Sentencing Commission ("USSC") has established guidelines to determine when such extraordinary and compelling reasons justify compassionate release.⁴⁴

³⁷ See KIDEUK KIM & BRYCE PETERSON, AGING BEHIND BARS: TRENDS AND IMPLICATIONS OF GRAYING PRISONERS IN THE FEDERAL SYSTEM, URB. INST., 21–22 (2014), <https://www.urban.org/sites/default/files/publication/33801/413222-Aging-Behind-Bars-Trends-and-Implications-of-Graying-Prisoners-in-the-Federal-Prison-System.PDF>; OFF. OF THE INSPECTOR GEN., THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS, U.S. DEPT. OF JUST., 38–41 (2016) <https://oig.justice.gov/reports/2015/e1505.pdf>.

³⁸ See KIM & PETERSON, *supra* note 37; OFF. OF THE INSPECTOR GEN., *supra* note 37.

³⁹ See, e.g., Victoria Law, *Prison Officials Routinely Deny Hearings to Terminally Ill New Yorkers*, BOLT MAG (Apr. 14, 2022), <https://boltsmag.org/prison-officials-routinely-deny-hearings-to-terminally-ill-new-yorkers/> (“Still locked up, afraid he will lose his eyesight completely, afraid he will never meet his daughter outside prison walls, Medina describes ‘the sad and painful reality of dying alone in a cold dark prison cell.’”).

⁴⁰ See, e.g., *How George Floyd's Death Became a Catalyst for Change*, NAT'L MUSEUM OF AFR. AM. HIST. & CULT., <https://nmaahc.si.edu/explore/stories/how-george-floyds-death-became-catalyst-change> (last visited Oct. 19, 2023); George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (1st Sess. 2021).

⁴¹ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987. This bill abolished life without parole in the federal system, except for persons sentenced before November 1, 1987, persons convicted under District of Columbia Law, transfer treaty inmates, and persons who violated military law. *Id.* It also created the United States Sentencing Commission, which was codified as 18 U.S.C. § 991.

⁴² Lindsey E. Wylie et al., *Extraordinary and Compelling: The Use of Compassionate Release Laws in the United States*, 24 PSYCH. PUB. POL'Y & L. 216, 216–17 (2018).

⁴³ *Id.*

⁴⁴ U.S. SENT'G GUIDELINES MANUAL § 1B1.13, p.s. (U.S. SENT'G COMM'N 2016).

1. Federal Law: Decades of Inaction, A Glimmer of Hope, And A Deadly Pandemic

Federal law permits sentence reductions and early releases for certain categories of prisoners by filing for such release under 18 U.S.C. § 3582 (c)(1)(A), as amended by the First Step Act of 2018 (“First Step Act”).⁴⁵ However, for the many incarcerated people who fit these criteria, securing a compassionate release grant is still beyond reach.⁴⁶ Originally, only the Bureau of Prisons (“BOP”) could bring a motion in court for an individual’s compassionate release and there was a multi-leveled review process.⁴⁷ It was not uncommon for a person to die before their request made its way through the long and convoluted process of reviews by the warden, medical staff, BOP General Counsel, and Director of BOP, and then a ruling by the court.⁴⁸

The array of stories about individuals dying in prison while pleading for mercy when the BOP made the sole decision are disturbing. In 1994, Michael Mahoney was sentenced to a mandatory fifteen years in federal prison for possession of a firearm because he had previously served ten years for several small drug sales to an undercover agent dating back to 1984.⁴⁹ Ten years later he was dying from cancer and a myriad of other conditions at the Federal Medical Center (“FMC”) in Lexington, Kentucky.⁵⁰ He applied for compassionate release after being diagnosed with Hepatitis C, Non-Hodgkin’s lymphoma, and growing tumors.⁵¹ The warden supported his request, and the U.S. Attorney did not oppose his petition.⁵² However, the BOP denied the motion citing the “totality of the circumstances” and his “multiple felony convictions.”⁵³ The sentencing judge then wrote the BOP director pleading on

⁴⁵ First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

⁴⁶ U.S. SENT’G COMM’N, U.S. SENTENCING COMMISSION COMPASSIONATE RELEASE DATA REPORT: FISCAL YEARS 2020-2022, Table 1 (2022).

⁴⁷ See 18 U.S.C. § 3582(c)(1)(A).

⁴⁸ OFF. OF THE INSPECTOR GEN. EVALUATION AND INSPECTIONS DIV., U.S. DEP’T OF JUST., THE FEDERAL BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM 11 (2013), <https://oig.justice.gov/reports/2013/e1306.pdf> [hereinafter OFF. OF THE INSPECTOR GEN., COMPASSIONATE RELEASE PROGRAM].

⁴⁹ Carrie Johnson, *Federal ‘Compassionate’ Prison Release Rarely Given*, NPR (Nov. 29, 2012, 3:08 PM), <https://www.npr.org/2012/11/30/166178036/federal-compassionate-prison-release-rarely-given>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² HUM. RTS. WATCH & FAMS. AGAINST MANDATORY MINIMUMS, THE ANSWER IS NO: TOO LITTLE COMPASSIONATE RELEASE IN US FEDERAL PRISONS 44 (2012), <https://www.hrw.org/sites/default/files/reports/us1112ForUploadSm.pdf>.

⁵³ *Id.*

behalf of Mr. Mahoney.⁵⁴ The BOP never responded, and Mahoney died at age forty-nine handcuffed to a prison hospital bed, despite the fact that his family had arranged for hospice care for him.⁵⁵

In 2018 the Sentencing Reform Act was modified when former President Donald Trump signed into law The First Step Act, bipartisan legislation designed to reform federal prisons and sentencing laws in order to reduce recidivism, decrease the federal prison population and maintain public safety.⁵⁶ This law is designed to help terminally ill or aging people who pose little or no threat to public safety to seek release.⁵⁷ It allows people in prison to seek compassionate release directly in federal court, and it gives sentencing judges the authority to consider these requests once all administrative processes have been exhausted with the BOP or when the BOP failed to act on a compassionate release request within thirty days (whichever came first).⁵⁸ As indicated, before this time only the director of BOP could petition the court on behalf of a sick prisoner, which was a rarity.⁵⁹ A recent report by The Sentencing Project highlights how prior to the First Step Act, compassionate release was egregiously rare, with the Office of the Inspector General reporting only 3% of petitions were granted in 2016.⁶⁰ Additionally, the length of time for BOP to process requests proved deadly, as 5% of the 5,400 applicants for compassionate release in 2014–2017 died during the 4.5 months it took, on average, for their request to be reviewed.⁶¹ In *United States v. Ebberts*,⁶² the court explained the findings from an Office of the Inspector General, which showed that over a six-year period, the BOP filed zero compassionate release motions for non-medical reasons and only twenty-four for medical reasons.⁶³

⁵⁴ *Id.*

⁵⁵ Johnson, *supra* note 49.

⁵⁶ ASHLEY NELLIS & LIZ KOMAR, THE FIRST STEP ACT: ENDING MASS INCARCERATION IN FEDERAL PRISONS, THE SENT’G PROJECT 1 (2023), <https://www.sentencingproject.org/app/uploads/2023/08/First-Step-Act-2023.pdf>.

⁵⁷ *Id.* at 3.

⁵⁸ *Id.* at 3, 8 n.21.

⁵⁹ *Id.* at 3.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 432 F. Supp. 3d 421 (S.D.N.Y. 2020).

⁶³ See *id.* at 430 (citing *United States v. Brown*, 411 F. Supp. 3d, 446, 451 (2019) (quoting *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm’n* (2016) (statement of Michael E. Horowitz, Inspector General, Dep’t of Justice)); OFF. OF THE INSPECTOR GEN., COMPASSIONATE RELEASE PROGRAM, *supra* note 48, at 53 (“Moreover, the BOP recently stated that its practice is to deny non-medical compassionate release requests, and indeed we found that the BOP did not approve a single non-medical compassionate release request during the 6-year period covered by our review.”)).

Mr. Ebbers was convicted of securities fraud and sentenced to twenty-five years of imprisonment.⁶⁴ After thirteen years in prison, he developed significant health issues at the age of seventy-eight years old.⁶⁵ On September 5, 2019, he requested compassionate release.⁶⁶ Because his case was filed after the passage of the First Step Act, he was able to seek relief independently from the BOP.⁶⁷ BOP had denied his initial petition in August 2019, even though Mr. Ebbers suffered from macular degeneration and cardiomyopathy.⁶⁸ By the time his motion was granted by the courts, Mr. Ebbers was disoriented, bedridden, and had been moved to a twenty-four-hour nursing care unit at FMC Fort Worth because he needed assistance with daily living.⁶⁹ He died within two months of being released.⁷⁰

During the recent COVID-19 pandemic, scores of petitions were filed for incarcerated individuals seeking release based on compassionate relief.⁷¹ The pandemic literally closed the courthouse doors that had been figuratively closed for decades, slowing most daily law operations to a crawl.⁷² In response, sole practitioners and law firms, including corporate attorneys, joined the fray and redirected their efforts to represent populations of individuals previously foreign to them.⁷³ Many were trained by the National Association of Criminal Defense Lawyers (“NACDL”) and began to file motions requesting vulnerable individu-

⁶⁴ *Ebbers*, 432 F. Supp. 3d at 422.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 422-23.

⁶⁸ *Id.* at 424.

⁶⁹ *Id.* at 431.

⁷⁰ Katharine Q. Seelye & Daniel Victor, *Bernard J. Ebbers, WorldCom Chief Jailed in Fraud, Dies at 78*, N.Y. TIMES (Feb. 3, 2020), <https://www.nytimes.com/2020/02/03/business/bernard-ebbers-dead.html#:~:text=%2Dblown%20dementia.%E2%80%9D-,Mr.,his%20fi-nal%20months%20at%20home>.

⁷¹ U.S. SENT’G COMM’N., COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC 1, 3 (Mar. 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf [hereinafter USSC COMPASSIONATE RELEASE REPORT].

⁷² See Griff Witte & Mark Berman, *Long After the Courts Shut Down for Covid, the Pain of Delayed Justice Lingers*, WASH. POST (Dec. 19, 2021, 6:00 AM), https://www.washingtonpost.com/national/covid-court-backlog-justice-delayed/2021/12/18/212c16bc-5948-11ec-a219-9b4ae96da3b7_story.html.

⁷³ See *Get Involved with Compassionate Release*, WASH. LAWS.’ COMM. FOR CIV. RTS. AND URB. AFFS. (Nov. 19, 2020), <https://www.washlaw.org/get-involved-with-compassionate-release/>.

als be granted compassionate release and other post-conviction remedies.⁷⁴ It is reported that requests for compassionate release surged during the pandemic and 7,014 motions were filed in fiscal year 2020.⁷⁵ However, data from the USSC reveals judges rejected over 80% of compassionate release requests filed in that fiscal year.⁷⁶ As petitioners were filing individual motions, sometimes with lawyers and sometimes without, federal legislation was being enacted with the intent to provide large-scale relief. Congress passed the Coronavirus Aid Relief and Economic Security Act (“CARES Act”) in March 2020 as a comprehensive response to the COVID-19 pandemic.⁷⁷ The Act granted BOP the authority to place prisoners in home confinement based on criteria established by the U.S. Attorney General.⁷⁸ It did not free people from prison, it merely changed their security level and location.⁷⁹ However, BOP still retains discretion over whether individuals may continue serving their sentences on home confinement or must return to prison.⁸⁰ Despite well-coordinated efforts, nearly 2,500 people held in state and federal prisons died of COVID-19 from March 2020 through February 2021, according to an August 2022 report from the Bureau of Justice Statistics.⁸¹ Judges continued to deny requests as people were dying in prisons of COVID.⁸² Many federal prisoners were sent to Butner Medical facility in North Carolina, which had hundreds of people locked in who were diagnosed with the virus.⁸³ An attorney for the ACLU, who filed a lawsuit seeking immediate release for individuals so that the facility

⁷⁴ See *Coronavirus Resources: NACDL to Focus on Service and Support for Members, Clients, and Community Throughout Virus Emergency*, NAT’L ASS’N OF CRIM. DEF. LAWS. (Mar. 19, 2020), <https://www.nacdl.org/content/coronavirusresources> (collecting resources for seeking release due to the COVID-19 pandemic, including templates for motions, letters, and briefs).

⁷⁵ See USSC COMPASSIONATE RELEASE REPORT, *supra* note 71, at 3.

⁷⁶ See *id.* at 16-18.

⁷⁷ Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

⁷⁸ *Id.* at § 12003(b)(2).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *How Many People in Prisons Died of COVID-19?*, USA FACTS (Sept 20, 2022), <https://usa-facts.org/articles/how-many-people-in-prisons-died-of-covid-19/>.

⁸² U.S. SENT’G COMM’N, COMPASSIONATE RELEASE DATA REPORT: CALENDAR YEAR, 2020, Table 2 (2021).

⁸³ See *Hallinan v. Scarantino*, No. 20-CT-3333, 2022 WL 945590, at *3 (E.D.N.C. Mar. 29, 2022). This case was ultimately dismissed for failure to exhaust administrative remedies. *Id.* at *14.

could comply with social distancing guidelines, called the prison a “death trap.”⁸⁴ Many did not survive.⁸⁵

The number of individuals who were granted release decreased as the pandemic lengthened over months and years. According to a report of monthly compassionate release grants and denials, in October 2019, twenty-two requests for compassionate release were granted and six were denied; in May 2020, 270 compassionate release requests were granted and 582 were denied.⁸⁶ By September 2020, 254 requests were granted and 1,041 were denied.⁸⁷ Individuals who were granted relief tended to be older than those who were denied compassionate release.⁸⁸ On April 5, 2023, the U.S. Sentencing Commission approved new guidelines that expanded the ability for individuals serving time on federal sentences to qualify for compassionate release from prison.⁸⁹ If these revisions merely serve to untangle and clarify the considerations process it is a step in the right direction.⁹⁰

2. State Law: Inefficiencies And Devastating Consequences

Most states have established a mechanism for the aging incarcerated population and those who are battling terminal illness – most are titled compassionate release statutes.⁹¹ Compassionate release challenges are even more difficult on the state level than on the federal level.⁹² Forty-nine states and the District of Columbia have medical parole provisions, and twenty-four states and the District of Columbia offer geriatric parole – or release based upon age.⁹³ “Only Iowa has no specific compassionate release law or regulation.”⁹⁴ Most state statutes have strict eligibility requirements and grant compassionate release sparingly, often only when the individual is expected to die within a

⁸⁴ Memorandum of Law in Support of Petitioners/Plaintiff’s Motion for Temporary Restraining Order, Preliminary Injunction, and Writ of Habeas Corpus at 5, *Hallinan v. Scarantino*, 255 F. Supp. 3d 587 (2020) (No. 20-HC-2088).

⁸⁵ See *Hallinan*, 2022 WL 945590, at *3.

⁸⁶ See USSC COMPASSIONATE RELEASE REPORT, *supra* note 71, at 17.

⁸⁷ *Id.*

⁸⁸ *Id.* at 22.

⁸⁹ U.S. SENT’G GUIDELINES MANUAL § 1B1.13 amend. (U.S. SENT’G COMM’N 2023).

⁹⁰ It is also worth noting that the recidivism rate for individuals released under the First Step Act is much lower than the national average as well, with nearly nine out of ten returning citizens being released without reoffending. See NELLIS & KOMAR, *supra* note 56, at 1.

⁹¹ Wylie et al., *supra* note 42, at 218.

⁹² *Id.*

⁹³ PRICE, *supra* note 36, at 28-33.

⁹⁴ *Id.* at 12.

matter of days or weeks.⁹⁵ The definitions and parameters vary among the states and are often vague and inconsistent because they are not usually developed in consultation with medical professionals to define terms such as “terminal illness” or “permanent incapacitation.”⁹⁶ Some states require that the individual be within twelve months of death while others require a six-month life expectancy.⁹⁷ Unfortunately, few statutes require states to track and report data and statistics for public information.⁹⁸ As a result of the lack of reporting requirements, little is known about the basis for requests and reasons for denials.⁹⁹ While waiting upon layers of medical review, the individual’s health worsens as they decompensate, conditions become chronic, and they often face imminent death.¹⁰⁰ Some states have exclusions from compassionate release for certain offenses solely based on what is politically popular to the public and the current legislature’s whims.¹⁰¹ Sex offenders and violent offenders, are often disqualified from seeking such relief.¹⁰²

Such relief is difficult to obtain even for individuals housed in prison medical units or dormitory units designed for the aging population.¹⁰³ Older incarcerated people pose little, if any, danger to the public because of their age and low recidivism rates.¹⁰⁴ Nationally, aging people return to prison for new convictions at a rate between five and ten percent, and in some states, it is often far lower.¹⁰⁵ In Maryland, 235

⁹⁵ *See id.* at 13.

⁹⁶ *See id.* at 15, 28–33 (listing names states use to refer to their compassionate release programs).

⁹⁷ *Id.* at 13–15. *See also* FAMS. AGAINST MANDATORY MINIMUMS, COMPASSIONATE RELEASE STATE BY STATE, <https://famm.org/wp-content/uploads/CCR-State-Chart-2022indd-03-18-22.pdf> (last visited Oct. 22, 2023).

⁹⁸ PRICE, *supra* note 36 at 12 (“Only 13 states are required by state law to keep track of and report compassionate release statistics, with very few of them making that information public.”).

⁹⁹ *Id.* at 12, 19–20.

¹⁰⁰ *Id.* at 12, 14–16.

¹⁰¹ *See id.* at 14 (detailing how “Alaska forbids medical parole to prisoners convicted of sexual assault or abuse”; New Jersey excludes many offenses from compassionate release consideration; South Carolina is among several states that deny access by individuals serving life without parole or death sentences; Louisiana prohibits compassionate release for individuals with “contagious diseases”; and Maine only considers compassionate release for those in minimum security).

¹⁰² Wylie et al., *supra* note 42, at 219.

¹⁰³ INIMAI CHETTIAR ET AL., ACLU, AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY, 28–29, 51 (2012), https://www.aclu.org/sites/default/files/field_document/elderlyprisonreport_20120613_1.pdf.

¹⁰⁴ *Id.*

¹⁰⁵ *See id.* at 21–25.

individuals became eligible for release based on the *Unger*¹⁰⁶ decision, and of those released less than three percent have recidivated.¹⁰⁷ In New York, less than seven percent of formerly incarcerated people over the age of fifty are reconvicted, while in Virginia that number is as low as one percent for those sixty and older.¹⁰⁸ It is worth highlighting that these rates are far lower than national averages for recidivism rates for released individuals, which are typically around forty percent.¹⁰⁹

Although recidivism rates for geriatric and medical releases is incredibly low, states are still reluctant to grant compassionate release for those who are dying in prison.¹¹⁰ Pennsylvania's compassionate release statute is so narrow that "only [thirty-one] people have successfully petitioned for it in [thirteen] years."¹¹¹ Costs of incarceration soar as the population ages and grows sicker.¹¹² Incarcerated individuals in Pennsylvania with less than a year to live can request transfer from prison to a hospital or long-term care facility.¹¹³ They can also request transfer to a hospice facility if they are terminally ill and unable to walk.¹¹⁴ Eight people have died since 2016 awaiting a medical transfer hearing.¹¹⁵ Mr. Frank Rodriguez, who was suffering from late-stage cancer, left prison in August 2017 after spending weeks working on a medical transfer request.¹¹⁶ He died just two days later in his sister's home.¹¹⁷

¹⁰⁶ *Unger v. State*, 48 A.3d 242 (2012). The *Unger* decision opened the door for hundreds of individuals whose convictions resulted from erroneous jury instructions prior to 1981. See JUST. POL'Y INST., THE UNGERS, 5 YEARS AND COUNTING: A CASE STUDY IN SAFELY REDUCING LONG PRISON TERMS AND SAVING TAXPAYER DOLLARS 3, 10, 17 (2018), <https://justicepolicy.org/research/reports-2018-the-ungers-5-years-and-counting-a-case-study-in-safely-reducing-long-prison-terms-and-saving-taxpayer-dollars/> [hereinafter JPI UNGER REPORT]. These released individuals, all men and one woman, have built a strong community and support group for each other, and are doing amazing work in the community. See *id.* at 10.

¹⁰⁷ Marc Schindler, *Paroling Elderly Inmates is Humane Solution to Costly Mass Incarceration*, HILL (Nov. 24, 2018, 11:00 AM), <https://thehill.com/opinion/criminal-justice/417765-paroling-elderly-inmates-is-humane-solution-to-costly-mass/>.

¹⁰⁸ JPI UNGER REPORT, *supra* note 106, at 17.

¹⁰⁹ See KIM S. HUNT & ROBERT DUMVILLE, U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 15 (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

¹¹⁰ See CHETTIAR ET AL., *supra* note 103, at 26-30.

¹¹¹ See Danielle Ohl, *Broken 'Compassionate Release' Rules Strand Pa.'s Sickest Prisoners as Costs to Taxpayers Soar*, SPOTLIGHT PA (Mar. 30, 2022), <https://www.spotlightpa.org/news/2022/03/pa-prison-life-sentence-compassionate-release/>.

¹¹² See CHETTIAR ET AL., *supra* note 103, at 21-22.

¹¹³ Ohl, *supra* note 111.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

While Maryland has both medical and geriatric parole options, approval for such release is scarce. “Between 2015 and 2020, the Maryland Parole Commission approved 86 medical parole applications and denied 253.”¹¹⁸ Because the Governor must still approve medical parole for lifers (individuals who are serving life sentences in prisons or jails), it is worth noting that the Governor granted nine out of twenty-three medical parole requests from individuals serving life sentences.¹¹⁹ It is also worth noting that the Maryland Parole Commission only approved seven percent of applications in 2020, at the height of the COVID-19 pandemic.¹²⁰ This was the lowest yearly approval rating from 2015–2020, despite the urgent public health crisis.¹²¹ Maryland passed the Justice Reinvestment Act in 2016, which lowered the age for geriatric eligibility from sixty-five to sixty years old.¹²² According to a report from the Justice Policy Institute, there are over 600 individuals “over the age of sixty in Maryland’s prison system who have served at least [fifteen] years” in custody.¹²³ However, such release is still out of reach for many of them. The review process is time consuming and “Maryland’s medical parole statute [has] criteria that are [incompatible] with

¹¹⁸ JPI, COMPASSIONATE RELEASE IN MARYLAND, *supra* note 35, at 1.

¹¹⁹ *Id.* at 1. William J. Ford, *Supporters Push for Reform of Maryland’s Medical, Geriatric Parole System*, MD. MATTERS (Feb. 9, 2023), <https://www.marylandmatters.org/2023/02/09/supporters-push-for-reform-of-marylands-medical-geriatric-parole-system/>. Maryland was one of three states (Arkansas and Hawaii remaining) that required the “governor to approve parole recommendations before people serving life sentences [could] be conditionally released.” Hannah Gaskill, *Legislature Votes to Remove Governor from the Parole Process*, MD. MATTERS (April 13, 2021), <https://www.marylandmatters.org/2021/04/13/legislature-votes-to-remove-governor-from-the-parole-process/>. The Maryland General Assembly passed a bill removing the governor from the process which went into effect in October 2021. *Id.*; MD. CODE REGS. 12.08.01.18 (2016) *amended by* S.B. 0202, 2021 Leg. 442nd Sess. (Md. 2021). “In lieu of [the governor’s] signature on final parole decisions, the bill [requires] six of the 10 members of the Maryland Parole Commission to vote for parole.” Gaskill, *supra* note 119.

¹²⁰ JPI, COMPASSIONATE RELEASE IN MARYLAND, *supra* note 35, at 1.

¹²¹ *Id.*

¹²² *Id.* The Justice Reinvestment Act of 2016 was passed in both houses of the Maryland General Assembly, effective on April 6, 2016. *Maryland Reinvestment Act*, MD. ALLIANCE FOR JUST. REFORM, <https://www.ma4jr.org/jusjust-reinvestment/> (last visited Oct. 22, 2023); S.B. 1005, 2016 Leg., 436th Sess. (Md. 2016). Then Maryland Governor Hogan signed the Justice Reinvestment Act into law on May 19, 2016. *Maryland Reinvestment Act*, MD. ALLIANCE FOR JUST. REFORM. The goal of the Act was “to reduce Maryland’s prison population and use the savings to provide for more effective treatment to offenders, before, during, and after incarceration. This is intended to reduce the likelihood of reoffending, as well as to benefit victims and families.” *Id.* One of the provisions of the bill is the “presumption that debilitated and incapacitated inmates may be paroled, absent Governor’s veto for those serving life sentences.” *Id.* See also MD. CODE ANN., CORR. SERVS. § 7-309.

¹²³ JPI, COMPASSIONATE RELEASE IN MARYLAND, *supra* note 35, at 1.

those listed in the regulation intended to implement it.”¹²⁴ When such inconsistencies exist, the decision-making process may be prolonged as medical staff is unclear about whether they must make an assessment of whether the individual is chronically debilitated or incapacitated or whether the person is terminally ill.¹²⁵ In Maryland, no medical examination is required for compassionate release, but a Karnofsky¹²⁶ score measuring functional impairment must be done and a recommendation is then sent to the Maryland Parole Commission.¹²⁷ Legislation has been introduced before the Maryland General Assembly during the last two sessions to fix this dilemma, but it has not yet been enacted.¹²⁸ As this population ages, the onus is on the Department of Public Safety and Correctional Services to provide adequate medical care. The aging population in Maryland is primarily comprised of African American men and women. Nearly eight in ten people who are serving the longest prison terms in Maryland are African American, according to a 2019 Justice Policy Institute report.¹²⁹

The harms from delay and ineffectiveness in this system are real and severe. Mr. Donald Leroy Brown petitioned for a compassionate medical parole release due to his failing health after serving thirty-five

¹²⁴ See Price, *supra* note 36, at 14. Compare MD. CODE ANN., CORR. SERVS. § 7-309(b) (applying to individuals who are “so chronically debilitated or incapacitated by a medical or mental health condition, disease, or syndrome as to be physically incapable of presenting a danger to society. . .”), with MD. CODE REGS. 12.02.09.04 (2021) (defining eligibility as requiring a showing that an inmate is “imminently terminal or has a condition which would indicate that continued imprisonment would serve no useful purpose.”).

¹²⁵ JPI, COMPASSIONATE RELEASE IN MARYLAND, *supra* note 35, at 2-3.

¹²⁶ The Karnofsky Performance Scale Index was created in the 1940s by David Karnofsky and Joseph Burchenal. Carsten Timmermann, ‘Just Give Me the Best Quality of Life Questionnaire’: *The Karnofsky Scale and the History of Quality of Life Measurements in Cancer Trials*, 9 CHRONIC ILLNESS 179, 180 (2013). It is a medical assessment that measures the functional impairment and prognosis of terminally ill patients. See Valerie Crooks et al., *The Use of the Karnofsky Performance Scale in Determining Outcomes and Risk in Geriatric Outpatients*, 46 J. GERONTOLOGY 139, 139 (1991). The scale relates solely to physical ability and covers several factors and assesses a score for each factor which range from normal health to death. *Id.* The lower the Karnofsky score, the worse the survival for most serious illnesses. *Id.*

¹²⁷ JPI, COMPASSIONATE RELEASE IN MARYLAND, *supra* note 35, at 3.

¹²⁸ See S.B. 0033, 2023 Leg., 445th Sess. (Md. 2023); S.B. 0098, 2023 Leg., 44th Sess. (Md. 2023).

¹²⁹ JUST. POL’Y INST., RETHINKING APPROACHES TO OVER INCARCERATION OF BLACK YOUNG ADULTS IN MARYLAND 4 (2019) https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/Rethinking_Approaches_to_Over_Incarceration_MD.pdf [hereinafter JPI, RETHINKING APPROACHES].

years in prison.¹³⁰ He requested parole based on his suffering from congestive heart failure and kidney failure, as well as diabetes and high blood sugar, but his petition was denied on June 1, 2020.¹³¹ Mr. Brown fell and broke his hip, which required him to have surgery, which in turn led to a plethora of additional health complications.¹³² His health condition worsened, and a second request was made, because like most states, there is no right to appeal a denial in Maryland.¹³³ He was eventually granted medical parole and was released from prison on June 18, 2020, but Mr. Brown passed away in a nursing home facility on July 6, 2020.¹³⁴

In Illinois, the legislature enacted the Joe Coleman Medical Release Act,¹³⁵ which authorized the State Prisoner Review Board to release terminally ill or medically incapacitated people from their prison sentences. It is an uncomplicated straightforward mechanism to review terminally ill and disabled individuals seeking medical release.¹³⁶ The bill is named after Joe Coleman who died in prison in October 2019 at eighty-one years old, despite the heroic efforts of his attorney pleading for his release.¹³⁷ He was a decorated veteran and family man who succumbed to his battle with prostate cancer while he was serving a life sentence.¹³⁸ He had been incarcerated for forty years for a robbery conviction.¹³⁹ This legislation serves as a blue print for other states to follow in detangling their convoluted compassionate release statutes.¹⁴⁰

¹³⁰ JPI, COMPASSIONATE RELEASE IN MARYLAND, *supra* note 35, at 3; Shelly Hettleman & Vivian Penda, *Compassionate Release from Prison: A Moral Imperative*, BALT. SUN (Jan 26, 2022, 4:34 PM), <https://www.baltimoresun.com/2022/01/26/compassionate-release-from-prison-a-moral-imperative-guest-commentary/>.

¹³¹ Donald Leroy Brown, MOURNING OUR LOSSES, <https://www.mourningourlourn.org/memorials/donald-leroy-brown> (last visited Jan. 18, 2024).

¹³² *Id.*

¹³³ *Id.*; PRICE, *supra* note 36, at 19.

¹³⁴ See MOURNING OUR LOSSES, *supra* note 131.

¹³⁵ The Medical Release Act (Joe Coleman Act) became effective in Illinois on January 1, 2022. See H.B. 3665, 102nd Gen. Assemb. (Ill. 2022).

¹³⁶ *Id.*

¹³⁷ Jennifer Soble, *Joe Coleman Died in Prison on Thursday – For What?*, CHI. SUN-TIMES (Oct. 7, 2019, 3:31 PM), <https://chicago.suntimes.com/2019/10/7/20903380/joe-coleman-illinois-prison-idoc-life-sentences-illinois-prison-project-jennifer-soble>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See generally Ill. H.B. 3665.

B. Judicial Failures to Ensure Compassion and Provide Clear Guidance

Courts have wide “discretion in deciding whether to grant or deny a motion for a sentence reduction.”¹⁴¹ Most applications for compassionate release are denied for various reasons.¹⁴² Failure to exhaust administrative remedies is often a basis for denials from the courts.¹⁴³ U.S. law governing imposition of sentences provides in relevant part that:

The court . . . upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier, may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction¹⁴⁴

In *United States v. Millan*,¹⁴⁵ the court found that Mr. Millan met the thirty-day requirement because he had waited thirty days from when the warden received his request, not when his request was submitted.¹⁴⁶

Other reasons why applications are denied include failure to demonstrate extraordinary and compelling reasons or a finding of danger to the public.¹⁴⁷ The federal statute does not delineate what “extraordinary and compelling” means, so judges are largely left to figure it out on their own.¹⁴⁸ However, the statute does direct judges to consider factors in sentencing laws and guidelines from the USSC.¹⁴⁹ Congress has

¹⁴¹ See *United States v. Tagliaferri*, No. 13 CR. 115, 2019 WL 6307494, at *3 (S.D.N.Y. Nov 25, 2019) (citations omitted).

¹⁴² Emily Widra & Wandra Bertram, *Compassionate Release Was Never Designed to Release Large Numbers of People*, PRISON POL’Y INITIATIVE (May 29, 2020), <https://www.prisonpolicy.org/blog/2020/05/29/compassionate-release/>.

¹⁴³ U.S. SENT’G COMM’N, U.S. SENTENCING COMMISSION COMPASSIONATE RELEASE DATA REPORT: FISCAL YEARS 2020-2022, Tables 11, 13, 15 (2022).

¹⁴⁴ 18 U.S.C. § 3582(c)(1)(A).

¹⁴⁵ 91-CR-685, 2020 WL 1674058 (S.D.N.Y. Apr. 6, 2020).

¹⁴⁶ *Id.* at *8.

¹⁴⁷ See USSC COMPASSIONATE RELEASE REPORT, *supra* note 71, at 41.

¹⁴⁸ *Id.* at 6.

¹⁴⁹ *Id.* (“Congress delegated the task of describing the term ‘extraordinary and compelling reasons’ to the Commission through directives in 28 U.S.C. § 994(a)(2)(C) and (t).”).

not altered the U.S. Sentencing Guidelines definition of “extraordinary and compelling reasons.” These guidelines provide that “extraordinary and compelling reasons” exist based on (1) the medical circumstances of the defendant; (2) the age of the defendant; (3) the family circumstances of the defendant; (4) the defendant’s experience as a victim of abuse while in custody; (5) other reasons; or (6) an unusually long sentence.¹⁵⁰ The First Step Act did not revise the substantive criteria for compassionate release—it expanded access to the courts, but it did not change the standard of review.¹⁵¹

Many compassionate release petitions are filed pro se with many petitioners arguing that their cases are extraordinary due to medical issues, coronavirus risk, age, or excessive sentences.¹⁵² The U.S. Sentencing Guidelines also mandate that a determination be made that the individual “is not a danger to the safety of any other person or to the community . . .”¹⁵³ and “the reduction is consistent with this policy statement.”¹⁵⁴ However, very few pro se litigants are privy to these guidelines or the referenced policy statements simply due to their confinement and the limited law library resources available. They merely know that their health is declining as they remain in vulnerable and unsafe institutions.

Recently, courts have been split on whether the U.S. Sentencing Commission guidelines are still relevant under the First Step Act for defining “extraordinary and compelling” under § 3582 (c)(1)(A).¹⁵⁵ For

¹⁵⁰ U.S. SENT’G GUIDELINES MANUAL § 1B1.13(b) amend. (U.S. SENT’G COMM’N 2023).

¹⁵¹ See *United States v. Brown*, 411 F. Supp. 3d 446, 450 (S.D. Iowa 2019) (noting that the title is “especially valuable” in evaluating Congress’s intent in light of the BOP’s long and criticized history of rarely granting compassionate release petitions); *United States v. Willis*, 382 F. Supp. 3d 1185, 1187 (D.N.M. 2019) (“Aside from allowing prisoners to bring a motion directly, the First Step Act did not change the standards for compassionate release.”).

¹⁵² The U.S. Sentencing Commission’s recent report on the First Step Act and COVID-19 Pandemic did not gather data on whether an incarcerated individual filed their own motion for compassionate release pro se or with the assistance of counsel. See USSC COMPASSIONATE RELEASE REPORT, *supra* note 71, at 18, 69 n.67. See also Casey Tolan, *Compassionate Release Became a Life-or-Death Lottery for Thousands of Federal Inmates During the Pandemic*, CNN (Sept. 30, 2021, 7:05 AM), <https://www.cnn.com/2021/09/30/us/covid-prison-inmates-compassionate-release-invs/index.html> (reporting how nearly 65% of the 127 cases heard by federal judges in Oregon between January 2020 and June 2021 were granted when Oregon appointed public defenders to assist with such cases, while less than 4% of the 80 compassionate release motions heard in the Western District of Oklahoma were granted, with the vast majority of individuals seeking relief lacking public defenders).

¹⁵³ U.S. SENT’G GUIDELINES MANUAL § 1B13(a)(2) (U.S. SENT’G COMM’N 2023). Relevant factors include the nature of the offense, the history and characteristics of the defendant, and the nature of the danger. See 18 U.S.C. § 3142(g).

¹⁵⁴ U.S. SENT’G GUIDELINES MANUAL § 1B1.13(a)(3).

¹⁵⁵ *United States v. Fox*, 14-CR-03, 2019 WL 3046086, at *2 (D. Me. July 11, 2019) (listing cases to indicate the split among the courts).

example, in *United States v. Cantu*,¹⁵⁶ the court found that § 1B1.13 “clearly contradicts” the new § 3582(c)(1)(A) amendments under the First Step Act and that, because Congress changed the statute to expand the use of compassionate release, the guideline “no longer fits with the statute and thus does not comply with the congressional mandate”¹⁵⁷ In *United States v. Bryant*,¹⁵⁸ the Eleventh Circuit held that § 1B1.13 applies to – and limits – all § 3582 motions, even those filed by defendants, and held firmly that district courts cannot individually determine when a defendant’s circumstances qualify as “extraordinary and compelling.”¹⁵⁹ The court criticized the seven other circuits which held otherwise – that these guidelines do not apply to pro se filers.¹⁶⁰

As the pandemic lengthened, the government took the position in their written responses that if an individual did not get vaccinated then they did not deserve compassionate release; and if they were vaccinated, then they were safe where they were, behind the walls.¹⁶¹ Unfortunately, such was not the case for Mr. Rasheem Hicks.¹⁶² He was forty-two years old and was serving a six-and-a-half-year sentence in the BOP for cocaine and firearm possession.¹⁶³ He was vaccinated but contracted the coronavirus and died about two weeks after testing positive.¹⁶⁴ His compassionate release petition, which he filed pro se, was

¹⁵⁶ 423 F. Supp. 3d 345 (S.D. Tex. 2019).

¹⁵⁷ *Id.* at 347–51. *See also* *United States v. Haynes*, 456 F. Supp. 3d 496 (E.D.N.Y. 2020).

¹⁵⁸ 996 F.3d 1243 (11th Cir. 2021).

¹⁵⁹ *Id.* at 1247–48.

¹⁶⁰ *Id.* at 1252 (citing *United States v. Aruda*, 993 F.3d 797 (9th Cir. 2021); *United States v. Shkambi*, 993 F.3d 388 (5th Cir. 2021); *United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021); *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020); *United States v. Jones*, 980 F.3d 1098 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020); *United States v. Brooker*, 976 F.3d 228, 236 (2d Cir. 2020) (all holding that 1B1.13 does not apply to inmate-filed compassionate release motions)).

¹⁶¹ Tolan, *supra* note 152 (“The DOJ’s position now is either you’re vaccinated and you’re safe, or you should have gotten vaccinated, and if not, you’re not deserving of compassionate release.”). *See also*, Jake Shore, *Where is it Hardest to Gain ‘Compassionate Release’ in America? Georgia*, GPB NEWS (Sep. 16, 2022, 2:51 PM), <https://www.gpb.org/news/2022/09/16/where-it-hardest-gain-compassionate-release-in-america-georgia> (highlighting how “Judge Lisa G. Wood... denied [Kenneth] Moore’s [compassionate release] request...cit[ing] the fact that Moore was vaccinated and his prostate cancer appeared under control. She also added that releasing him would not promote respect for the law.”).

¹⁶² *United States v. Hicks*, No. 18-CR-314, 2021 WL 2637329, at *1 (E.D.N.C. June 25, 2021).

¹⁶³ *Id.* at *1–3.

¹⁶⁴ Press Release, U.S. Dep’t of Just., Fed. Bureau of Prisons, Inmate Death at FMC Butner (Aug. 30, 2021), https://www.bop.gov/resources/news/pdfs/20210830_press_release_bux_hicks.pdf.

denied, with the court citing his vaccination status in its opinion.¹⁶⁵ He suffered from sickle cell disease, diabetes, and chronic liver disease, which were all cited in his petition.¹⁶⁶ On June 25, 2021, he moved for reconsideration of his motion for compassionate release, but died on August 22, 2021.¹⁶⁷ His case was dismissed as moot after his death.¹⁶⁸

There have been a few successful challenges seeking court intervention when an individual has been denied compassionate release. Though it was a state case, in *People v. Torres*,¹⁶⁹ an appellate court in California reversed denial and ordered a grant of compassionate release where the sentencing court found that Mr. Torres met statutory criteria but had been denied release based on other factors.¹⁷⁰ The Court of Appeals of California, Fourth Appellate District held that the trial court abused its discretion when it denied a motion for compassionate release.¹⁷¹ Mr. Torres was terminally ill, suffered from widespread metastatic pancreatic cancer, and was required to use a wheelchair and a “permanent hard cervical collar to stabilize his neck.”¹⁷² His daughter had arranged to provide in-home hospice care for him if he was released.¹⁷³ Both the Department of Corrections and Rehabilitation and the Board of Parole supported his release.¹⁷⁴ The appellate court held that the trial court’s denial of compassionate release based on him not being deserving was improper and that his case met all of the statutory criteria.¹⁷⁵ The decision in this case was an anomaly, and even though Mr. Torres was ultimately successful in court, a year passed between when he first requested compassionate release due to his severe illness in April 2019 and when the appellate court ultimately reversed the lower court’s discretionary denial in April 2020.¹⁷⁶ When Mr. Torres first requested compassionate release, doctors predicted he only had six

¹⁶⁵ *Hicks*, 2021 WL 2637329, at *3. Hicks received two doses of the Pfizer vaccine prior to his death. *Id.*

¹⁶⁶ *Id.* The Center for Disease Control and Prevention (CDC) identifies these illnesses as heightened risk medical conditions, noting that persons with such conditions were “more likely to get very sick with COVID-19.” *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL AND PREVENTION (May 11, 2023), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

¹⁶⁷ *United States v. Hicks*, No. 18-CR-314, 2021 WL 4130543, at *1 (E.D.N.C. Sep. 9, 2021).

¹⁶⁸ *Id.*

¹⁶⁹ 261 Cal. Rptr. 3d 844 (2020).

¹⁷⁰ *Id.* at 846.

¹⁷¹ *Id.* at 852.

¹⁷² *Id.* at 847.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 852-53.

¹⁷⁶ *Id.* at 846-47.

months to live, yet he spent this time challenging the court's denial on appeal instead of in home hospice care.¹⁷⁷ Compassionate release denials continue to be unreasonable and court intervention often leaves people seeking such relief with another door slammed in their face.

III. CLEMENCY: A DISCRETIONARY MEANS EXPLOITED FOR POLITICAL GAINS

A. Statutory Vesting of Discretion in Political Decision-Makers

Clemency is a mechanism to grant relief from a court-ordered sentence or punishment or to spare such a punishment before it is imposed.¹⁷⁸ It is a useful, though highly discretionary, tool for addressing unfair and excessive sentencing practices.¹⁷⁹ The granting of clemency lies in the hands of elected political figures.¹⁸⁰ For persons who are sentenced in state court, this authority lies with the governor, with one exception.¹⁸¹ For individuals who are sentenced in the District of Columbia local courts, the President is the only authority who can grant a clemency petition.¹⁸² Clemency includes requests for commutations of sentences (for persons still in custody) or pardons (for persons who have been released from a sentence).¹⁸³

¹⁷⁷ *Id.* At some prisons, incarcerated individuals have set up hospice care programs to care for each other at the end of their lives. See Jesse Wegman et al., *They Know What They Did. They'd Like You To Know Who They've Become.*, N.Y. TIMES (Aug. 1, 2023), <https://www.nytimes.com/2023/08/01/opinion/louisiana-angola-prison-mass-incarceration.html> (sharing the stories of people incarcerated in Louisiana's Angola prison—Jerome Derricks, Jack Segura, Theortic Givens, Hannibal Stanfield, Kuantau Reeder, Jeffery Hilburn, and Sammie Robinson, among other unidentified individuals—who are not sentenced to be executed but nevertheless sentenced to die in prison, often cared for by other incarcerated individuals). Sammie Robinson was convicted at the age of 17 in 1953. *Id.* He died in Angola prison in 2019, at the age of 83, after serving 66 years. *Id.* As one unidentified incarcerated individual remarked: "I make sure that my life is very purposeful. Every time I invest myself into someone else, I free a part of myself. A part of me will leave here with you. I'm going to love people so passionately until a part of me will always live outside the gates of Angola." *Id.*

¹⁷⁸ KENNY LO ET AL., CTR. FOR AM. PROGRESS, CLEMENCY 101 (2020) <https://www.american-progress.org/article/clemency-101/>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* See also *Clemency*, DEATH PENALTY INFORMATION CTR., <https://deathpenaltyinfo.org/facts-and-research/clemency> (last visited Nov. 18, 2023) (noting the political nature of clemency consideration in death penalty cases, including when this relief is a last resort against execution when judicial options are exhausted).

¹⁸¹ See LO ET AL., *supra* note 178.

¹⁸² D.C. CODE §§ 24-4801.01–08 (2018).

¹⁸³ See LO ET AL., *supra* note 178.

I. Federal Law: A Longstanding Mechanism With a Checkered Past

“The origins of the pardon power in the United States Constitution can be [traced to] English history . . . It first appeared during the reign of King Ine of Wessex in the seventh century.”¹⁸⁴ At the Constitutional Convention in 1787, Alexander Hamilton introduced the pardon power concept in the United States.¹⁸⁵ Article II, Section 2 of the U.S. Constitution provides that the President has the authority to “grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”¹⁸⁶ The U.S. Supreme Court has interpreted this power as “plenary,” meaning that it is extremely broad and not often subject to congressional modification.¹⁸⁷ “In both *Ex Parte Garland*¹⁸⁸ (1866) and *United States v. Klein*,¹⁸⁹ (1871) the Court ruled that legislation could not restrict the president’s pardon power.”¹⁹⁰ These two landmark cases gave presidents unfettered control over clemency decisions.¹⁹¹

There are different types of clemency that fall under the president’s power, including pardon, amnesty, commutation, and reprieve.¹⁹² A pardon generally applies to individuals who have been released from custody, absolves them from punishment, and restores all civil liberties.¹⁹³ Amnesty is the same as the pardon but is extended to an entire group of individuals.¹⁹⁴ Commutation generally applies to individuals who are in custody and reduces their sentences.¹⁹⁵ A reprieve delays

¹⁸⁴ See Colleen Shogan, *The History of the Pardon Power: Executive Unilateralism in the Constitution*, WHITE HOUSE HIST. ASS’N (Dec. 2, 2020), <https://www.whitehousehistory.org/the-history-of-the-pardon-power>.

¹⁸⁵ *Id.*

¹⁸⁶ U.S. CONST. art. II, § 2.

¹⁸⁷ MICHAEL A. FOSTER, CONG. RSCH. SERV., PRESIDENTIAL PARDONS: OVERVIEW AND SELECTED LEGAL ISSUES (2020).

¹⁸⁸ 71 U.S. 333 (1866). *Ex Parte Garland* established that presidents may issue pardons at any time after the commission of a federal offense, even before federal charges have been filed or a sentence has been imposed. *See id.*

¹⁸⁹ 80 U.S. 128 (1871).

¹⁹⁰ Shogan, *supra* note 184.

¹⁹¹ FOSTER, *supra* note 187, at 6.

¹⁹² *Id.* at 4.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 4-5.

¹⁹⁵ *Id.* at 5.

imposition of a sentence or punishment, generally after a person has received a conviction.¹⁹⁶ Pardons and commutations are the most commonly issued types of clemency relief.¹⁹⁷ Clemency has been issued by presidents on a fairly consistent basis.¹⁹⁸ Presidents have routinely doled out clemency pardons at the end of the year and often at the end of their terms.¹⁹⁹ George Washington issued the first presidential pardon in 1795 to John Mitchell and Philip Weigel who were involved in the Whiskey Rebellion in Western Pennsylvania and convicted of treason.²⁰⁰ Thomas Jefferson granted amnesty to citizens convicted under the Alien and Sedition Acts.²⁰¹ Abraham Lincoln granted clemency to Confederate Army deserters and spared the lives of 265 Dakota Sioux who had been sentenced to hanging by refusing to sign their death warrants.²⁰² In 1868, Andrew Johnson pardoned Jefferson Davis, the former President of the Confederacy, which was controversial.²⁰³ Harry Truman surprisingly commuted the death sentence of the man who tried to kill him.²⁰⁴

There have been more controversial exercises of this authority. Warren G. Harding commuted sentences of twenty-four political prisoners, including socialist leader Eugene Debs in 1921.²⁰⁵ “Richard Nixon commuted the sentence of James Hoffa, former president of the International Brotherhood of Teamsters who was convicted for pension fund fraud and jury tampering,” in 1971.²⁰⁶ The same President Nixon who was responsible for opening the prison floodgates for African Americans would later be pardoned himself in 1974 by President Gerald

¹⁹⁶ *Id.*

¹⁹⁷ *See id.* at 6. *See also Clemency Statistics*, OFF. OF THE PARDON ATT’Y, U.S. DEP’T OF JUST., <https://www.justice.gov/pardon/clemency-statistics> (last visited Aug. 22, 2023) [hereinafter OFF. OF THE PARDON ATT’Y, *Clemency Statistics*].

¹⁹⁸ *See* OFF. OF THE PARDON ATT’Y, *Clemency Statistics*, *supra*, note 197.

¹⁹⁹ *Id.*

²⁰⁰ Shogan, *supra* note 184; Carrie Hagen, *The First Presidential Pardon Pitted Alexander Hamilton Against George Washington*, SMITHSONIAN MAG. (Aug. 29, 2017), <https://www.smithsonianmag.com/history/first-presidential-pardon-pitted-hamilton-against-george-washington-180964659/>.

²⁰¹ Shogan, *supra* note 184.

²⁰² Ron Soodalter, *Lincoln and the Sioux*, N.Y. TIMES OPINIONATOR (Aug. 20, 2012, 12:30 PM), <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2012/08/20/lincoln-and-the-sioux/?smid=pl-share>; Gustav Niebuhr, *How A Bishop Moved Lincoln, and Saved 265 Dakota Indians*, L.A. TIMES (July 17, 2014, 3:24 PM), <https://www.latimes.com/opinion/op-ed/la-oe-niebuhr-abraham-lincoln-religion-indians-20140718-story.html>.

²⁰³ P.S. Ruckman, Jr. *Executive Clemency in the United States: Origins, Development, and Analysis (1900-1993)*, 27 PRESIDENTIAL STUD. Q. 251, 253–54 (1997).

²⁰⁴ Mark Osler, *Clemency as the Soul of the Constitution*, 34 J.L. & POL. 131, 142 (2019).

²⁰⁵ Shogan, *supra* note 184.

²⁰⁶ *Id.*

Ford after the Watergate scandal.²⁰⁷ Ford pardoned Nixon for all federal crimes he “committed, or may have committed, or taken part in” while in office.²⁰⁸ Nixon was pardoned just weeks after becoming the first and only U.S. president to resign from office.²⁰⁹ This pardon proved to be a political disaster for President Ford.²¹⁰ Additionally, Ford created a special clemency commission that led to clemency for at least 6,000 Vietnam deserter recipients.²¹¹ On his first day in office in 1977, Jimmy Carter pardoned people who evaded signing up for the draft in protest against the Vietnam War before they were charged for their actions.²¹² He also commuted G. Gordon Liddy who was sentenced to twenty years for his role in the Watergate break-ins.²¹³ He would serve only eight years in prison instead.²¹⁴ On Christmas Eve 1992, President George H.W. Bush pardoned former Secretary of Defense Caspar Weinberger and others involved in the Iran-Contra scandal, claiming they had fallen victim to “the criminalization of policy differences.”²¹⁵ Weinberger and others had been indicted on charges of lying to Congress about selling secret weapons to Iran, the profits of which were used to support U.S.-backed rebels in Nicaragua.²¹⁶ Bill Clinton pardoned Roger Clinton, his half-brother, who had been convicted on cocaine drug charges; Patty Hearst, a publishing heiress convicted in a 1974 bank robbery; as well as Susan McDougal, a former Clinton business partner who was involved in the Whitewater scandal.²¹⁷ Former Illinois Rep. Dan Rostenkowski was also pardoned by Clinton after his 1996 conviction for mail fraud.²¹⁸

²⁰⁷ Granting Pardon to Richard Nixon, Proclamation No. 4311, 3 C.F.R. 32601 (1974).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See Ruckman, *supra* note 203, at 255.

²¹¹ See Osler, *supra* note 204, at 146; COMPTROLLER GENERAL OF THE UNITED STATES, THE CLEMENCY PROGRAM OF 1974, at i (1977).

²¹² Shogan, *supra* note 184.

²¹³ James T. Wooten, *Carter Reduces Liddy Sentence, Citing ‘Fairness,’* N.Y. TIMES, (Apr. 13, 1977), <https://www.nytimes.com/1977/04/13/archives/carter-reduces-liddy-sentence-citing-fairness-watergate-case-figure.html>.

²¹⁴ *Id.*

²¹⁵ Melissa Bell, *Clair George’s 1992 Pardon by George H.W. Bush*, WASH. POST (Oct. 17, 2011, 10:27 AM), https://www.washingtonpost.com/blogs/blogpost/post/clair-georges-1992-pardon-by-george-h-w-bush/2011/10/17/gIQAYhLUrL_blog.html.

²¹⁶ Andrew Glass, *Bush Pardons Iran-Contra Felons, Dec. 24, 1992*, POLITICO (Dec. 24, 2018, 7:21 AM), <https://www.politico.com/story/2018/12/24/bush-pardons-iran-contra-felons-dec-24-1992-1072042>.

²¹⁷ See *Pardons Granted by President William J. Clinton (1993–2001)*, OFF. OF THE PARDON ATT’Y, U.S. DEP’T OF JUST., <https://www.justice.gov/pardon/pardons-granted-president-william-j-clinton-1993-2001> (last visited July 31, 2023).

²¹⁸ *Id.*

Until the 1980s, commutations were granted regularly, but in recent decades, commutations numbers have been shrinking. A recent exception was President Barack Obama, who granted 1,715 commutations and 212 pardons.²¹⁹ By comparison, Ronald Reagan granted thirteen commutations and 393 pardons; George H. W. Bush granted three commutations and seventy-four pardons; William Clinton granted sixty-one commutations and 396 pardons; George W. Bush granted eleven commutations and 189 pardons; and Donald Trump granted ninety-four commutations and 144 pardons.²²⁰ To date, President Biden has granted 111 commutations and nine pardons.²²¹ Each year, thousands of petitions are received and thousands are closed without presidential action.²²² President Donald Trump granted clemency early on in his presidency.²²³ He granted pardons to Bernard B. Kerik, former New York City police commissioner; Michael R. Milken, junk-bond king of the 1980s; Edward J. DeBartolo Jr., former owner of the San Francisco 49ers; and commuted the sentence of former Illinois governor Rod R. Blagojevich for corruption charges.²²⁴ Other celebrity cases in which he issued pardons include Kristian Saucier, a sailor who had been convicted of mishandling Navy secrets, and Alice Marie Johnson, whose case came to his attention by celebrity Kim Kardashian.²²⁵ Trump granted sixteen commutations in the nearly four years before his last month in office, and seventy-eight within the last thirty-one days of his presidency.²²⁶ President Obama issued the most pardons and commutations for a two-term president.²²⁷ In comparison, George W. Bush issued the fewest number of clemency actions for a two-term president, only 200.²²⁸ Most of the individuals who had their sentences commuted

²¹⁹ See OFF. OF THE PARDON ATT'Y, *Clemency Statistics*, *supra* note 197.

²²⁰ *Id.*

²²¹ *Id.*

²²² Shogan, *supra* note 184.

²²³ See Osler, *supra* note 204, at 146.

²²⁴ See *Pardons Granted by President Donald J. Trump (2017-2021)*, OFF. OF THE PARDON ATT'Y, U.S. DEP'T OF JUST. (Apr. 28, 2021), <https://www.justice.gov/pardon/pardons-granted-president-donald-j-trump-2017-2021> [hereinafter OFF. OF THE PARDON ATT'Y, *Trump Pardons*]; *Commutations granted by President Donald J. Trump (2017-2021)*, OFF. OF THE PARDON ATT'Y, U.S. DEP'T OF JUST. (Apr. 28, 2021),

<https://www.justice.gov/pardon/commutations-granted-president-donald-j-trump-2017-2021>.

²²⁵ Erin Jenson, *Kim Kardashian West Talks 'Mission' of Commuting Alice Johnson, Trump's 'Compassion,'* USA TODAY, (June 14, 2018, 9:22 AM), <https://www.usatoday.com/story/life/people/2018/06/14/kim-kardashian-west-alice-johnson-today-show-hoda-kotb/700890002/>; OFF. OF THE PARDON ATT'Y, *Trump Pardons*, *supra* note 226.

²²⁶ See OFF. OF THE PARDON ATT'Y, *Clemency Statistics*, *supra* note 197.

²²⁷ *Id.*

²²⁸ *Id.*

by Obama were non-violent drug offenders.²²⁹ It is estimated that President Joe Biden has a current backlog of approximately 17,000 petitions.²³⁰

According to the Department of Justice statistics, the total number of clemency actions from 1900 to 2017 was 22,485.²³¹ In recent decades the number of clemency grants and petitions have both declined.²³² Over time, presidents have been slow in utilizing this relief power and the process is multilayered.²³³ A clemency petition is considered by the staff of the Pardon Attorney, the Pardon Attorney, the staff of the Deputy Attorney General, the Deputy Attorney General, the staff of the White House Counsel, the White House Counsel, and finally reviewed by the President for the ultimate decision.²³⁴

Reform is clearly needed as this avenue for relief continues to fall short of its intended purpose; instead, it is often used to fuel the political rhetoric, generally to the disadvantage of African American men and women.²³⁵ Congress has considered some reforms of the clemency process, but so far failed to act.²³⁶ Congresswoman Ayanna Pressley (D-MA) introduced a bill in 2021, H.R. 6234, the Fair and Independent Experts in Clemency Act, also referred to as the “FIX Clemency Act,” to implement a coherent system for analyzing petitions and advising the president on clemency.²³⁷ This bill would create a presidentially-appointed board (akin to those implemented by many states), working

²²⁹ *A Nation of Second Chances: President Obama's Record on Clemency*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/issues/clemency> (last visited Dec. 30, 2023).

²³⁰ See Jacob Sullum, *A Post-Clemency Prosecution Shines a Light on a Broken System*, THE NEW AM. (July 7, 2023), <https://thenewamerican.com/a-post-clemency-prosecution-shines-a-light-on-a-broken-system/>.

²³¹ See OFF. OF THE PARDON ATT'Y, *Clemency Statistics*, *supra* note 197.

²³² *Id.*

²³³ See *id.*; OFF. OF THE PARDON ATT'Y, U.S. DEPT. OF JUST., PROCESS TO APPLY FOR CLEMENCY; RULES GOVERNING PETITIONS FOR EXECUTIVE CLEMENCY (Sept. 26, 2022), <https://www.justice.gov/pardon/page/file/1538026/download> [hereinafter OFF. OF THE PARDON ATT'Y, RULES GOVERNING CLEMENCY].

²³⁴ See OFF. OF THE PARDON ATT'Y, RULES GOVERNING CLEMENCY, *supra* note 233, § 1.10 at 7.

²³⁵ See Lois Beckett & Robin Respaut, *Racial Disparity in Presidential Pardons: What Can Be Done?*, PROPUBLICA (Dec. 9, 2011, 5:45PM), <https://www.propublica.org/article/racial-disparity-in-presidential-pardons-what-can-be-done>; Austin Sarat, *Trump's Pardons are Troubling, but Presidential Pardon Power is Absolutely Essential*, USA TODAY (Nov. 30, 2020, 7:01 AM), <https://www.usatoday.com/story/opinion/2020/11/30/presidential-pardons-controversy-surrounding-column/6455664002/>.

²³⁶ FIX Clemency Act, H.R. 6234, 117th Cong. (2021).

²³⁷ *Id.*

outside of the Justice Department, that would analyze clemency petitions and advise the president directly on outcomes.²³⁸ Such legislation is critical to ensure the federal clemency process is fair, reliable, and just.

2. State Law: Models for Reform and Divestment of Executive Authority

Because presidents can only grant clemency relief for federal offenses, state constitutions vest power to grant clemency in the governor, the highest-ranking head of state.²³⁹ The clemency petition process is defined differently in each state and the authority is embedded in each state's constitution.²⁴⁰ In most cases, the governor has the final authority to grant clemency.²⁴¹ In some states, like New York, the governor alone makes this decision.²⁴² In other states, governor approval is done in conjunction with either approval or advice from a state clemency board.²⁴³ And in other states, like Connecticut, the governor is not involved in the clemency decision making at all.²⁴⁴ Many states have a Board of Pardons that examines clemency petitions and then submits recommendations to the Governor, who makes the final decision.²⁴⁵ Clemency Boards act as gate keeper and their approval is necessary for clemency petitions to move forward for consideration.²⁴⁶ A favorable recommendation causes a written recommendation to be sent to the governor and an unfavorable recommendation ends the process.²⁴⁷ Some states, such as Alabama and Connecticut, use independent boards established by the

²³⁸ *Id.*

²³⁹ See 50-State Comparison: Pardon Policy & Practice, RESTORATION OF RIGHTS PROJ. (Oct. 2022), <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-characteristics-of-pardon-authorities-2/> [hereinafter RESTORATION OF RIGHTS PROJ., 50-State Comparison].

²⁴⁰ See *id.*

²⁴¹ See *id.*

²⁴² See BEN NOTTERMAN, CTR. ON THE ADMIN. OF CRIM. L., NYU L., TAKING STOCK OF CLEMENCY IN THE EMPIRE STATE: A CENTURY IN REVIEW 1 (2020), https://www.law.nyu.edu/sites/default/files/CACL%20NY%20Clemency%20_3_4_A_Accessible.pdf [hereinafter NOTTERMAN, TAKING STOCK OF CLEMENCY IN THE EMPIRE STATE].

²⁴³ RESTORATION OF RIGHTS PROJ., 50-State Comparison, *supra* note 241.

²⁴⁴ See BEN NOTTERMAN, CTR. ON THE ADMIN. OF CRIM. L., NYU L., SEARCHING FOR CLEMENCY IN THE CONSTITUTION STATE 1 (2020), https://www.law.nyu.edu/sites/default/files/CT_4_15_A%20CACL%20Clemency_Final%20.pdf [hereinafter NOTTERMAN, SEARCHING FOR CLEMENCY IN THE CONSTITUTION STATE]; STATE OF CONN. BD. OF PARDONS AND PAROLES, POLICY NUMBER III.02 (2023), <https://portal.ct.gov/-/media/BOPP/Pardons/Policy-III02-Commutations.pdf>.

²⁴⁵ RESTORATION OF RIGHTS PROJ., 50-State Comparison, *supra* note 239.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

governor to grant clemencies.²⁴⁸ But even with different structures that do not leave clemency solely in one executive official's hands, in many states, the granting of clemency has nearly ground to a halt.

Since 1997, Massachusetts's use of commutation has been miniscule. In Massachusetts, a person submits a petition for initial review by the Advisory Board of Pardons, whose eight members are appointed by the Governor.²⁴⁹ This Board then holds a public hearing and submits a recommendation to the governor in favor of or opposing clemency.²⁵⁰ The governor then decides whether to grant the clemency requested.²⁵¹ If the governor gives a favorable recommendation, that decision is subject to the consent of the Executive Council, composed of eight elected officials.²⁵² "The Council may consent to clemency only after conducting its own public hearing."²⁵³ The "[Advisory] Board has averaged [only] one hearing every two years, despite receiving 386 petitions," since 2005.²⁵⁴

Pennsylvania is one of a few states that categorically exclude people serving life sentences from parole consideration and so the only way for a lifer to be released is by clemency.²⁵⁵ Similarly to the rest of the country, the number of people in prison grew dramatically in Pennsylvania in the 1970s and 1980s, with a disproportionate increase in

²⁴⁸ NOTTERMAN, SEARCHING FOR CLEMENCY IN THE CONSTITUTION STATE, *supra* note 244; *What Is Involved in the Pardon or Remission Process, Pardon FAQs*, ALA. BUREAU OF PARDONS AND PAROLES, <https://paroles.alabama.gov/about-us/faqs-pardons/> (last visited Oct. 24, 2023).

²⁴⁹ BEN NOTTERMAN, CTR. ON THE ADMIN. OF CRIM. L., NYU L., WILLIE HORTON'S SHADOW: CLEMENCY IN MASSACHUSETTS 1-2, https://www.law.nyu.edu/sites/default/files/CACL%20Clemency%20MA_Accessible.pdf (last visited Oct. 24, 2023) [hereinafter NOTTERMAN, WILLIE HORTON'S SHADOW].

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ BEN NOTTERMAN, CTR. ON THE ADMIN. OF CRIM. L., NYU L., THE DEMISE OF CLEMENCY FOR LIFERS IN PENNSYLVANIA 1, https://www.law.nyu.edu/sites/default/files/CACL%20Clemency%20PA_Accessible.pdf (last visited Oct. 24, 2023) [hereinafter NOTTERMAN, THE DEMISE OF CLEMENCY FOR LIFERS]. Pennsylvania has not yet banned juvenile life without parole sentences. See *More Than Half of All US States Have Abolished Life Without Parole for Children*, CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, <https://cfsy.org/map2023/> (last visited Oct. 24, 2023) [hereinafter CFSY, *More Than Half of All US States Have Abolished LWOP*]. To comply with *Miller* and *Montgomery*, the Pennsylvania Department of Corrections permits individuals convicted as children to seek a reduction in their sentence. *Juvenile Lifers Information*, PA. DEP'T OF CORR., <https://www.cor.pa.gov/About%20Us/Initiatives/Pages/Juvenile-Lifers-Information.aspx> (last visited Oct. 24, 2023).

those sentenced to spend life in prison without the possibility of parole.²⁵⁶ However, in the 1980s and 1990s as the lifer population increased, the granting of executive clemency came to a “virtual standstill.”²⁵⁷ A former lifer committed additional crimes in New York in 1994 after having his sentence commuted by Governor Robert Casey.²⁵⁸ This individual was tagged “Pennsylvania’s Willie Horton”²⁵⁹ and his case was the impetus for the Board of Pardons changing their state constitution to require a “unanimous” vote, making clemency virtually unobtainable for lifers.²⁶⁰ Criminal legal policy that is created based on fear and outrage is not sound penal practice.

In New York, former Governor Andrew Cuomo granted zero clemencies during his first term.²⁶¹ In October 2015, he announced the creation of a pro bono clemency program,²⁶² but between 2015 and 2019 only twenty-one commutations were issued.²⁶³ The current governor, Kathy Hochul, granted clemency to ten individuals (nine pardons and one commutation) in December 2021 and announced the formation of a clemency advisory panel²⁶⁴ just four months after her tenure began on

²⁵⁶ See NOTTERMAN, THE DEMISE OF CLEMENCY FOR LIFERS, *supra* note 255, at 4.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* “In June 1986, [Willie] Horton failed to return from his weekend furlough” and almost a year later, assaulted a man and raped his fiancé. NOTTERMAN, WILLIE HORTON’S SHADOW, *supra* note 249, at 6. Then-Governor Michael Dukakis’s presidential political aspirations were abruptly halted and “discretionary release programs [across the country] came to be viewed as political landmines.” *Id.* “Massachusetts immediately terminated its furlough program” and other states throughout the country followed suit. *Id.* Regardless of a program’s success, the “Willie Horton effect” reverberated nationwide and a single act of mischief closed release doors. *Id.* No politician wanted to appear to be soft on crime. *Id.*

²⁶⁰ See NOTTERMAN, THE DEMISE OF CLEMENCY FOR LIFERS, *supra* note 255, at 2 (explaining how Article 9 of the Pennsylvania State Constitution was amended in 1997 to require that the Board vote unanimously before recommending a lifer for commutation).

²⁶¹ NOTTERMAN, TAKING STOCK OF CLEMENCY IN THE EMPIRE STATE, *supra* note 242, at 9.

²⁶² Press Release, Off. of the Governor of N.Y., Governor Cuomo Grants Clemency to Four Individuals and Launches Pro Bono Clemency Program (Oct. 22, 2015), <https://web.archive.org/web/20210810195950/https://www.governor.ny.gov/news/governor-cuomo-grants-clemency-four-individuals-and-launches-pro-bono-clemency-program>. “The organizations listed in connection with the Governor’s 2015 announcement were the New York City Bar Association, the New York County Lawyers Association, the New York State Bar Association, the Legal Aid Society, Prisoners’ Legal Services of New York and NACDL.” NOTTERMAN, TAKING STOCK OF CLEMENCY IN THE EMPIRE STATE, *supra* note 242, at 9 n.48.

²⁶³ NOTTERMAN, TAKING STOCK OF CLEMENCY IN THE EMPIRE STATE, *supra* note 242, at 9.

²⁶⁴ Press Release, Off. of the Governor of N.Y., Governor Hochul Grants Clemency to 10 Individuals and Announces Formation of New Clemency Advisory Panel (Dec. 24, 2021), <https://www.governor.ny.gov/news/governor-hochul-grants-clemency-10-individuals-and-announces-formation-new-clemency-advisory>.

August 24, 2021. She subsequently granted clemency to thirteen individuals (four commutations and nine pardons) in December 2022²⁶⁵ and in April 2023 she granted clemency to seven individuals (five pardons and two commutations).²⁶⁶

Between 1991 and 1994, the Board of Pardons in Connecticut approved thirty-six pardon applications; for the following nine years, they granted zero.²⁶⁷ The clemency process ceased entirely in 2019 when the Board would not even accept applications as they waited for new guidelines and instructions.²⁶⁸ Operations resumed in 2022, but due to political pressure, Connecticut's Governor stalled the Board's review in April 2023.²⁶⁹ Currently, there is, once again, no meaningful opportunity to apply for clemency in the state.²⁷⁰

In the nation's capital, the District of Columbia, the Clemency Board Establishment Act was passed in 2018,²⁷¹ but it was not until two years later that the Board became active, drafted regulations and operating procedures, and began meeting regularly.²⁷² In 2022, the Board finally began to receive and review applications from eligible persons

²⁶⁵ Press Release, Off. of the Governor of N.Y., Governor Hochul Grants Clemency to Thirteen Individuals (Dec. 21, 2022), <https://www.governor.ny.gov/news/governor-hochul-grants-clemency-thirteen-individuals>.

²⁶⁶ Press Release, Off. of Governor of N.Y., Governor Hochul Grants Clemency to Seven Individuals (Apr. 7, 2023), <https://www.governor.ny.gov/news/governor-hochul-grants-clemency-seven-individuals>.

²⁶⁷ NOTTERMAN, SEARCHING FOR CLEMENCY IN THE CONSTITUTION STATE, *supra* note 244, at 1.

²⁶⁸ *Id.*

²⁶⁹ Kelan Lyons, *Connecticut Governor Scrambles Pardons Board and Halts Clemency*, BOLTS (April 28, 2023), <https://boltsmag.org/connecticut-governor-scrambles-board-of-pardons-and-paraoles-clemency/>.

²⁷⁰ *See id.* The majority of the more than 700 people serving life sentences in Connecticut are African Americans, while African Americans people comprise about 13% Connecticut's population. *See* ASHLEY NELLIS, SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 19 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf>; America Counts Staff, *Connecticut's Population Inched Up 0.9% Last Decade*, U.S. CENSUS BUREAU (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/connecticut-population-change-between-census-decade.html>.

²⁷¹ Clemency Board Establishment Act of 2018, D.C. CODE §23-481.

²⁷² Paul Duggan, *Only the President Can Pardon D.C.'s Convicted Offenders, but a City Panel Will Begin Making Recommendations to the White House*, WASH. POST. (Mar. 18, 2022, 5:56PM), <https://www.washingtonpost.com/dc-md-va/2022/03/18/dc-prisoners-clemency-board/>. Pursuant to the enactment legislation, the Clemency Board is mandated to conduct meetings that are open to the public before they convene into a closed meeting where they review and vote on actual petitions. *See* D.C. CODE §23-481. I have long advocated for the Board to act with urgency, and I am often the sole non-board member and public citizen who attends these meetings to observe the actions of the Clemency Board and provide input regarding their operations and their impact on the community.

sentenced in D.C. Superior Court.²⁷³ Because D.C. is not a state, the mayor cannot grant clemency; therefore, the Clemency Board reviews applications of people convicted of D.C. Code offenses and determines which applicants to recommend to the President of the United States for clemency.²⁷⁴ Applications to the Clemency Board are not applications for clemency because an application must be filed with the Department of Justice, Office of Pardon Attorney in order to be considered.²⁷⁵ Just three people convicted of a D.C. Code offense have received clemency since 1989, one in 2013 by President Obama and two since 2022 by President Biden.²⁷⁶

The use of clemency power has not always trickled down to people who lack popularity or notoriety. Atrophy and misuse often reflect the attitude of decision-makers when common folk seek such relief. The case of sixty-five-year-old Mr. Crosley Green is just one troubling example.²⁷⁷ He was convicted for a murder in 1989. Resulting from the carjacking of Charles Flynn and his ex-girlfriend Kim Hallock.²⁷⁸ He was sentenced to death by an all-white jury and subsequently resentenced to life in prison due to an error in the sentencing phase of the trial.²⁷⁹ After more than thirty years in prison, he was awarded a new trial in 2018 when the Eleventh Circuit Court of Appeals overturned his conviction based on a *Brady* violation.²⁸⁰ Prosecutors withheld notes from a meeting with first responders who said they believed Green was

²⁷³ Duggan, *supra* note 272.

²⁷⁴ See D.C. CODE § 24-4801.03.

²⁷⁵ *Id.*

²⁷⁶ See *Pardons Granted by President Barack H. Obama (2009-2017)*, OFF. OF THE PARDON ATT'Y, U.S. DEP'T OF JUST., <https://www.justice.gov/pardon/pardons-granted-president-barack-h-obama-2009-2017> (last visited Dec. 30, 2023); *Commutations Granted by President Joseph Biden (2021-Present)*, OFF. OF THE PARDON ATT'Y, U.S. DEP'T OF JUST., <https://www.justice.gov/pardon/commutations-granted-president-joseph-biden-2021-present#> (last visited Dec. 30, 2023); *Pardons Granted by President Joseph Biden (2021-Present)*, OFF. OF THE PARDON ATT'Y, U.S. DEP'T OF JUST., <https://www.justice.gov/pardon/pardons-granted-president-joseph-biden-2021-present> (last visited Dec. 30, 2023).

²⁷⁷ John A. Torres, *Crosley Green Must Turn Himself In By April 17*, FL. TODAY (Apr. 3, 2023) <https://www.floridatoday.com/story/news/2023/04/03/crosley-green-ordered-back-to-prison-must-turn-himself-in/70077927007/> [hereinafter Torres, *Crosley Green Must Turn Himself In*].

²⁷⁸ John A. Torres, *U.S. Supreme Court Denies Crosley Green*, FL. TODAY (Feb. 27, 2023, 12:22PM), <https://www.floridatoday.com/story/news/2023/02/27/supreme-court-denies-crosley-green-his-hope-now-in-clemency-from-desantis/69948485007/> [hereinafter Torres, *U.S. Supreme Court Denies Crosley Green*].

²⁷⁹ Torres, *Crosley Green Must Turn Himself In*, *supra* note 277; Erin Moriarty, *A Judge Ruled Crosley Green Was Wrongfully Convicted – So Why Was He Ordered Back to Prison?*, CBS NEWS, (Apr. 22, 2023, 10:23 PM), <https://www.cbsnews.com/news/crosley-green-wrongfully-convicted-ordered-back-to-prison-48-hours/>.

²⁸⁰ Torres, *Crosley Green Must Turn Himself In*, *supra* note 277.

innocent.²⁸¹ The two officers with the Brevard County Sheriff's office said they believed that Hallock herself was responsible.²⁸² The court acknowledged the withheld information should have been turned over to the defense team.²⁸³ "Green was released from prison to house arrest in April 2021 pending the ruling [from] the Eleventh Circuit."²⁸⁴ The state of Florida appealed the court's decision, and the conviction was reinstated.²⁸⁵ Green appealed to the U.S. Supreme Court, but it declined to hear his case in February 2023.²⁸⁶ Despite his stellar institutional record during his prior incarceration and his exemplar compliance with house arrest conditions, he was ordered back to prison in April 2023 after two years of freedom.²⁸⁷ In June 2023 Mr. Green learned he would not be eligible for parole until 2054, if he survives in prison to be ninety-seven years old.²⁸⁸ His only real hope now is clemency from Florida Governor Ron DeSantis.²⁸⁹

Several states increased the use of clemency, particularly during the pandemic. Governor Kevin Stitt, Republican governor of Oklahoma, granted clemency to over 1,000 people in 2019.²⁹⁰ He granted an additional 450 commutations in 2020 during the height of the pandemic.²⁹¹ Governor Jay Inslee (Democrat) of Washington also responded to the pandemic crisis by granting commutations to over 1,100 people.²⁹² Kentucky Governor Andy Beshear (Democrat) also issued commutations for over 500 incarcerated folks who were considered to be at high risk for contracting COVID-19.²⁹³ While these governors are to be commended, these numbers still remain relatively low as compared to how rapidly the numbers swelled under the powerful tide of mass incarceration growth. An active clemency board does not mean

²⁸¹ Torres, *U.S. Supreme Court Denies Crosley Green*, *supra* note 278.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Torres, *Crosley Green Must Turn Himself In*, *supra* note 277.

²⁸⁶ *Id.*

²⁸⁷ Torres, *U.S. Supreme Court Denies Crosley Green*, *supra* note 278.

²⁸⁸ John A. Torres, *Crosley Green Is Not Eligible for Parole Until 2054. He'd Be 97.*, FL. TODAY (June 22, 2023, 4:34 PM), <https://www.clickorlando.com/news/local/2023/06/22/crosley-green-is-not-eligible-for-parole-until-2054-hed-be-97/>.

²⁸⁹ Kaelan Deese, *DeSantis Clemency only Option for Ex-Death Row Inmate After Supreme Court Denial*, WASH. EXAM'R (Feb. 27, 2023, 7:14 PM), <https://www.washingtonexaminer.com/policy/courts/desantis-clemency-only-option-for-inmate-after-scotus-denial>.

²⁹⁰ See LO ET AL., *supra* note 178, at 1.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

that a state is soft on crime, but that it recognizes human beings are capable of change and that punishment for an offense should not be perpetual.

B. Judicial Recognition of This Critical Remedy And Our Failure to Provide It

In 1976, the Supreme Court emphasized the continuing significance of clemency review. In *Gregg v. Georgia*,²⁹⁴ the Court held that a system of capital punishment without executive clemency “would be totally alien to our notions of justice.”²⁹⁵ In 1998, the U.S. Supreme Court issued a major decision in an attempt to clarify clemency procedures. In *Ohio Adult Parole Authority v. Woodard*,²⁹⁶ the Court unanimously dismissed the claim that the Ohio clemency procedures violated an individual’s constitutional rights.²⁹⁷ Mr. Woodard was on death-row and was seeking relief, but because the process included an interview, he claimed that it violated his Fifth Amendment right to remain silent.²⁹⁸ Unfortunately, the Court determined that his claims were found to be without merit and that giving an individual the option of voluntarily participating in an interview as part of the clemency process was not a violation.²⁹⁹ The Supreme Court was sharply divided on the central question of whether clemency must comply with “due process of law.”³⁰⁰

In 2010, Justice Anthony Kennedy brought up the scarcity of clemency grants in *Dillon v. United States*.³⁰¹ He asked, “[a]nd were there-how many commutations last year? None. And how many commutations the year before? Five. Does this show that something is not working in the system?”³⁰²

²⁹⁴ 428 U.S. 153 (1976).

²⁹⁵ *Id.* at 199, n.50.

²⁹⁶ 523 U.S. 272 (1998).

²⁹⁷ *Id.* at 287–88.

²⁹⁸ *Id.* at 277.

²⁹⁹ *Id.* at 287–88.

³⁰⁰ *See id.* at 290 (Stevens, J., concurring in part and dissenting in part). In the broadest sense, “due process of law” refers to the body of mechanisms regulating each stage of legal proceedings to protect the fairness and impartiality of justice. In procedures where basic due process rights apply, all defendants are entitled to an open and fair hearing before a duly constituted tribunal, a formal notification of the charges against them, the opportunity to present a defense and the pronouncement in public of the tribunal’s decision and the reasons for it. *See Due Process of Law*, BALLENTINE’S LAW DICTIONARY (3d ed. 2010); *Due Process*, WEX, LEGAL INFORMATION INSTITUTE, CORNELL L. SCH., https://www.law.cornell.edu/wex/due_process.

³⁰¹ Transcript of Oral Argument at 40–41, *Dillon v. United States*, 560 U.S. 817 (2010) (No. 09-6338).

³⁰² *Id.*

Yet, the availability of clemency, even in name only, has provided justification for the Court to narrow other pathways to review convictions and sentences. Chief Justice Rehnquist noted in *Herrera v. Collins*³⁰³ that “clemency . . . is the historic remedy for preventing miscarriages of justice where judicial review has been exhausted.”³⁰⁴ Mr. Herrera was executed three months after the Court’s ruling when then-Governor of Texas Ann Richards only promised to study recommendations from advocates.³⁰⁵ These advocates had asked her “to develop mechanisms so that [persons] alleging miscarriages of justice would receive full and fair clemency hearings.”³⁰⁶

Even when courts have tried to instill greater accountability and fairness in clemency processes, the Supreme Court has rejected these efforts. In *Dumschat v. Connecticut Board of Pardons*,³⁰⁷ the district court ruled that due process obligated the Board to provide an explanation whenever it denied a clemency application for someone serving a life sentence.³⁰⁸ However, the Supreme Court reversed this decision in *Connecticut Board of Pardons v. Dumschat*,³⁰⁹ and ruled that the Board did not violate a prisoner’s due process rights when it failed to give him reasons for not commuting his sentence.³¹⁰ Mr. Dumschat was serving a life sentence and had filed several applications for commutation.³¹¹ They had all been rejected by the Connecticut Board of Pardons without explanation.³¹² The Court found that no explanation was required, therefore depriving Mr. Dumschat of any constitutional remedy for the clear harm he continues to suffer.³¹³

³⁰³ 506 U.S. 390 (1993).

³⁰⁴ *Id.* at 411–12. The Court cited clemency as the alternative to Habeas review for cases of actual innocence, except perhaps in rare death penalty cases with exceedingly persuasive evidence. *See id.* at 416–17 (“But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.”).

³⁰⁵ *See* AMNESTY INT’L, UNITED STATES OF AMERICA: KILLING WITHOUT MERCY: CLEMENCY PROCEDURES IN TEXAS 6 (1999).

³⁰⁶ *Id.*

³⁰⁷ 432 F. Supp. 1310, 1314–15 (D. Conn. 1977), *aff’d*, 593 F.2d 165 (2d Cir. 1979), *vacated sub nom.* Connecticut Board of Pardons v. Dumschat, 442 U.S. 926 (1981).

³⁰⁸ *See id.* at 1314 (“Where . . . the state has set up a statutory process for granting commutations . . . and granted such relief to at least three-quarters of the longterm inmates appearing before it, I think it clear that the denial of a pardon to such inmates implicates a liberty interest requiring due process protections.”).

³⁰⁹ 452 U.S. 458 (1981).

³¹⁰ *Id.* at 467.

³¹¹ *Id.* at 460–61.

³¹² *Id.* at 461.

³¹³ *Id.* at 467.

Grants of clemency are administrative decisions that tend to be political in nature.³¹⁴ The path to seek such relief should be available to every deserving individual without insurmountable obstacles.

IV. JUVENILE LIFER: THE SLOW UNDOING OF CHILDREN'S CONDEMNATION

A. The Supreme Court Speaks and the States Listen

1. Federal Law: A Long Overdue Yet Imperfect Protection for Children Against Cruel and Unusual Punishment

Until the last two decades, nothing in the U.S. Constitution was interpreted to preclude inflicting the harshest of punishments upon children who were convicted of serious offenses.³¹⁵ Until the early 2000s, our criminal legal system meted out death sentences to children, both those sentenced to be executed by the state and those sentenced to die in prison, often automatically, by serving life without parole.³¹⁶ The youngest recorded person to be sentenced to death was George Stinney, Jr., an African American boy sentenced and convicted by an all-white jury at the age of fourteen for allegedly raping and killing two young girls in South Carolina in 1944.³¹⁷ He was executed on June 16, 1944 by electrocution.³¹⁸ The number of children executed at the hands of the Klan and other white supremacists groups that took the law into their own hands, often with at least willful disregard from the state, may never be fully known.³¹⁹

³¹⁴ See *supra* Section III.A.

³¹⁵ See generally BRYAN STEVENSON, *JUST MERCY* 147–62 (paperback ed. 2015) (describing the “legally condemned children hidden away in adult prisons” serving life sentences).

³¹⁶ See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that the Eighth and Fourteenth Amendments preclude imposing the death sentence on individuals who committed their offenses as minors).

³¹⁷ *Fourteen-Year-Old George Stinney Executed in South Carolina*, EQUAL JUST. INITIATIVE, <https://calendar.eji.org/racial-injustice/jun/16> (last visited Aug 2, 2023). This decision was vacated in 2014 when a court found that George Stinney Jr. had been “fundamentally deprived of due process throughout the proceedings against him.” *Id.*

³¹⁸ *Id.*

³¹⁹ Organizations such as the Equal Justice Initiative have led critical efforts to document and memorialize America’s history of racial injustice so we as a country can undertake the critical work of reckoning with its impact to present day. See *Community Remembrance Project*, EQUAL JUST. INITIATIVE, <https://eji.org/projects/community-remembrance-project/> (last visited July 31, 2023) (“EJI’s Community Remembrance Project partners with community coalitions to memorialize documented victims of racial violence throughout history and foster meaningful dialogue about race and justice today.”).

The concept of condemning a sixteen-year-old child to die in prison for an offense they most likely committed as a product of significant trauma defining their short life should be unconscionable to anyone who grapples with this reality. When a child commits a violent act, or is present for the commission of that act and deemed as culpable, it is our systems of neglect, abuse, and trauma that are to blame. For far too long, we have callously classified these children as permanently irredeemable and avoided reckoning with the cycles of systemic racism, oppression, poverty, and violence that lead to each tragedy that occurs with their offense and incarceration. Among the most devastating impacts from opening the floodgates to mass incarceration are the generations of young African American boys who have been caught in this current and swept into the cages where they remain to this day.

A series of U.S. Supreme Court cases have now recognized the difference between juvenile and adult offenders, including the lack of maturity, an undeveloped sense of responsibility, vulnerability to peer pressure, and the inability to fully understand the consequences of one's actions.³²⁰ For these reasons, the Supreme Court ruled that the Eighth Amendment precludes execution of a juvenile who was under the age of eighteen at the time of the crime,³²¹ prevents sentencing a juvenile to life imprisonment without the possibility of parole for non-homicidal crimes,³²² and forbids the imposition of a mandatory sentence of life without parole for juvenile offenders even in homicide cases.³²³ Courts recognize that children are constitutionally different from adults in their level of culpability when it comes to sentencing.³²⁴ Further, research confirms that an adolescent's greater potential for rehabilitation is a result of this continued development and means that "the vast majority of juvenile offenders, even those who commit serious crimes, grow out of antisocial activity as they transition into adulthood."³²⁵ In a brief supporting the case of Mr. Miller himself, the American Psychological Association argued,

³²⁰ See *Roper*, 543 U.S. at 569 (recognizing juveniles' lack of maturity, undeveloped sense of responsibility, and vulnerability to peer pressure); *Miller v. Alabama*, 567 U.S. 460, 477 (2012) (acknowledging the significance of juveniles' inability to appreciate risks and consequences).

³²¹ *Roper*, 543 U.S. at 578.

³²² *Graham v. Florida*, 560 U.S. 48, 79 (2010).

³²³ *Miller*, 567 U.S. at 465.

³²⁴ See *id.* at 473-74.

³²⁵ See LAURENCE STEINBERG ET AL., OFF. OF JUV. JUST. AND DELINQ. PREVENTION, U.S. DEP'T OF JUST., PSYCHOSOCIAL MATURITY AND DESISTANCE FROM CRIME IN A SAMPLE OF SERIOUS JUVENILE OFFENDERS 1, 9 (2015), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248391.pdf>.

Because of their developmental immaturity, adolescents are more susceptible than adults to the negative influences of their environment, and their actions are shaped directly by family and peers in ways that adults' are not. . . . Yet, precisely because of their legal minority, juveniles lack the freedom to remove themselves from those negative external influences.³²⁶

In 2012, the Supreme Court decided *Miller v. Alabama*,³²⁷ and held that unless a rare circumstance was present, juvenile life without parole sentences were unconstitutional.³²⁸ Citing *Graham v. Florida*, Justice Kagan noted that every state “must provide ‘some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.’”³²⁹ In 2016, the Court decided *Montgomery v. Louisiana*³³⁰ and found that the *Miller* decision applied retroactively to cases before 2012.³³¹ These decisions limit the ability of courts to sentence juveniles to life sentences moving forward and also allow individuals who are serving such sentences to have a meaningful opportunity to get back in court, demonstrate rehabilitation, and fight for resentencing and possibly their freedom.³³²

Since this series of rulings, dozens of individuals have had the chance to argue for release and many have been resentenced, while others wait or fight to have their sentences reviewed.³³³ Some have won their freedom, including Mr. Joe Ligon, believed to be the oldest and the longest-serving juvenile lifer to date.³³⁴ Mr. Ligon was found guilty

³²⁶ Brief for The American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae Supporting Petitioners at 15-16, *Miller v. Alabama*, 567 U.S. 460 (2012), *Jackson v. Hobbs*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647).

³²⁷ 567 U.S. 460 (2012).

³²⁸ *See id.* at 479-80.

³²⁹ *Id.* at 479 (citing *Graham v. Florida*, 560 U.S. 48, 75 (2010)).

³³⁰ 577 U.S. 190 (2016).

³³¹ *See id.* at 206-13. *See also* Lauren Gill, *Sentenced to Life Without Parole at 17 and Denied Freedom at 52*, THE APPEAL (Aug. 7, 2019), <https://theappeal.org/alabama-life-without-parole-denied-freedom-supreme-court/> (highlighting the impact that applying *Miller* retroactively will have in allowing individuals who were sentenced to life in prison, and who have faced obstacles in other paths to their release, to seek another opportunity for relief).

³³² *See Montgomery*, 577 U.S. at 208-09 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)) (applying *Miller* retroactively based on the recognition that the “vast majority of juvenile offenders – [face] a punishment that the law cannot impose upon [them].”).

³³³ Gill, *supra* note 331.

³³⁴ Heather Law & Evan Simko-Bednarski, *After 68 Years in Prison, America's Oldest Juvenile Lifer was Released*, CNN (Feb. 17, 2021, 9:27 PM), <https://www.cnn.com/2021/02/17/us/oldest-juvenile-lifer-released-trnd/index.html>.

in Pennsylvania Court of two counts of first-degree murder and sentenced to life without parole when he was fifteen years old.³³⁵ He was eighty-three years old when he was released in February 2021 after serving sixty-eight years in prison.³³⁶ Mr. Ligon is African American.³³⁷

The racial disparities for persons serving juvenile lifer sentences are astounding. “Sixty-two percent of people serving JLWOP [(juvenile life sentences without parole)], among those for whom racial data are available, are African American,”³³⁸ though African American youth make up only roughly fifteen percent of the U.S. juvenile population.³³⁹ These statistics are shockingly disproportionate. The race of the victim also factors in and furthers the discriminatory harm inflicted on African American children.³⁴⁰ While twenty-three percent of juvenile arrests for murder involve an African American suspected of killing a white person, forty-three percent of those convicted are sentenced to JLWOP.³⁴¹ Concurrently, “white juvenile offenders with [African American] victims are only about half as likely (3.6%) to receive a JLWOP sentence [compared] to their proportion of arrests for killing [an African American] (6.4%).”³⁴² Furthermore, most of the children that come into the criminal legal system bring with them a history of trauma and systemic failures. A significant percentage of youth entering the criminal legal system, estimated to be as high as seventy-nine percent in girls and forty-seven percent in boys, have experienced abuse or neglect.³⁴³ Most

³³⁵ *See id.*

³³⁶ *Id.*

³³⁷ Dahleen Glanton, *Joe Ligon, America’s Longest-Servicing Juvenile Lifer, Has a Message for Young Black Offenders*, CHI. TRIB. (Feb. 22, 2021, 5:00AM), <https://www.chicagotribune.com/columns/dahleen-glanton/ct-joe-ligon-prison-release-20210222-nsohnj2t5vbn5by312w2t2evm4-story.html>.

³³⁸ JOSHUA ROVNER, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW, THE SENT’G PROJ. 4 (2023), <https://www.sentencingproject.org/app/uploads/2023/04/Juvenile-Life-Without-Parole.pdf>.

³³⁹ The 2020 U.S. Census data indicated 11,123,707 of the approximately 73 million American youth are Black. *Juvenile Population Characteristics*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, U.S. DEP’T OF JUST. (2021), <https://www.ojjdp.gov/ojstatbb/population/qa01104.asp>; QuickFacts: *United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/RH1225222> (13.6% of the U.S. population is “Black or African American alone”) (last visited Nov. 19, 2023).

³⁴⁰ CAMPAIGN FOR THE FAIR SENT’G OF YOUTH (2023), <https://cfsy.org/wp-content/uploads/NCVCCFSY-Fact-Sheet-January-2023.pdf>.

³⁴¹ ASHLEY NELLIS, THE SENT’G PROJ., THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 3 (2012), https://web.archive.org/web/20150322080416/http://sentencingproject.org/doc/publications/publications/jj_The_Lives_of_Juvenile_Lifers.pdf.

³⁴² *Id.*

³⁴³ *See id.*

of these children are held in state facilities. The Federal Bureau of Prisons reports that there are only twelve children under the age of eighteen currently housed in BOP facilities,³⁴⁴ but the number of individuals who were sentenced as children and have now served decades in prison is greater.³⁴⁵ According to the Campaign for the Fair Sentencing of Youth, twenty-three federal juvenile lifers have been resentenced with most of them receiving a shorter sentence.³⁴⁶ This is a move in the right direction and a path for relief for the states to follow.

2. State Law: Retroactive Application Begins to Make A Dent

“Since 2012, thirty-three states and the District of Columbia have changed their [sentencing] laws for people under eighteen convicted of homicide.”³⁴⁷ Once the Supreme Court laid down the law, national and local advocates across the country drafted legislation, testified before the legislators, and celebrated the passage of new local statutes giving individuals sentenced as children a second chance.³⁴⁸ Twenty-eight states have banned LWOP for children under eighteen; some states also eliminated LWOP for felony murder or re-wrote penalties that were struck down by the Court in *Graham*.³⁴⁹ “In nine additional states, no one is serving life without parole for offenses committed before age [eighteen].”³⁵⁰ Following the logic of these decisions, many states and the District of Columbia passed local legislation and established a threshold age of eighteen or younger at the time of the offense to petition for release.³⁵¹ The District of Columbia and Washington State have increased the age to twenty-five and twenty-one, respectively, based on the understanding of neuroscience and complete

³⁴⁴ See *Inmate Age*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_age.jsp (last visited Dec. 31, 2023).

³⁴⁵ See e.g., Assoc. Press, *A State-By-State Look at Juvenile Life Without Parole*, ASSOC. PRESS (July 31, 2017, 5:28PM), <https://apnews.com/general-news-9debc3bdc7034ad2a68e62911fba0d85> (noting that thirty-eight inmates of federal prisons were sentenced as juveniles and are currently serving life sentences as of 2017).

³⁴⁶ *Id.* (citing findings from the Campaign for the Fair Sentencing of Youth).

³⁴⁷ ROVNER, *supra* note 338, at 3.

³⁴⁸ See, e.g., *Ten Years After Miller v. Alabama*, EQUAL JUST. INITIATIVE (June 24, 2022), <https://eji.org/news/ten-years-after-miller-v-alabama/> (“*Miller* also sparked major legislative change as lawmakers across the country responded to the ruling by passing new laws limiting excessive sentences for children.”).

³⁴⁹ ROVNER, *supra* note 338, at 3; CFSY, *More Than Half of All US States Have Abolished LWOP*, *supra* note 255.

³⁵⁰ ROVNER, *supra* note 338, at 1.

³⁵¹ See Assoc. Press., *A State by State Look at Juvenile Life Without Parole*, SEATTLE TIMES (July 31, 2017), <https://www.seattletimes.com/nation-world/a-state-by-state-look-at-juvenile-life-without-parole/>.

brain development.³⁵² Data from the Campaign for the Fair Sentencing of Youth showed, as of June 2022, that half of the 2,800 people serving juvenile life without parole in the U.S. have been resentenced or had their sentences changed since 2012.³⁵³

“Starting in 2017, the state of Pennsylvania responded to [the] Supreme Court ruling[s] and released 271 people who were sentenced to life behind bars before they were [eighteen].”³⁵⁴ At the time, Pennsylvania prisons held the most “juvenile lifers” of any state in the country—over 500 people.³⁵⁵ In both West Virginia and the District of Columbia, local statutes allow an individual to petition for release after serving fifteen years.³⁵⁶ Maryland, Nevada, New Jersey, and Virginia allow for the possibility of release after twenty years of imprisonment.³⁵⁷

In April 2021 the Maryland General Assembly enacted the Juvenile Restoration Act (“JRA”).³⁵⁸ It was the twenty-fifth state to enact local compliance legislation.³⁵⁹ This law prohibits courts from imposing sentences of life without parole on children in Criminal Procedure Article § 6-235, and outlines the court processes for filing motions, getting hearings, and the decision-making factors in Criminal Procedure Article § 8-110.³⁶⁰ The science of adolescent brain development and the low rate of recidivism for older persons led Maryland to enact the JRA.³⁶¹ Many individuals were immediately eligible to pursue meaningful relief after having spent decades behind bars.³⁶² In Maryland, “people who have served at least [twenty] years of a sentence for a crime committed when they were under the age of [eighteen are allowed] to file a motion

³⁵² ROVNER, *supra* note 338, at 5. Characteristics of adolescent brain development, including immaturity and inability to appreciate risks and consequences, do not end suddenly when a child turns eighteen, an understanding which has led advocates to pursue resentencing relief for emerging adults as well. *See generally id.*

³⁵³ NATIONAL TRENDS IN SENTENCING CHILDREN TO LIFE WITHOUT PAROLE, CAMPAIGN FOR THE FAIR SENT’G OF YOUTH (June 2022) <https://cfsy.org/wp-content/uploads/Fact-sheet-June-2022.pdf>.

³⁵⁴ Ohl, *supra* note 111.

³⁵⁵ *Id.*

³⁵⁶ ROVNER, *supra* note 338, at 5.

³⁵⁷ *Id.*

³⁵⁸ S.B. 494, 2021 Leg., 442nd Sess. (Md. 2021).

³⁵⁹ Natalie Rubino, *Maryland Bans Life Sentences for Juvenile Offenders*, FOX 5 D.C. (April 12, 2021), <https://www.fox5dc.com/news/maryland-bans-life-sentences-for-juvenile-offenders>.

³⁶⁰ *See* MD. CODE ANN., CRIM. PROC. §§ 6-235, 8-110 (2021).

³⁶¹ *See* BRIAN SACCENTI, MD. OFF. OF THE PUB. DEF., THE JUVENILE RESTORATION ACT, YEAR ONE – OCTOBER 1, 2021 TO SEPTEMBER 30, 2022, at 4-6 (2022), https://www.opd.state.md.us/_files/ugd/868471_e5999fc44e87471baca9aa9ca10180fb.pdf [hereinafter OPD JRA ONE YEAR REPORT].

³⁶² Rubino, *supra* note 359.

asking the circuit court to reduce their sentence.”³⁶³ The JRA instructs the sentencing court to “reduce such a sentence if, after a hearing, it finds that (a) ‘the individual is not a danger to the public’ and (b) ‘the interests of justice will be better served by a reduced sentence.’”³⁶⁴ This determination is to be based on a weighing of several factors that importantly look beyond the static factors of a person’s offense and include the conditions of their childhood and record of rehabilitation during their incarceration.³⁶⁵ Other state statutes are similarly drafted to provide for review of factors that led to the Court’s determination that children are constitutionally different for sentencing purposes.³⁶⁶ Approximately 200 individuals incarcerated in Maryland were immediately eligible for reconsideration when the JRA passed, and this number increases daily as more individuals reach the twenty-year statutory threshold for reconsideration.³⁶⁷

³⁶³ See *The Decarceration Initiative*, MARYLAND OFFICE OF THE PUBLIC DEFENDER, <https://opd.state.md.us/decarceration-initiative#:~:text=In%20April%202021%2C%20the%20Office,newly%2Denacted%20Juvenile%20Restoration%20Act> (last visited Feb. 3, 2024); MD. CODE ANN., CRIM. PROC. § 8-110(a)-(b).

³⁶⁴ See *id.* (quoting MD. CODE ANN., CRIM. PROC. § 8-110(c)).

³⁶⁵ When deciding whether to reduce a sentence, the court is required to consider:

- (1) The individual’s age at the time of the offense;
- (2) The nature of the offense and the history and characteristics of the individual;
- (3) Whether the individual has substantially complied with the rules of the institution in which the individual has been confined;
- (4) Whether the individual completed an educational, vocational, or other program;
- (5) Whether the individual has demonstrated maturity, rehabilitation, and fitness to reentry society sufficient to justify a sentence reduction;
- (6) Any statement offered by a victim or victim representative;
- (7) Any report of a physical, mental, or behavioral examination of the individual conducted by health professionals;
- (8) The individual’s family and community circumstances at the time of the offense, including any of the individual’s history of trauma, abuse, or involvement in the child welfare system;
- (9) The extent of the individual’s role in the offense and whether and to what extent an assault was involved in the offense;
- (10) The diminished culpability of a juvenile as compared to an adult, including an inability to fully appreciate risks and consequences; and
- (11) Any other factor the court deems relevant.

See MD. CODE ANN., CRIM. PROC. § 8-110(d).

³⁶⁶ See, e.g., D.C. CODE § 24-403.03 (2021) (providing re-sentencing opportunities for individuals convicted of an offense before the age of twenty-five depending on factors such as their childhood, nature of the offense, reports by physical, mental, or psychiatric professionals, and record of rehabilitation).

³⁶⁷ OPD JRA ONE YEAR REPORT, *supra* note 361, at 2.

The Decarceration Initiative of the Maryland Office of the Public Defender coordinates training and case assignment to law firms, law school clinics, sole practitioners, and others who have agreed to provide pro bono representation to eligible individuals.³⁶⁸ Social workers, re-entry coordinators, and other specialists become a part of the defense team, as the reintegration challenges are multi-layered given the extensive time that these individuals have been incarcerated.³⁶⁹ Many of the individuals who have re-entered society are residing with family, while others have been afforded transitional housing.³⁷⁰ Almost all have connected with organizations that provide holistic re-entry services in order to have the necessary support during the reintegration period.³⁷¹ As of publication, there have been ninety-six total rulings on JRA petitions from Maryland circuit courts, sixty-two of which were granted in full or in part, and thirty-four of which were denied.³⁷² In four cases, the sentences were reduced but the individual has more time to serve, and in seven cases the courts denied the motion.³⁷³ In one case the individual was deemed ineligible for filing and in another case “the individual was released on parole after the motion was filed but before the hearing.”³⁷⁴ This individual was still allowed to benefit from the JRA when the court modified the sentence to place the individual on probation instead of being on parole.³⁷⁵ In most of the cases I have personally participated in where an individual is granted release pursuant to the JRA in Maryland, individuals are placed on probation instead of being on parole for the remainder of their lifetime.

³⁶⁸ *The Decarceration Initiative*, MD. OFF. OF THE PUB. DEF., <https://www.opd.state.md.us/decarceration-initiative#:~:text=In%20April%202021%2C%20the%20Office,newly%20Denacted%20Juvenile%20Restoration%20Act> (last visited Oct. 24, 2023).

³⁶⁹ See OPD JRA ONE YEAR REPORT, *supra* note 361, at 8–9. See also *Symposium Explores the Role of Law School Clinics in Challenging Overincarceration*, UNIV. OF MD. FRANCIS KING CAREY SCH. OF L. (April 20, 2023), <https://www.law.umaryland.edu/content/articles/name-681633-en.html> (highlighting how a range of clinical programs can work together to fuel decarceration efforts, including those focused on the intersection of law and social work).

³⁷⁰ See OPD JRA ONE YEAR REPORT, *supra* note 361, at 13.

³⁷¹ *Id.* at 2.

³⁷² E-mail from Brian Saccenti, Dir., OPD Decarceration Initiative to Olinda Moyd, Distinguished Prac. in Residence, Am. Univ., Washington Coll. of L. (Feb. 12, 2024) (on file with author).

³⁷³ See OPD JRA ONE YEAR REPORT, *supra* note 361, at 2.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

Such is the case for Mr. B,³⁷⁶ who was represented by the law school clinic directed by the author of this article.³⁷⁷ Mr. B was exposed to unspeakable turbulence, trauma, and neglect when he was a young child. His first exposure to domestic violence was when he was nine months old, when his father knocked him off a highchair in the middle of a fight with his mother. His mother was a chronic alcoholic, who subjected him to physical and verbal abuse for the entirety of his childhood. One of his earliest memories was hiding under a table with a broomstick to protect himself from his mother. By the age of nine years old, he was scared enough of his mother that he tried to run away several times. Eventually, the police and social services investigated his home, which led to his placement in foster care due to the hard environment of the home. Unfortunately, foster care offered him no reprieve. Foster care was cruel and harsh, just like home, and within six months he was returned to his mother, who had been required to attend alcoholics anonymous and receive psychiatric counseling. Neither her drinking nor abuse stopped. Mr. B was seventeen years old when he committed a horrible crime and was sentenced as an adult to life in prison when he was just a child. Even at the time of sentencing, the sentencing judge stated that he was still a member of society who had potential, who could be a productive member of society. Mr. B went on to prove his productivity during the thirty-five years that he was in prison. He earned fourth level honor tier status and acted as a mentor for younger prisoners. He obtained his G.E.D., completed college courses, and received recognition as a meritorious scholar upon earning his associate degree. He was a faith leader in the community, and even the warden spoke of his rehabilitation and supported his release. After thirty-five years and two months in prison, he was released in January 2023, with five years of probation and entered transitional housing because his family no longer lives in the state. He has obtained a driver's license for the first time in his life, has a full-time job which allows him to travel around the state, and he has complied with all the conditions of his release.

While opportunities for juvenile offenders to seek relief are a necessary and long overdue development, this currently leaves behind the even greater number of people who were convicted of serious offenses shortly after turning eighteen. Distinguishing between a young person who committed an offense just shy of their eighteenth birthday and one who committed an offense a few weeks after creates an arbitrary

³⁷⁶ "Mr. B" is a pseudonym used to protect the privacy of a client represented by the Decarceration and Re-Entry Clinic at American University Washington College of Law.

³⁷⁷ See *State of Maryland v. "Mr. B."* (on file with The University of Maryland Law Journal of Race, Religion, Gender and Class) (supporting entire narrative that follows).

barrier to relief. This barrier disregards the same science about brain development that led to the Supreme Court's recent cases on juvenile sentencing and enactment of laws such as the JRA. Advocates in Maryland, like many other states, are championing to raise the age of applicability to age twenty-five, when experts agree that the brain fully develops.³⁷⁸ Neuroscientists agree that the frontal cortex of the brain is not fully developed until closer to age twenty-five or twenty-six, meaning that the lessened ability to understand risks, higher susceptibility to peer-influence, and decreased capacity for decision-making continues into early adulthood.³⁷⁹ In the District of Columbia, which has followed the science and increased the age of eligibility to twenty-four, many more individuals who would otherwise be ineligible have filed petitions for resentencing, and some have been released.³⁸⁰

Efforts to expand reconsideration to provide a second chance for those who committed offenses as emerging adults, now having served decades in prison, are essential to lessen the racially disparate impact of mass incarceration. A 2019 report by the Justice Policy Institute documented how over half of individuals serving the longest prison terms (ten plus years) in Maryland were incarcerated as emerging adults (stage between adolescence and young adulthood)—eighty-two percent of whom are African American.³⁸¹ Overall, forty-one percent of the people serving long sentences in Maryland are African American men who were convicted as emerging adults.³⁸²

B. Challenges in State Law Implementation and A Red Alert in Shifting Tides

Despite the well-documented purpose for enacting the JRA and statutory requirements, Maryland circuit courts have not been consistent in how these hearings are conducted, the issuing of the decisions, and the weighing of the factors in determining eligibility for relief. From my experience working with clients filing JRA motions, courts have

³⁷⁸ See OPD JRA ONE YEAR REPORT, *supra* note 361, at 19.

³⁷⁹ See *id.*; CINDY COTTLE, MOVING FORWARD: ADVANCED CONCEPTS IN ADOLESCENT BRAIN DEVELOPMENT (2018), https://www.ncjuveniledefender.com/files/ugd/a9743b_96db2e5ae3714b7eb5542699174ee2dc.pdf.

³⁸⁰ Omnibus Public Safety and Justice Amendment Act of 2020, D.C. Law 23-274, Title VI, § 601 (2020) (codified at D.C. CODE § 24-403.03). See Hailey Fuchs, *D.C. Passes Bill to Give Young Offenders Chance at Reduced Sentences*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/us/politics/dc-crime-youth.html>.

³⁸¹ JPI, RETHINKING APPROACHES, *supra* note 129, at 7.

³⁸² *Id.*

been inconsistent in expounding on their reasons for denials. Even if a court acknowledges the individual's childhood trauma, their rehabilitation and maturity during incarceration, and their status as a model prisoner engaged in educational and vocational programming, judges have still concluded that the person is a danger to the public and denied the motion on those grounds. Here, we examine three Maryland cases in which defendants appealed denials of their motions for relief.

Julian Andrew Johnson is twenty-four years into serving fifty years in prison, consecutively, for four separate offenses committed when he was sixteen years old.³⁸³ None of these offenses resulted in a death—they constituted a variety of robbery, burglary, assault, reckless endangerment, and handgun charges.³⁸⁴ Shortly after Maryland enacted the JRA in 2021, Mr. Johnson filed a motion seeking to reduce his sentences.³⁸⁵ However, the circuit court reviewing his motion held that Mr. Johnson was not even eligible for relief under this statute because he did not serve more than twenty years for a single offense.³⁸⁶ Mr. Johnson had multiple convictions for different cases and the sentences ranged from five to fifteen years in prison.³⁸⁷ None of the sentences, individually, were for more than twenty years, but they aggregated to a near life sentence combined that would not provide for his release until he reached his seventies.³⁸⁸ The court adopted a very narrow interpretation of the word “offense” and “sentence” in CPA § 8-110.³⁸⁹ It interpreted “offense” as meaning a specific violation of a law that would be charged in a single count and “sentence” as meaning the punishment imposed on a single count.³⁹⁰ Defense argued that the court should read “sentence” as referring to the aggregate sentence imposed for all counts in a case and that ignoring the legislative intent of the JRA would lead to ridiculous results based on the structure of an individual's sentence.³⁹¹

Mr. Johnson appealed this basis for denying his motion to the Appellate Court of Maryland, which ruled in May 2023 that the district court erred in failing to consider consecutive sentences for the same offense as being over twenty years, but upheld the lower court's determination that an individual serving multiple sentences for various offenses that combined far exceed the statutory requirement for eligibility cannot

³⁸³ See *Johnson v. State*, 295 A.3d 639, 642 (Md. App. 2023).

³⁸⁴ *Id.* at 643-45.

³⁸⁵ *Id.* at 642.

³⁸⁶ *Id.* at 647.

³⁸⁷ *Id.* at 645-47.

³⁸⁸ See *id.*

³⁸⁹ *Id.* at 647.

³⁹⁰ *Id.*

³⁹¹ *Id.* at 642-43, 652.

seek to reduce those sentences under the Act.³⁹² The upshot of this ruling is that people who are serving de facto life sentences for less serious offenses are rendered ineligible for relief despite their indisputably diminished culpability. This undermines the purpose of the JRA to provide a second chance for individuals who commit offenses as children and demonstrate their rehabilitation through serving at least twenty years in prison, regardless of their sentence structure.

On December 13, 1989, John Paul Sexton was sentenced to life in prison for an offense committed when he was sixteen.³⁹³ Mr. Sexton had a relatively stable childhood, but shortly after he started working as a teenager, he became influenced by older men at his job and developed an addiction to cocaine.³⁹⁴ Mr. Sexton resorted to whatever he could to feed his addiction, which tragically resulted in his involvement in a robbery-turned-homicide.³⁹⁵ After having served over three decades in prison, Mr. Sexton filed a motion seeking a reduction in his sentence under the JRA, citing his exemplary record of rehabilitation including education, joining victims' awareness efforts, and training service dogs through America's Vet Dogs.³⁹⁶ Yet the circuit court reviewing Mr. Sexton's case denied his motion purely on the basis that he was also eligible for parole.³⁹⁷ The circuit court held that Mr. Sexton's sentence was not inappropriate and that whether he had exhibited behavior that entitled him to a release is a parole board decision and not the court's decision to make.³⁹⁸ The court concluded that because his sentence was parole eligible, the parole board should be the deciding authority.³⁹⁹ Defense argued that the court applied the wrong legal standard in denying the motion and that the intent of the legislature in passing CPA 8-110 was to give rehabilitation to non-dangerous individuals, who had served at least twenty years in prison for a crime committed when they were children, an opportunity for relief by the courts.⁴⁰⁰

Like many state paroling authorities, the Maryland Parole Commission is an ineffective system and the process for being granted parole is replete with roadblocks, which result in standard and repeated denials. Persons serving life sentences have historically been denied parole after numerous hearings by the Maryland Parole Commission and by the

³⁹² *See id.* at 653-58.

³⁹³ *See* Sexton v. State, 298 A.3d 1018, 1019-20 (Md. App. 2023).

³⁹⁴ *Id.* at 1022.

³⁹⁵ *Id.* at 1019, 1022.

³⁹⁶ *Id.* at 1020-22.

³⁹⁷ *Id.* at 1026.

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 1019, 1029-30.

⁴⁰⁰ *Id.* at 1027-28.

Governor.⁴⁰¹ For decades, and across administrations, Maryland governors had a consistent policy to deny parole to anyone serving a life sentence.⁴⁰² Finally, in 2021, the Maryland General Assembly removed the Governor, and the political influences that come with their review, from the decision-making process for lifers.⁴⁰³

Maryland's courts have made it clear that a judge cannot shift their responsibility to decide an issue to another entity, even where the entity may have specialized knowledge or experience in the field. In *Whittlesey v. State*,⁴⁰⁴ the court held that a judge may not delegate the decision of whether a defendant should be shackled during a proceeding before a jury to courtroom security personnel.⁴⁰⁵ In *Miller v. Bosley*,⁴⁰⁶ the court held that a judge cannot abdicate his or her responsibility to review an order to ensure that a sufficient basis for the recommended order exists.⁴⁰⁷ In *Dingle v. State*,⁴⁰⁸ the court held that two-part *voir dire* questions were improper because they “usurped” the trial judge’s responsibility to determine the fitness of the individual potential juror.⁴⁰⁹

The Appellate Court of Maryland recently reversed the lower court’s decision in Mr. Sexton’s case.⁴¹⁰ Not only did it hold that the circuit court erred by deferring to the parole board when it had no discretion to do so, but it also emphasized how this failure to give effect to the JRA undermined the legislature’s intent, and as a result, the will of the people in Maryland that speak through its actions:

The plain language of CP § 8-110 makes clear that the General Assembly authorized and, indeed, required the circuit court to consider the factors listed in subsection (d) to determine whether to grant or deny a motion to reduce the sentence and to issue its decision in writing.

⁴⁰¹ See JUST. POL’Y INST., SAFE AT HOME: IMPROVING MARYLAND’S PAROLE RELEASE DECISION MAKING 6 (2023), <https://justicepolicy.org/wp-content/uploads/2023/05/Safe-At-Home.pdf> [hereinafter JPI, SAFE AT HOME].

⁴⁰² *Id.*

⁴⁰³ S.B. 0202, 2021 Reg. Sess., 442nd Sess. (Md. 2021).

⁴⁰⁴ 665 A.2d 223 (Md. 1995).

⁴⁰⁵ *Id.* at 249-50 (“The trial judge has broad discretion in maintaining courtroom security. In exercising this discretion, the decision as to whether an accused should wear leg cuffs or shackles must be made by the judge personally, and may not be delegated to courtroom security personnel.”).

⁴⁰⁶ 688 A.2d 45 (Md. App. 1997).

⁴⁰⁷ *Id.* at 52.

⁴⁰⁸ 759 A.2d 819 (Md. 2000).

⁴⁰⁹ *Id.* at 822-24.

⁴¹⁰ See *Sexton v. State*, 298 A.3d 1018, 1030 (Md. App. 2023).

There is no mention of parole in CP § 8-110, nor anything to suggest that the Parole Commission's authority takes precedence over the circuit court's authority. There is also no provision in CP § 8-110 that permits the circuit court simply to defer to the Parole Commission or to pass to that body the question of whether an inmate is entitled to a reduction of sentence under JUVRA. "[A] trial judge who encounters a matter that falls within the realm of judicial discretion must exercise [that judge's] discretion in ruling on the matter," and "[t]hat exercise of discretion must be clear from the record." *Gunning v. State*, 347 Md. 332, 351 (1997) (citations and emphasis omitted).⁴¹¹

In *Derrick Adams v. Maryland*, the circuit court, being heavily influenced by the nature of the crime, denied Adams's JRA motion.⁴¹² The court found that the nature of the crime was "shockingly violent," horrific, and that it was a crime of opportunity.⁴¹³ This decision seems to go against the intent of the legislation in providing a meaningful opportunity to demonstrate maturity and rehabilitation, regardless of the offense, if the individual was sentenced when they were a child and has been in prison for more than twenty years. Mr. Adams plead guilty to a first-degree sexual offense charge when he was seventeen years old, in 1993.⁴¹⁴ The defense argued that the Appellate Court of Maryland should be guided by the factors set forth in *Davis v. State*⁴¹⁵ and must consider all of the statutory factors and not give greater weight to any one particular factor.⁴¹⁶ The *Davis* case examined the factors the court must consider when transferring the case of a child charged as an adult to juvenile court, and the court provided guidance for circuit courts to consider such factors so they remain faithful to the intent of the General Assembly.⁴¹⁷ The court explained that circuit courts should consider the factors and that they are not "in competition with each other."⁴¹⁸ In-

⁴¹¹ *Id.* at 1029-30.

⁴¹² *See Adams v. State*, No. 1470, 2023 WL 6618310, at *6-7 (Md. App. Oct. 11, 2023).

⁴¹³ *Id.* at *6.

⁴¹⁴ *Id.* at *1.

⁴¹⁵ 255 A.3d 56 (Md. 2021).

⁴¹⁶ *See Adams*, 2023 WL 6618310, at *7-8.

⁴¹⁷ *See Davis*, 255 A.3d at 70-72.

⁴¹⁸ *Id.* at 71.

stead, they are “necessarily interrelated and, analytically, they all converge on amenability to treatment.”⁴¹⁹ It was clearly the legislative intent to give children a second chance if they have demonstrated maturity and rehabilitation.⁴²⁰

These cases and those from other jurisdictions evidence the courts moving towards stricter interpretation of the statute and closer scrutiny when making decisions regarding resentencing. Despite growing guidance from the Appellate Court of Maryland about the JRA’s purpose, Maryland circuit courts continue to deny JRA petitions, despite having all or most of the listed statutory factors weigh in favor of the petitioner cases in high proportions.⁴²¹ And federal constitutional rights may not provide a backstop for this regression. The Supreme Court’s new conservative super-majority reversed course in April 2021, ruling by a 6-3 vote that a judge need not make a finding of “permanent incorrigibility” before sentencing a juvenile offender to life without parole.⁴²² In *Jones v. Mississippi*, the high court deviated from rules establishing more leniency for juvenile offenders, even those convicted of murder.⁴²³ Brett Jones was fifteen years old when he stabbed his grandfather to death during a fight.⁴²⁴ He was convicted of murder and a Mississippi judge sentenced him to life without parole in 2004.⁴²⁵ Jones was twenty-two years old when he petitioned for resentencing.⁴²⁶ He had already served seven years in prison.⁴²⁷ During this time in prison, he had earned his GED and a record as a model prisoner.⁴²⁸ His attorneys argued at his resentencing hearing that he had been rehabilitated, but the judge again sentenced him to life without parole even though he did not make

⁴¹⁹ *Id.*

⁴²⁰ See *Sexton v. State*, 298 A.3d 1018, 1028 (Md. App. 2023) (“As Maryland’s Supreme Court has recognized, in enacting JUVRA, the ‘General Assembly has both reformed the parole process and, for juvenile offenders sentenced as adults, provided another avenue for release of those who can demonstrate maturity and rehabilitation following a substantial period of incarceration.’”) (quoting *Jedlicka v. State*, 281 A.3d 820, 822 (Md. 2022)).

⁴²¹ See *id.* at 1029. See also *supra* note 373 and accompanying text.

⁴²² See *Jones v. Mississippi*, 141 S. Ct 1307, 1310, 1318-19 (2021).

⁴²³ In *Jones*, the Supreme Court held that in the case of a defendant who committed a homicide when he or she was under eighteen, *Miller* and *Montgomery* do not require the sentencing court to make a separate factual finding of permanent incorrigibility before sentencing the defendant to life without parole. See *id.* at 1313. In such a case, a “discretionary sentencing system is both constitutionally necessary and constitutionally sufficient.” *Id.*

⁴²⁴ *Id.* at 1312.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ See *id.* at 1339 (Sotomayor, J., dissenting).

a finding that Jones was so incorrigible that he had no hope of rehabilitation.⁴²⁹ Jones's lawyer appealed to the Supreme Court, arguing that Jones should have a chance because he has shown that he is capable of rehabilitation.⁴³⁰ Justice Brett Kavanaugh, writing for the majority said: "[a]s this case again demonstrates, any homicide, and particularly a homicide committed by an individual under 18, is a horrific tragedy for all involved and for all affected."⁴³¹ Yet, the majority still put a dent in the advancements made with *Miller* and *Montgomery*, as Donald Ayer, a former prosecutor and deputy attorney general in Republican administrations stated, "[i]t's like the wind was blowing one way and now it's blowing in the opposite direction."⁴³² Ironically, Ayer joined other former prosecutors and judges, including two former Republican U.S. Attorneys General, and filed a brief in support of Jones.⁴³³ In her dissent, Justice Sonia Sotomayor wrote that the Court's decision in *Jones* was "an abrupt break from precedent" and "distorts *Miller* and *Montgomery* beyond recognition."⁴³⁴ We can only hope that this is not a sign of a changing tide.

⁴²⁹ See *id.* at 1313 (majority opinion).

⁴³⁰ See Petition for Writ of Certiorari at 16, *Jones v. Mississippi*, 141 S. Ct. 1307 (2021).

⁴³¹ See *Jones*, 141 S. Ct. at 1322.

⁴³² Nina Totenberg, *Supreme Court Rejects Restrictions on Life Without Parole for Juveniles*, NPR (Apr. 22, 2021, 11:17 AM), <https://www.npr.org/2021/04/22/989822872/supreme-court-rejects-restrictions-on-life-without-parole-for-juveniles>. See also *Jones*, 142 S. Ct. at 1335 (Sotomayor, J., dissenting) ("Today, however, the Court transforms *Miller* into a decision requiring only a 'discretionary sentencing procedure.' *Ante.* at 1321–1322. At the same time, the Court insists that it 'does not disturb' *Montgomery's* holding 'that *Miller* applies retroactively on collateral review.' *Ante.* at 1321. In other words, the Court rewrites *Miller* into a procedural rule and, paradoxically, maintains that *Miller* was nevertheless 'substantive for retroactivity purposes.' *Ante.* at 1317.").

⁴³³ See Brief of Amici Curiae Current and Former Prosecutors, Department of Justice Officials, and Judges in Support of Petitioner at A-1, *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (No. 18-1259).

⁴³⁴ See *Jones*, 141 S. Ct. at 1328, 1330 (Sotomayor, J., dissenting).

V. PAROLE: A PROCESS PLAGUED BY OPACITY, IMPLICIT BIAS, AND
LITTLE DUE PROCESS

A. Broken Parole Systems Contribute to Hopelessness

There is no constitutional right to parole, but it is often the one way out for many who have been sentenced to lengthy incarceration periods. While parole is not constitutionally guaranteed,⁴³⁵ it is a critical part of a person's rehabilitation and the corrections management process used to help ease prison overcrowding. However, the policies and practices of many administrative paroling authorities result in parole becoming as unobtainable as winning a million-dollar lottery.⁴³⁶ These policies, often inconsistent and opaque, frequently result in unfair decisions and practices.⁴³⁷ Paroling authorities determine who gets released on parole, the conditions of parole supervision, and whether a person should be returned to prison for an alleged violation of their parole conditions.⁴³⁸

Parole originates from the French word *paraula*.⁴³⁹ It means speech, spoken word or promise.⁴⁴⁰ When someone leaves prison before the expiration of their sentence, they give their "word" or promise that they will abide by conditions of parole. The basic theory of parole is that release should be granted as a kind of reward for good conduct in the institution, usually when a person has completed the minimum sentence, minus any good time credits earned, and when the board is convinced of reformation of the individual's soul.⁴⁴¹ Some of the factors that paroling authorities examine when making determinations about who should be granted parole include the nature of the offense, educa-

⁴³⁵ See *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7, 15-16 (1979) (holding that parole is not guaranteed but when state law requires the state to grant parole whenever a prisoner satisfies certain conditions, due process requires the state to allow the prisoner to present evidence in support of his request for parole and to furnish an explanation of the reasons why his request has been denied).

⁴³⁶ See e.g., *When Parole Becomes a Lottery*, ACLU of Md. (Mar. 17, 2020, 12:45 PM), <https://www.aclu-md.org/en/news/when-parole-becomes-lottery>.

⁴³⁷ JPI, SAFE AT HOME, *supra* note 401, at 27, 29.

⁴³⁸ CATHERINE C. McVEY ET AL., ROBINA INST. OF CRIM. L. & CRIM. JUST., MODERNIZING PAROLE STATUTES: GUIDANCE FROM EVIDENCE-BASED PRACTICE 5 (2018).

⁴³⁹ See *Parole*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/parole> (last visited Oct. 22, 2023).

⁴⁴⁰ *Id.*

⁴⁴¹ See Cecelia Klingele, *Changing the Sentence without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 487-91 (2010).

tional and vocational programming, institutional behavior, risk assessment scoring, statements from the victim or victim representative, and expressions of remorse from the individual.⁴⁴² Medical and mental health evaluations are also reviewed during the decision-making process.⁴⁴³ Experienced professionals using risk assessment software often demonstrate inherent biases when diagnosing African American individuals who are up for parole consideration.⁴⁴⁴ They are often viewed as more threatening and often receive higher scores during evaluations for risk assessments.⁴⁴⁵ Unlike judicial tribunals, parole boards are governed by minimal procedural safeguards in comparison to other critical steps in the criminal legal process.⁴⁴⁶ Parole board members must practice fairness and impartiality in making such decisions, but the impact of implicit and express biases combined with the lack of safeguards in these systems often undermine this aspiration.⁴⁴⁷

Given the disproportionate number of African Americans and Latinos affected by the criminal legal system, the decision-making process of parole highlights disparate treatment of these groups. Research examining the parole process has primarily focused on release decisions and examined the effect of race and ethnicity on how long offenders have to wait for parole.⁴⁴⁸ Such research has found that African Americans served significantly longer periods of time awaiting parole in comparison to White offenders.⁴⁴⁹ It is worth noting that “nearly half

⁴⁴² See, e.g., *The Parole Consideration Process*, MICH. DEP’T. OF CORR., <https://www.michigan.gov/corrections/services/victim/the-parole-consideration-process> (last visited Oct. 20, 2023) (“The factors considered by the Parole Board in making parole decisions include the nature of the current offense, the prisoner’s criminal history, prison behavior, program performance, age, parole guidelines score, risk as determined by various validated assessment instruments and information obtained during the prisoner’s interview, if one is conducted.”).

⁴⁴³ See, e.g., *Parole Expectations / Process*, NEB. BD. OF PAROLE, <https://parole.nebraska.gov/content/parole-expectations-process> (last visited Oct. 22, 2023) (“The Board will also review all reports available that may include court case histories; social histories; medical, psychological, psychiatric, and mental health reports; and past and present institutional behavior patterns.”).

⁴⁴⁴ See *Risk Assessments Biased Against African Americans, Study Finds*, EQUAL JUST. INITIATIVE (June 2, 2016), <https://eji.org/news/risk-assessments-biased-against-african-americans/> [hereinafter EJI, RISK ASSESSMENTS BIASED AGAINST AFRICAN AMERICANS] (“A study examining computer algorithms that rate a defendant’s risk of future crime found they falsely labeled Black defendants as future criminals at nearly twice the rate of white defendants. At the same time, white defendants were wrongly identified as low risk more often than Black defendants.”).

⁴⁴⁵ See *id.*

⁴⁴⁶ See *infra* Section V.B.

⁴⁴⁷ See EJI, RISK ASSESSMENTS BIASED AGAINST AFRICAN AMERICANS, *supra* note 444.

⁴⁴⁸ See, e.g., Beth M. Huebner & Timothy S. Bynum, *The Role of Race and Ethnicity in Parole Decisions*, 46 CRIMINOLOGY 907, 907, 911–12 (2008).

⁴⁴⁹ *Id.* at 920–21.

(48.3%) of people serving life sentences with the possibility of parole are [African American]⁴⁵⁰ When a person is released from incarceration on parole, the duration of their supervision is typically what would have been their full sentence.⁴⁵¹ Therefore, someone who is sentenced to life continues to remain on strict state supervision for the rest of their life, even if released from prison, unless they are resentenced. Excessive supervision subjects individuals to even more restrictive, often unnecessary challenges that outlive any useful purpose.

1. Federal Law: The Abolition of Federal Parole

Federal parole was initially established through legislation in the U.S. in June 1910.⁴⁵² In Washington, D.C., a single Board of Parole was created legislatively in 1930, which consisted of three members serving full time.⁴⁵³ These three members were appointed by the office of the Attorney General.⁴⁵⁴ The Board was expanded in 1950, to members appointed by the President with the advice and consent of the Senate for six-year staggered terms.⁴⁵⁵ In October 1972, the Board began a pilot reorganization which established five regions of the country.⁴⁵⁶ In 1976, the Parole Commission and Reorganization Act “re-titled the Board of Parole as the United States Parole Commission and established it as an independent agency within the Department of Justice.”⁴⁵⁷ The U.S. Parole Commission is the paroling authority for persons convicted of federal offenses and still operates even though parole was abolished in 1984 in the federal system under the Comprehensive Crime Control Act.⁴⁵⁸

⁴⁵⁰ Kathryn M. Young & Jessica Pearlman, *Racial Disparities in Lifer Parole Outcomes: The Hidden Role of Professional Evaluations*, 47 L. & SOC. INQUIRY 783, 787 (2022).

⁴⁵¹ ALLISON FRANKEL, HUMAN RTS. WATCH, & ACLU, REVOKED: HOW PROBATION AND PAROLE FEED MASS INCARCERATION IN THE UNITED STATES 13 (2020), <https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states> (stating that people released early on parole “typically must serve the rest of their sentence under parole supervision.”).

⁴⁵² PETER B. HOFFMAN, U.S. PAROLE COMM’N, HISTORY OF THE FEDERAL PAROLE SYSTEM 1 (2003), <https://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf>.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* at 1, 13-14. *See also* Youth Corrections Act September 30, 1950, ch. 1115, 64 Stat. 1086 (1950).

⁴⁵⁶ HOFFMAN, *supra* note 452, at 1.

⁴⁵⁷ *Id.* *See also* Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, 90 Stat. 219 (codified as amended at 18 U.S.C. §§ 4201-4218).

⁴⁵⁸ HOFFMAN, *supra* note 452, at 1-2; Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2032-33 (discussing the implementation of the new Federal Sentencing Guidelines and establishing a review date of a study that should discuss whether the parole system should be reinstated, after eliminating all references to it from the code in multiple previous sections).

This legislation also originally scheduled the Parole Commission for abolition.⁴⁵⁹ Parole was abolished in the federal system in an attempt to increase consistency in federal sentencing and because of concerns of unpredictable sentencing outcomes.⁴⁶⁰ Since parole was abolished, the U.S. Parole Commission has been reauthorized numerous times by Congress.⁴⁶¹

The U.S. Parole Commission currently has jurisdiction over D.C. Code offenders, military prisoners, old law federal prisoners who were sentenced before parole was abolished, and treaty transfer prisoners.⁴⁶² Since the National Capital Area Revitalization Act was signed into law by President Bill Clinton in 1997, the number of cases over which the Parole Commission has authority has been shrinking, except for D.C. Code offenders.⁴⁶³

2. State Law: Exponential Barriers to Seeking Release and Arbitrary Denials

Most states have a statutorily established state-wide paroling authority. One exception is that persons who are sentenced in the District of Columbia are under the authority of the U.S. Parole Commission, along with federal offenders.⁴⁶⁴ State paroling authorities and the U.S.

⁴⁵⁹ HOFFMAN, *supra* note 452, at 2.

⁴⁶⁰ See Douglas A. Berman, *Reflecting on Parole's Abolition in the Federal Sentencing System*, 81 FED. PROB. 18, 19 (2017).

⁴⁶¹ See HOFFMAN, *supra* note 452, at 2-3. “[T]he Judicial Improvements Act of 1990 extended the life of the Parole Commission until November 1, 1997. The Parole Commission Phaseout Act of 1996 again extended the life of the Parole Commission This Act authorized the continuation of the Parole Commission until November 1, 2002.” *Id.* at 2. “The 21st Century Department of Justice Appropriations Authorization Act of 2002 extended the life of the Parole Commission until November 1, 2005.” *Id.* at 3. The Commission was extended again and is now up for reauthorization after being granted a one-year extension in 2021. See United States Parole Commission Extension Act of 2020, Pub. L. No. 116-159, 134 Stat. 741.

⁴⁶² See HOFFMAN, *supra* note 452, at 30.

⁴⁶³ See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., U.S. PAROLE COMMISSION 7 (2015), <https://www.gao.gov/assets/gao-15-359.pdf> (finding that the total number of people under the U.S. Parole Commission's jurisdiction declined 26 percent between 2002 and 2014). The National Capital Area Revitalization and Self-Government Improvement Act of 1997 was enacted on August 5, 1997, and reformed the criminal justice system in Washington, D.C., including closing the local prisons and ordering that D.C. Code offenders be housed in the federal Bureau of Prisons; abolishing the local parole board and transferring parole authority to the U.S. Parole Commission and changing the sentencing scheme in the District from an indeterminate to a determinate sentencing structure. National Capital Area Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 734, 741-42, 745; HOFFMAN, *supra* note 459, at 2.

⁴⁶⁴ National Capital Area Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 734, 741-42, 745; HOFFMAN, *supra* note 452, at 2.

Parole Commission take several factors into consideration when determining whether to grant a person parole release. Some of these factors include the original offense, institutional behavior, statements from the victim, participation in rehabilitative programs, and release planning.⁴⁶⁵ Many states also use a risk assessment instrument to rate each individual to determine whether they pose a low or high risk of recidivism if released.⁴⁶⁶ While risk assessments are not mandated by law, many jurisdictions apply such risk assessments for individuals serving life sentences. Maryland is one such state.⁴⁶⁷ In 2021, seventy-one percent of the parole denials in Maryland were African American petitioners and twenty-four percent were white.⁴⁶⁸ Parole release decisions should not be based solely on static factors when determining an individual's future risk to the community, but based on dynamic criteria, which more accurately predict possibility for change.

The parole process should not be confusing and opaque. Yet, there is considerable inconsistency in the operation, eligibility criteria, administration, and organization of paroling authorities across the country.⁴⁶⁹ Some states have autonomous panels with administrative support from a department of corrections or a community corrections agency.⁴⁷⁰ In some states, they “may be a part of the executive branch of state government.”⁴⁷¹ Decision-makers have access to a wide array of information, some of which is not privy to the individual facing parole consideration.⁴⁷² Some states outright exclude certain offenses from parole eligibility, which contradicts the basic intent of parole.⁴⁷³ As long ago

⁴⁶⁵ See 28 C.F.R. § 2.18 (2023), Granting of Parole (“As prerequisites to a grant of parole, the Commission must determine that the prisoner has substantially observed the rules of the institution or institutions in which he has been confined; and upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, must determine that release would not depreciate the seriousness of his offense or promote disrespect for the law, and that release would not jeopardize the public welfare (i.e., that there is a reasonable probability that, if released, the prisoner would live and remain at liberty without violating the law or the conditions of his parole).”).

⁴⁶⁶ JPI, SAFE AT HOME, *supra* note 401, at 10-11; EJI, RISK ASSESSMENTS BIASED AGAINST AFRICAN AMERICANS, *supra* note 444.

⁴⁶⁷ JPI, SAFE AT HOME, *supra* note 401, at 10.

⁴⁶⁸ *Id.* at 21.

⁴⁶⁹ See Parole, NAT'L INST. OF CORR., <https://nicic.gov/resources/resources-topics-and-roles/topics/parole> (last visited Oct. 22, 2023).

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² See Jorge Renaud, *Grading the Parole Release Systems of All 50 States*, PRISON POL'Y INITIATIVE (Feb. 26, 2019), https://www.prisonpolicy.org/reports/grading_parole.html [hereinafter Renaud, *Grading the Parole Release Systems*].

⁴⁷³ See *id.*

as 1910, “Professor Mittermaier suggested that parole should be an integral part of [any person’s] sentence” and should not be reserved for “exceptional cases.”⁴⁷⁴ He put forth that “the period of parole should not be made equal only to the remainder of the sentence but should last until reformation is assured.”⁴⁷⁵ Most states look to good institutional behavior as a significant factor when making parole release decisions.⁴⁷⁶ Needless to say, parole decisions are highly subjective and often tempered by social and political trends.⁴⁷⁷

“Sixteen states have abolished or severely curtailed discretionary parole,” and have transitioned to determinate parole sentencing schemes.⁴⁷⁸ In these states parole is not guaranteed but left up to the subjectivity of various state decision makers.⁴⁷⁹ Other states have adopted a system of presumptive parole, where release on parole is guaranteed once certain conditions are met.⁴⁸⁰ In a report grading the parole systems in all fifty states, only one state received a B- rating (Wyoming), five states received C’s (Hawaii, Michigan, Mississippi, New Jersey and Utah) and eight states received D’s (Maryland, Montana, Nevada, New Hampshire, New York, South Dakota, Vermont and West Virginia).⁴⁸¹ The rest of the states failed with an F or F-.⁴⁸² These grades

⁴⁷⁴ Helen Leland Witmer, *The History, Theory and Results of Parole*, 18 J. OF CRIM. L. AND CRIMINOLOGY 24, 49 (1927) (citing M.W. Mittermaier, *Amendments to a System of Conditional Liberation*, INT’L PRISON CONG. (1910)).

⁴⁷⁵ *Id.*

⁴⁷⁶ Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROBATION 16 (June 2007) (“Many empirical studies on parole board decision-making found institutional conduct to be significantly associated with release decisions”).

⁴⁷⁷ Renaud, *Grading the Parole Release Systems*, *supra* note 472.

⁴⁷⁸ *Id.* “For example, Wisconsin changed its sentencing structure in 2000 to eliminate the option of discretionary parole for all offenses committed after that date. But in California and Washington, discretionary parole was eliminated for most offenses, although it is still available for life and certain other offenses/sentencing types. Of course, the federal constitution did not allow states to remove parole for offenses committed prior to the law change, so some people are still reviewed for discretionary parole.” *Id.* at n.1.

⁴⁷⁹ Edward E. Rhine et al., *Parole Boards Within Indeterminate and Determinate Sentencing Structures*, ROBINA INST. OF CRIM. L. & CRIM. JUST. (April 3, 2018), <https://robinainstitute.umn.edu/articles/parole-boards-within-indeterminate-and-determinate-sentencing-structures> (“The length of term may be adjusted by one or more decisionmakers who exercise later-in-time release discretion in a way that is routinized and reasonably knowable in advance.”).

⁴⁸⁰ Renaud, *Grading the Parole Release Systems*, *supra* note 472. See also JORGE RENAUD, PRISON POL’Y INITIATIVE, EIGHT KEYS TO MERCY: HOW TO SHORTEN EXCESSIVE PRISON SENTENCES 3 (2018) <https://www.prisonpolicy.org/reports/longsentences.html> [hereinafter RENAUD, EIGHT KEYS TO MERCY] (highlighting examples of effective presumptive parole systems in Mississippi, New Jersey, Michigan, and Hawai’i).

⁴⁸¹ Renaud, *Grading the Parole Release Systems*, *supra* note 472.

⁴⁸² *Id.*

were based on assessments of the fairness and equity of each state's parole system, including:

- Whether the state's legislature allows the parole board to offer discretionary parole to most people sentenced today;
- The opportunity for the person seeking parole to meet face-to-face with the board members and other factors about witnesses and testimony;
- The principles by which the parole board makes its decisions;
- (4) the degree to which the staff help every incarcerated person prepare for their parole hearing; and
- The degree to which the parole board is transparent in the way it incorporates evidence-based tools.⁴⁸³

Common challenges individuals impacted by parole board actions face are the lack of transparency in understanding the parole process, the subjective nature of the decision-making process, and the frequent denials without explanation.⁴⁸⁴ Sometimes hearings are open to the public, such as in Washington, Oregon, Florida, and Alabama.⁴⁸⁵ In other states, including New Mexico, New Jersey, Pennsylvania, and Wisconsin, they are closed.⁴⁸⁶ When the public is closed out of administrative and judicial hearing processes, transparency and accountability are often lacking. In Maryland, if a victim appears to testify at a parole hearing for a lifer, then the parole hearing is open; however, if the victim chooses not to appear or cannot be located, the hearing is a closed hearing.⁴⁸⁷ Additionally, a person may have counsel representation for a parole hearing; however, counsel is not permitted to be present at the actual hearing if the hearing is closed.⁴⁸⁸ The only opportunity for the representative to advocate for their client is during a thirty-minute meeting with a commissioner in advance of the hearing that their client will have at a later date.⁴⁸⁹ If the hearing is open, the attorney is allowed to attend, but is not allowed to speak on behalf of their client.⁴⁹⁰

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ Beth Schwartzapfel, *Life Without Parole*, MARSHALL PROJ. (July 7, 2015, 2:15 PM), <https://www.themarshallproject.org/2015/07/10/life-without-parole>.

⁴⁸⁶ *Id.*

⁴⁸⁷ See MD. CODE REGS. § 12.08.02.03.

⁴⁸⁸ MD. CODE REGS. § 12.08.01.18(c)(1).

⁴⁸⁹ JPI, SAFE AT HOME, *supra* note 401, at 12-13; MD. CODE REGS. § 12.08.01.18(c)(1).

⁴⁹⁰ MD. CODE REGS. §§ 12.08.02.05; 12.08.01.18(c); JPI, SAFE AT HOME, *supra* note 401, at 12.

Even those who are ultimately granted parole seem to never escape the intensive surveillance and government intrusion into their lives as they reenter society and navigate compliance with parole conditions. “An estimated one in sixty-six [(862,100)] adult U.S. residents were under community supervision at the end of 2020[,]” an increase of 1.3 percent from January 1 of that year.⁴⁹¹ “While parole is an important mechanism for reducing the overall prison population,” and rewarding individuals who have earned the opportunity for release, the process remains opaque.⁴⁹² The population returning home is disproportionately composed of African Americans, who often come from, and must return to, some of America’s poorest, most under-resourced, and most racially segregated urban neighborhoods.⁴⁹³ For many people of color, this conditional liberation can be overwhelming and challenging. Upon release, returning citizens have to navigate myriad obstacles including long waiting lines to obtain social services or exclusion from government programs due to their conviction, interruptions with obtaining and maintaining employment, family reunification challenges, learning new technology, and finding stable housing.⁴⁹⁴ Having to balance these challenges with routine visits with supervision officers and compliance with strict terms of supervision compounds roadblocks to re-entry.⁴⁹⁵ This runaround exacerbates the stress of poverty, breeds distrust of state authorities, and fosters hopelessness, which in some cases precipitates recidivism.⁴⁹⁶ Failure to follow the strictest requirements could land a person back in prison.⁴⁹⁷ Technically, those who have been released on parole are still prisoners because they are still serving a sentence and,

⁴⁹¹ DANIELLE KAEBLE, U.S. DEP’T OF JUST., PROBATION AND PAROLE IN THE UNITED STATES, 2020 (2021), <https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf>.

⁴⁹² See Tri Keah S. Henry, *Revolving Doors: Examining the Effect of Race and Ethnicity on Discretionary Decision-Making in Parole Revocation*, 46 AM. J. OF CRIM. JUST. 279, 280 (2021).

⁴⁹³ See Reuben J. Miller, *Devolving the Carceral State: Race, Prisoner Reentry, and the Micro-Politics of Urban Poverty Management*, 16 PUNISHMENT AND SOC’Y 305, 307, 312-15 (2014).

⁴⁹⁴ See generally DEMELZA BAER ET AL., JUST. POL’Y CTR., UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE’S PRISONER REENTRY PORTFOLIO (2006). “People under supervision, lawyers, and even some judges and former supervision officers recognize that supervision often sets people up to fail. People must comply with an array of wide-ranging, sometimes vague, and hard-to-follow rules, including rules requiring them to pay steep fines and fees, attend frequent meetings, abstain from drugs and alcohol, and report any time they change housing or employment.” FRANKEL, *supra* note 451, at 3. “A wide range of conduct, such as failing to report to supervision officers when required, failing to inform them that you have moved, or failure to be truthful, can lead to incarceration.” *Id.* at 60.

⁴⁹⁵ FRANKEL, *supra* note 451, at 48, 60, 75.

⁴⁹⁶ See John M. Halushka, *The Runaround: Punishment, Welfare, and Poverty Survival after Prison*, 67 SOC. PROBS. 233, 247 (2020).

⁴⁹⁷ FRANKEL, *supra* note 451, at 48, 60, 75.

even outside of prison walls, live every day with the overwhelming threat that the most minor slip-up could land them back in a cell.

The Supreme Court outlined due process requirements for revoking parole in *Morrissey v. Brewer*,⁴⁹⁸ recognizing the individual liberties at stake with the risk of sending someone back to prison arbitrarily.⁴⁹⁹ However, far too often revocation sends individuals back to prison indiscriminately. Fourteen percent (more than 80,000) of all state prison admissions are for technical parole violations – these individuals did not commit any new offenses.⁵⁰⁰ For example, individuals are returned to prison for failure to pay monthly supervision fees, a condition for which compliance is made exponentially more difficult with the numerous barriers to jobs for returning citizens.⁵⁰¹ At no time should a non-criminal violation subject someone on parole to reincarceration, and no one should bear the cost of their supervision. This contradicts the basic theory of parole, and this author proposes that procedural safeguards, including the right to counsel, should be mandatory during the revocation hearing process.⁵⁰²

This back end sentencing and returning people to jail for minor administrative violations contributes to mass incarceration. While most people believe much of the rise of mass incarceration comes from traditional criminal proceedings, the reality is that a significant portion of the current prison population is incarcerated due to technical parole violations.⁵⁰³ Individuals are also kept on supervision way beyond it serving

⁴⁹⁸ See 408 U.S. 471 (1974). The due process requirements outlined include the right to a hearing before an impartial hearing officer; the right to a hearing at or near the place where the alleged violation took place; receipt of notice and alleged violations; the right to present information and question informants; and the right to receive information about evidence relied upon and reasons for the board's decision. See *id.* at 488–89.

⁴⁹⁹ See *id.* at 482–84.

⁵⁰⁰ COUNCIL OF STATE GOV'TS, CONFINED AND COSTLY 1 (June 2019), <https://csgjustice-center.org/wp-content/uploads/2020/01/confined-and-costly.pdf>.

⁵⁰¹ See FRANKEL, *supra* note 451, at 70–71.

⁵⁰² See Olinda Moyd, *In the Shadow of Gideon: No Sixth Amendment Right to Counsel at Parole Revocation Hearings*, 6 HOW. HUM. & CIV. RTS. L. REV. 31, 56, 61 (2021) [hereinafter Moyd, *In the Shadow of Gideon*].

⁵⁰³ *Legislative Primer Series on Community Supervision: Limiting Incarceration in Response to Technical Violations*, NAT'L CONF. OF STATE LEGISLATURES (June 29, 2022), <https://www.ncsl.org/civil-and-criminal-justice/community-supervision-limiting-incarceration-in-response-to-technical-violations> (finding approximately “25% of the total prison population in the 50 States and Washington, D.C Nationwide [and] 45% of prison admissions are the result of violations or probation or parole.”); Jeffrey Lin et al., “Back-End Sentencing” and Reimprisonment: Individual, Organizational, and Community Predictors of Parole Sanctioning Decisions, 48 CRIMINOLOGY 759, 774 (2010).

any redeemable purpose.⁵⁰⁴ Extensive supervision periods serve no purpose and often frustrate individuals' ability to start their lives anew.

Just as the front-end gates to mass incarceration have inflicted generational harm on African Americans, this back-door re-incarceration process furthers racial injustice. Data from the National Corrections Reporting Program has shown that "[African American] parolees were significantly more likely to receive a revocation for a new offense, as well as, a technical offense, compared to successfully completing parole supervision."⁵⁰⁵ The guidelines and actuarial devices used to measure "dangerousness" typically do not favor people of color.⁵⁰⁶ Remediating the decades of the racially disparate harm of mass incarceration requires both preventing African Americans from being swept into the prison system at such astonishingly high rates and ensuring that relief mechanisms such as parole do not leave behind those who have experienced the greatest harm.

B. Judicial Recognition But Failure to Protect Individuals' Liberty Interests

In *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*,⁵⁰⁷ the Supreme Court, for the first time, examined whether individuals have due process rights in parole proceedings.⁵⁰⁸ The general belief was that individuals had no constitutionally protected interest in parole since it was a grace extended by the states.⁵⁰⁹ Practices and procedures that are not mandated in statutes or regulations do not create liberty interests when it comes to parole.⁵¹⁰ But, the Nebraska statute at issue in *Greenholtz* was mandatory and indicated that a person shall be granted parole unless one of four designated reasons for not doing so existed.⁵¹¹ The Court found that a liberty interest did not arise from the

⁵⁰⁴ See FRANKEL, *supra* note 451, 123-24; Moyd, *Racial Disparities*, *supra* note 31.

⁵⁰⁵ Henry, *supra* note 492, at 284.

⁵⁰⁶ See Moyd, *Racial Disparities*, *supra* note 31.

⁵⁰⁷ 442 U.S. 1 (1979).

⁵⁰⁸ See *id.* at 7-16.

⁵⁰⁹ *Id.* at 7, 11.

⁵¹⁰ See *Ingrassia v. Purkett*, 985 F.2d 987, 988 (8th Cir. 1993); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) (holding that the frequency with which a parole board has in the past commuted sentences and paroled inmates sentenced to life did not create a liberty interest. *C.f.* *Sandin v. Connor*, 515 U.S. 472, 486-87 (1995) (rejecting a liberty interest in being free from disciplinary solitary confinement that violates prison rules and regulations).).

⁵¹¹ *Greenholtz*, 442 U.S. at 11.

Nebraska statute, despite any expectation of release by incarcerated individuals.⁵¹² However, the Court emphasized that, in other cases, the unique structure and language of state statutes must be reviewed to determine if they create a liberty interest in being paroled.⁵¹³

Courts have found mandatory language in other statutes. The Ninth Circuit Court of Appeals held that a Guam statute, providing that a prisoner could be released on parole after serving two-thirds of his sentence, created a constitutionally protected liberty interest based on the “shall” language of the statute.⁵¹⁴ In *Williams v. Missouri Board of Probation and Parole*,⁵¹⁵ the Eighth Circuit Court of Appeals found that the “when” and “shall” language in Missouri’s statute gave the same entitlement as Nebraska’s “shall” and “unless” language.⁵¹⁶ Furthermore, in *Waston v. DiSabato*,⁵¹⁷ the District Court of New Jersey found that New Jersey’s “shall...unless” language created a liberty interest in release.⁵¹⁸ Finally, in *Bohannan v. Texas Board of Criminal Justice*,⁵¹⁹ the Texas Court of Appeals held that the mandatory language in the statute (that a prisoner shall be released unless certain factors are found) created a presumption, and thus a constitutionally protected expectation, of release.⁵²⁰ Many state statutes now contain a combination of mandatory and discretionary language.⁵²¹ Building on *Morrissey’s* recognition of a liberty interest related to parole revocation, the Court in *Greenholtz* expanded the possibility of constitutionally protected liberty interests in the conditional context.⁵²² In parole revocation proceedings, persons have already been released from custody and have an interest in maintaining their liberty, whereas a person who is seeking parole grant is already in custody and is merely seeking early release through an act of kindness from the board.

⁵¹² *Id.* at 16 (“The Nebraska procedure affords an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole; this affords the process that is due under these circumstances. The Constitution does not require more.”).

⁵¹³ *Greenholtz*, 442 U.S. at 12.

⁵¹⁴ *Bermudez v. Duenas*, 936 F.2d 1064, 1067 (9th Cir. 1981).

⁵¹⁵ 661 F.2d 697 (8th Cir. 1981).

⁵¹⁶ *Id.* at 698-99.

⁵¹⁷ 933 F. Supp. 390, 392 (D.N.J. 1996).

⁵¹⁸ *Id.* at 392-93.

⁵¹⁹ 942 S.W. 2d 113 (Tex. App. 1997).

⁵²⁰ *Id.* 118.

⁵²¹ *See generally* RENAUD, EIGHT KEYS TO MERCY, *supra* note 479.

⁵²² *Greenholtz v. Inmates of Nebraska Penal and Corr. Complex*, 442 U.S. 1, 12 (1979) (“We can accept respondents’ view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection.”).

As explained above, statutes in some states have been held to create a liberty interest.⁵²³ However, in other states there is no liberty interest in obtaining parole.⁵²⁴ Federally, a person in custody who is still eligible for parole and has substantially observed institutional rules must be released unless the Parole Commission determines that one or more reasons for denial are present.⁵²⁵ Even if the state statute creates certain procedural protections, they are usually very limited. The courts have held that parole conditions do not violate the Constitution unless they significantly infringe on substantial constitutional rights.⁵²⁶ In some states, a formal hearing is not required.⁵²⁷ Additionally, it is not unconstitutional for states to arbitrarily permit parole for some but deny parole for others.⁵²⁸ States may also impose special requirements on particular offenses or types of offenders as long as the requirements have a rational basis.⁵²⁹

Most state statutes outline parole procedures, including hearing notification to the individual, notice to the public or to victims (or victim representatives), in person appearance, the presentation of evidence, and access to file and disclosure of other information.⁵³⁰ There are also no, or very little, restrictions on what a board may consider when making the parole release decision.⁵³¹ They can even consider allegations for

⁵²³ See *Bd. of Pardons v. Allen*, 482 U.S. 369, 377–78 (1987); *Felce v. Fiedler*, 974 F.2d 1484, 1491 (9th Cir. 1992).

⁵²⁴ See *Inmates of Orient Corr. Inst. v. Ohio State Adult Parole Auth.*, 929 F.2d 233, 235–36 (6th Cir. 1991); *Brandon v. D.C. Bd. of Parole*, 823 F.2d 644, 648 (D.C. Cir. 1987); *Huggins v. Isenbarger*, 798 F.2d 203, 206 (7th Cir. 1986) (per curiam); *Staton v. Wainwright*, 665 F.2d 686, 688 (5th Cir. 1982); *Shirley v. Chestnut*, 603 F.2d 805, 807 (10th Cir. 1979). See also *Lomax v. Warden, Md. Corr. Training Ctr.*, 707 A.2d 395 (Md. Ct. Spec. App. 1998); *Fults v. Missouri Bd. of Prob. & Parole*, 857 S.W.2d 388, 392–93 (Mo. Ct. App. W.D. 1993); *Vineski v. Travis*, 664 N.Y.S.2d 391, 392 (N.Y. App. Div. 1997).

⁵²⁵ See 18 U.S.C. § 4206(a), (c). Parole can be denied if release would depreciate the seriousness of the offense, promote disrespect for the law, or jeopardize public welfare, or for other “good cause.” See *id.*

⁵²⁶ See *Felce*, 974 F.2d at 1493–96 (restricting involuntary psychotropic medication); *Hyland v. Proconier*, 311 F. Supp. 749, 750–51 (N.D. Cal 1970) (enjoining limits on public speeches by parolee).

⁵²⁷ See *Greenholtz*, 442 U.S. at 14–15.

⁵²⁸ See *United States v. Zavala-Serra*, 853 F.2d 1512, 1518 (9th Cir. 1988).

⁵²⁹ See *Walrath v. United States*, 830 F. Supp. 444, 446–47 (N.D. Ill. 1993); *McColpin v. Davies*, 778 F. Supp. 516, 518 (D. Kan. 1991), *aff’d* No. 91-3373, 1992 WL 74164 (10th Cir. 1992); *Patterson v. Webster*, 760 F. Supp. 150, 153 (E.D. Mo. 1991).

⁵³⁰ For reports on the parole and supervised release statutes and procedures across the country, see generally *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States*, ROBINA INST. OF CRIM. L. & CRIM. JUST., <https://robinainstitute.umn.edu/publications/profiles-parole-release-and-revocation-examining-legal-framework-united-states> (last visited Jan. 7, 2023).

⁵³¹ *Id.*

which the individual was not convicted.⁵³² Parole boards often base a denial on the seriousness of the individual's original offense, a factor that will not change despite decades of rehabilitation and exemplary records while incarcerated, and courts have found such a basis to be permissible.⁵³³ Denial of parole based on the seriousness of the offense alone does not constitute double jeopardy,⁵³⁴ even though this practice is logically indistinguishable from an original trial and sentencing. In *Averhart v. Tutsie*, an individual was denied parole five times based on the seriousness of his offense.⁵³⁵ The only limitation parole boards face is that they may not overtly base a denial on unconstitutional considerations such as race or whether the individual has asserted their constitutional rights.⁵³⁶

Boards may face Equal Protection challenges if decisions are deemed to be discriminatory and have no rational basis.⁵³⁷ They also may not base denials on erroneous or inaccurate information.⁵³⁸ However, since there is no right to review one's file before or during a parole hearing, it can be difficult for the person to actually know the information upon which the board is basing its decision.⁵³⁹ Parole Boards can also change their policies on how much time a person must serve before becoming parole eligible. Courts have held that such changes may violate ex post facto laws if such changes are applied retroactively to offenses committed before the law was changed, reduce the frequency of parole consideration, and are not merely procedural changes.⁵⁴⁰

⁵³² See *Vargas v. United States Parole Comm'n*, 865 F.2d 191, 195 (9th Cir. 1988) (arrest report); *Fiumara v. O'Brien*, 889 F.2d 254, 257-58 (10th Cir. 1989) (prosecutor's letters); *Castillo-Sicairos v. United States Parole Comm'n*, 866 F.2d 262, 264 (8th Cir. 1989) (counts dismissed in a plea bargain).

⁵³³ *Resnick v. United States Parole Comm'n*, 835 F.2d 1297, 1300-01 (10th Cir. 1987) (parole commission could deny parole based on "enormity or magnitude of the offense").

⁵³⁴ *Averhart v. Tutsie*, 618 F.2d 479, 483-84 (7th Cir. 1980).

⁵³⁵ *Id.* at 480.

⁵³⁶ See *Block v. Potter*, 631 F.2d 233, 241 (3d Cir. 1980); Renaud, *Grading the Parole Release Systems*, *supra* note 472.

⁵³⁷ *Potter*, 631 F.2d at 241.

⁵³⁸ See *Monroe v. Thigpen*, 932 F.2d 1437, 1441-43 (11th Cir. 1991) (parole may not be denied based on false information even if no liberty interest exists).

⁵³⁹ *Slocum v. Georgia. State Bd. of Pardons and Paroles*, 678 F.2d 940, 942 (11th Cir. 1982).

⁵⁴⁰ See *Weaver v. Graham*, 450 U.S. 24, 25, 35-36 (1981) (finding "a Florida statute altering the availability of such 'gain time for good conduct' is unconstitutional as an ex post facto law when applied to petitioner, whose crime was committed before the statute's enactment."); *Jones v. Murray*, 962 F.2d 302, 309-11 (4th Cir. 1992) (inmates cannot be held past their mandatory parole release date for refusing to comply requirement of providing blood sample before parole release); *Land v. Lawrence*, 815 F. Supp. 1351, 1352-53 (D. Nev. 1993) (requirement that sex

Except in the parole revocation or prison disciplinary context, where there is a clear liberty interest, most courts have held that there is no right to counsel in parole hearings.⁵⁴¹ Some states do not permit lawyers at parole hearings at all.⁵⁴² Many state statutes follow the federal statute, which allows for representation of the individual's choosing.⁵⁴³ This could be a fellow detainee or a licensed attorney. But even in states that do allow counsel, the right to counsel is not guaranteed.⁵⁴⁴ Given the educational challenges many prisoners face before and during incarceration, some may not be able to sufficiently navigate the steps of the parole process independently.⁵⁴⁵ Questions of who would bear the expense of such representation and whether the presence of an attorney would alter the dynamics of the hearing itself, making it more adversarial, are some of the issues raised during the discussion of whether attorneys should be integrated into the parole grant process. The benefits of securing attorney representation should not be left only to those who can afford to pay for such an asset. The role of an attorney may often make the difference in whether a person secures their freedom or not. Every person deserves a fair chance regardless of their ability to pay.

VI. CONCLUSION: AN URGENT CALL TO REDIRECT THE SHIFTING TIDES TOWARDS DECARCERATION

After the civil war, the color of prisons in America has changed from white to Black.⁵⁴⁶ African Americans continue to be disproportionately overrepresented in our criminal legal system and the speed with which individuals are released is deliberate and measured. The ripple effects of this nation's pseudo wars and initiatives, including the

offenders be approved by "Psyche panel" before parole was not an ex post facto law); *Alston v. Robinson*, 791 F. Supp. 569, 590 (increase in required parole board vote for release and provisions for victim notice and response were merely procedural).

⁵⁴¹ See *McGee v. Aaron*, 523 F.2d 825, 827 n.2 (7th Cir. 1975) (citing *Ganz v. Bensinger*, 480 F.2d 88 (7th Cir. 1973)); *Ganz*, 480 F.2d at 89-90; *Wagner v. Gilligan*, 425 F. Supp. 1320, 1324 (N.D. Ohio 1977), *rev'd on other grounds*, 609 F.2d 866 (6th Cir. 1979); *Fronczak v. Warden, El Reno Reformatory*, 431 F. Supp. 981, 983 (W.D. Okla. 1976); *c.f.* *Tasker v. Mohn*, 267 S.E.2d 183, 190 (W. Va. 1980) (prisoner has no right to counsel at parole release unless government attorney involved).

⁵⁴² See, e.g., *Franciosi v. Michigan Parole Bd.*, 583 N.W.2d 903, 905-06 (Mich. App. 1998) (upholding Michigan statute barring lawyers from representing prisoners at parole hearings); *Holup v. Gates*, 544 F.2d 82, 84-85 (2d Cir. 1975) (upholding Connecticut rule excluding attorneys at parole hearings).

⁵⁴³ 18 U.S.C. § 4208 (d)(2) (repealed 2023); 28 C.F.R. § 2.13(b) (2022).

⁵⁴⁴ See *infra* notes 551-552 and accompanying text.

⁵⁴⁵ Moyd, *In the Shadow of Gideon*, *supra* note 502, at 81.

⁵⁴⁶ See W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA, 1860-1880*, AT 608-09 (New York: Free Press, 1997).

1968 Omnibus Crime Control and Safe Streets Act, the war on drugs, the 1994 Crime Bill and mandatory sentencing schemes have served only to flood our prisons with people of color. Righting these wrongs through the mechanisms currently available are mere drops in the bottomless bucket, but impactful, nonetheless.

Our criminal legal system must make meaningful all avenues of relief to every deserving individual and correct centuries of race-based disproportionate harm. Compassionate release must be afforded to elderly and dying incarcerated individuals and not thwarted by confusing and convoluted statutes that make them ineffective. Politics must not be allowed to sidetrack opportunities for meaningful clemency releases based on notoriety or celebrity status. Not only must we abandon the tradition of sentencing children to die in prison, but we must also allow every person sentenced as a child to get back in court to demonstrate maturity, transformation, and rehabilitation. Parole considerations must incorporate greater due process and less bias in decision-making. Practices must change and all newly enacted criminal justice policies must be accompanied by a racial impact analysis. These are critical steps to redirect the tide of mass incarceration and speed up the painfully slow drip of decarceration. The speed with which we liberate eligible people from prison cells must be greater than, or at least equivalent to, the flood that sent them there in the first place.