EARLY RELEASE ADVOCACY IN THE AGE OF MASS INCARCERATION

RENAGH O'LEARY*

For over 50 years, the Legal Assistance to Incarcerated People (LAIP) Clinic at the University of Wisconsin Law School has represented people in prison. The clinic's advocacy evolved in response to the emergence of mass incarceration. Today, much of the clinic's work focuses on pursuing early release from prison for clinic clients.

This Essay draws on my experiences as a clinical professor in LAIP to explore early release advocacy strategies and their potential to change front-end sentencing practices. Rehabilitation narratives that highlight the client's growth and change while incarcerated are a staple of early release advocacy, and for good reason. But early release advocacy need not be limited to this approach. Early release advocacy will often be more effective when it includes arguments based on the client's experience of incarceration, mitigation investigation, and systemic injustice.

INTRODUCTION

We live in "the age of mass incarceration."[1] Since the mid-1970s, both the absolute number of people in prison and the incarceration rate

* Clinical Assistant Professor, University of Wisconsin Law School. I am grateful to Kate Finley, Adam Stevenson, Nicole Summers, Louise Trubek, and Steve Wright for their thoughtful comments. Thank you to Abby Chase, Connor Clegg, Anya Gersoff, and the other editors of the *Wisconsin Law Review* for their work on this Essay and the 2020 *Wisconsin Law Review* Symposium.

1. *See, e.g.*, Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/ [https://perma.cc/B2CH-U7PX]; NICOLE R. FLEETWOOD, MARKING TIME: ART IN THE AGE OF MASS INCARCERATION (2020); Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 L. & POL'Y 51 (2013). The concept of mass incarceration extends far beyond the number of people in prison and the incarceration rate, though those are my

have soared.[2] Today, over 1.4 million people are incarcerated in U.S. prisons;[3] they are disproportionately people of color.[4] Black Americans are incarcerated in state prisons at more than five times the rate of white Americans.[5] Though the U.S. prison population and incarceration rate have declined modestly since 2009,[6] we are a long way from ending mass incarceration. At the current rate of decarceration, it will take 60 years just to cut the U.S. prison population in half.[7]

The Legal Assistance to Incarcerated People (LAIP) clinic at the University of Wisconsin Law School was founded in 1964, a decade before the first signs of mass incarceration's emergence. At that time, under 3,000 people were incarcerated in Wisconsin state prisons[8] and clinic students were able to interview every person admitted to the Wisconsin prison system.[9] Today, nearly 20,000 people are incarcerated in Wisconsin state prisons.[10] The current incarceration rate for Black Wisconsin residents is more than 11 times higher than for white Wisconsin

---

focus in this Essay. *See generally* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) (describing the tensions between quantitative and qualitative frames for defining mass incarceration).

2. THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 33 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

3. E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., PRISONERS IN 2019 1 (2020), https://www.bjs.gov/content/pub/pdf/p19.pdf [https://perma.cc/Q6NN-7MZF].

4. ASHLEY NELLIS, THE SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 3 (2016), http://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/FUS6-245V].

5. CARSON, *supra* note 3, at 1.

6. *Id.* at 2.

7. Nazgol Ghandoosh, *Can We Wait 60 Years to Cut the Prison Population in Half?*, THE SENT'G PROJECT (Jan. 22, 2021), https://www.sentencingproject.org/publications/can-we-wait-60-years-to-cut-the-prison-population-in-half/ [https://perma.cc/AX2K-ZE99].

8. MARGARET WERNER CAHALAN, BUREAU OF JUST. STATS., UNITED STATES HISTORICAL CORRECTIONS STATISTICS: 1850–1984, at III-8 (1986), https://www.bjs.gov/content/pub/pdf/ushcs5084.pdf [https://perma.cc/TB8W-2AMV].

9. Meredith J. Ross, *A "Systems" Approach to Clinical Legal Education*, 13 CLINICAL L. REV. 779, 799–800 (2007) ("The heart of the relationship between the LAIP student and the [incarcerated] client was the diagnostic interview. In the program's early days, it was possible for LAIP students to interview each [person] who entered the Wisconsin prison system. The student asked the [client] a series of questions designed to identify issues that might be of concern to [them]—but also to identify issues that, although [they] did not realize it, might have a legal remedy. In addition to postconviction concerns, the interview might surface family law issues, tax or debt problems, health concerns, and other issues.").

10. WIS. DEP'T OF CORR., OFFENDERS UNDER CONTROL ON 03_12_2021 1 (2021), https://doc.wi.gov/DataResearch/WeeklyPopulationReports/03122021.pdf [https://perma.cc/T28N-Z4ND].

residents—the second-worst Black/white racial disparity in incarceration rates of any state in the country.[11]

LAIP's work has evolved in response to the emergence and persistence of mass incarceration. In LAIP's early years, law students provided generalist legal aid services to people in prison, assisting them with legal concerns ranging from challenges to their underlying conviction to civil and family law issues.[12] Today, much of LAIP's advocacy focuses on pursuing early release for clinic clients.

"Early release" is an umbrella term that encompasses a variety of procedural mechanisms.[13] In this Essay, I focus on discretionary mechanisms in which the sentencing court judge is the ultimate release decisionmaker. In Wisconsin, these mechanisms include compassionate release, sentence adjustment, and sentence modification.[14] While the availability of early release mechanisms vary widely from state to state,[15] the opportunities for early release advocacy are likely to expand in coming years.[16]

This Essay draws on my experiences as a clinical professor in LAIP to explore early release advocacy strategies and their potential to change front-end sentencing practices. The Essay proceeds in three parts. Part I situates Wisconsin's early release mechanisms in their historical context. Part II argues that early release proceedings present opportunities for expansive and creative advocacy strategies and describes three such strategies. Part III considers how early release advocacy might change front-end sentencing practices.

I. HISTORICAL CONTEXT

For over fifty years, law students in LAIP have represented people incarcerated in Wisconsin state prisons. But the context of that work has changed significantly. In addition to the emergence of mass incarceration,

11. CTR. ON WIS. STRATEGY (COWS), RACE IN THE HEARTLAND: WISCONSIN'S EXTREME RACIAL DISPARITY 3 (2019), https://cows.org/wp-content/uploads/sites/1368/2020/04/2019-Race-in-the-Heartland-Wisconsins-Extreme-Racial-Disparity.pdf [https://perma.cc/YXR5-DF5M].

12. Ross, *supra* note 9, at 794 (discussing LAIP students' work with clients on issues such as "debts, tax problems, wills, and immigration concerns" and "family law concerns . . . including divorce, visitation, child support, and paternity issues.").

13. *See generally* Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415 (2012) (discussing early release measures).

14. *See infra* notes 34–41 and accompanying text.

15. *See id.*

16. *See id.*

the path to release from prison is markedly different today than it was in LAIP's early years.[17]

From the 1930s through the mid-1970s, every state and the federal system operated a model of indeterminate sentencing and parole.[18] Under indeterminate sentencing, parole boards had broad discretion to determine how much time a person would actually serve in prison.[19] Parole boards made release decisions based on (what purported to be) individualized assessments of progress toward rehabilitation, the guiding value of this period.[20] Parole decision-making in this era was entirely discretionary, with few standards or criteria to guide decisionmakers.[21] Under indeterminate sentencing, "'early' release from prison was the rule, not the exception . . . . [F]ailure to secure parole before the termination of the sentence was a sign that the system had failed."[22]

Then, beginning in the 1970s, the dominant system of indeterminate sentencing and parole "imploded."[23] Critics from across the political spectrum attacked indeterminacy and the unchecked discretion of the

---

17. To be clear, I am not claiming that the shift to determinate sentencing and the constriction of parole-release discretion is a *cause* of mass incarceration. That question is an empirical one and is beyond the scope of this Essay. *See generally* Kevin R. Reitz, *Prison-Release Reform and American Decarceration*, 104 MINN. L. REV. 2741 (2020) (discussing the relationship between mass incarceration and parole-release discretion). Reitz challenges the "conventional wisdom" that abolishing parole-release discretion in favor of determinate sentencing systems was a top contributor to the emergence of mass incarceration in one-third of the states. *Id.* at 2746–47. Instead, Reitz argues:

> On average, states that maintained discretionary prison-release schemes over the prison buildup years experienced greater amounts of prison growth than states that abolished discretionary parole release. Today, nine of the ten states with the highest standing prison rates are those that used indeterminate prison-release systems through the entire buildup period, and the tenth had been indeterminate for most of that time.

Id. at 2747.

18. Michael Tonry, *Sentencing in America, 1975–2025*, *in* CRIME AND JUSTICE IN AMERICA, 1975–2025 141 (Michael Tonry ed., 2013).

19. *Id.* at 142.

20. *Id.* at 161.

21. *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 126 (1969) (criticizing the U.S. Board of Parole as an "outstanding example of completely unstructured discretionary power"); Donna Chu, Comment, *Due Process and the Parole Release Decision*, 66 KY. L.J. 405, 425 (1977) ("The legislatures have provided only vague statutory guidelines, leaving parole boards with virtually unchecked discretion."); Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 815–16 (1975) ("Until recently, parole boards have been left free to operate with unstructured discretion. . . . The apparent arbitrariness of parole release decisionmaking has been much criticized[.]"). The first attempt at developing parole guidelines did not begin until 1972, with a pilot project to develop guidelines for the U.S. Parole Commission. U.S. PAROLE COMM'N, U.S. DEP'T OF JUST., HISTORY OF THE FEDERAL PAROLE SYSTEM 18 (2003).

22. Klingele, *supra* note 13, at 417–18.

23. Tonry, *supra* note 18, at 142, 151–52.

parole board.[24] Over the next two decades, "parole boards witnessed a precipitous loss of legitimacy and a sharp curtailment in their authority."[25] Between 1976 and 2000, 16 states and the federal system eliminated parole release for all or most cases and implemented determinate sentencing regimes instead.[26] The motto of the determinate sentencing movement was "truth in sentencing": at the time of sentencing, the judge, the parties, and the public should be confident that the person sentenced will serve every day (or almost every day) of the sentence imposed.[27]

While a majority of states did not abolish parole outright, the parole systems in those states still changed dramatically.[28] Where it remained, parole became much more systematized. Legislatures or parole boards adopted guidelines for parole release decisions that constrained the unfettered discretion that was a hallmark of parole decision-making through the 1970s.[29] At the same time, parole boards became "progressively more risk-averse in their decision-making and ever more fearful of external scrutiny and condemnation," transforming themselves "into agencies of 'release-denial discretion.'"[30]

Wisconsin was part of the shift from indeterminate to determinate sentencing. Before 1999, all Wisconsin prison sentences were

---

24. Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 991 (2013). From the left, critics argued that indeterminate sentencing exacerbated racial disparities in sentencing and that its focus on progress toward rehabilitation was coercive; from the right, critics argued indeterminate sentencing was soft on crime. *Id.* at 991–95.

25. Edward E. Rhine, Joan Petersilia & Kevin R. Reitz, *The Future of Parole Release*, *in* REINVENTING AMERICAN CRIMINAL JUSTICE 279, 279 (Michael Tonry & Daniel S. Nagin eds., 2017).

26. Kevin R. Reitz & Edward E. Rhine, *Parole Release and Supervision: Critical Drivers of American Prison Policy*, 3 ANN. REV. CRIMINOLOGY 281, 283 (2020); JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER RE-ENTRY 66–67 (2003) (listing each of the sixteen states that eliminated or curtailed parole). In states that do not have some version of indeterminate sentencing, "their releasing authorities often exercise discretionary authority over 'old code' offenders, that is, those convicted prior to the effective date of the determinate sentencing statute, and/or inmates serving life sentences." EBONY L. RUHLAND, EDWARD E. RHINE, JASON P. ROBEY & KELLY LYN MITCHELL, ROBINA INST. OF CRIM. L. & CRIM. JUST., THE CONTINUING LEVERAGE OF RELEASING AUTHORITIES: FINDINGS FROM A NATIONAL SURVEY 9 (2017).

27. Klingele, *supra* note 13, at 449.

28. PETERSILIA, *supra* note 26, at 65; *see also* Reitz & Rhine, *supra* note 26, at 282 ("In 34 American states, the government actors with the greatest law-given power over time served are smallish parole boards, sometimes in concert with parole officers who work in separate and much larger supervision agencies.").

29. Tonry, *supra* note 18, at 151–53; *see also* Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protection for Parole*, 107 J. CRIM. L. & CRIMINOLOGY 213, 240-242 (2017) (discussing parole boards' release authority relative to type of offense and use of guidelines to enforce consistent parole decisions relative to seriousness of offense).

30. Reitz, *supra* note 17, at 2745; *see* PETERSILIA, *supra* note 26, at 55.

indeterminate: the sentencing judge imposed a sentence that included a maximum period of incarceration, but the state parole commission determined how much time someone would actually serve in prison.[31] In 1999, however, Wisconsin joined 16 other states and the federal system in abolishing parole and adopting a system of determinate sentencing (Truth-in-Sentencing).[32] Without parole, there are few opportunities for any decisionmakers in the criminal legal system to consider whether continued incarceration is still warranted. Under Truth-in-Sentencing, a person sentenced to prison in Wisconsin will likely serve every single day of the sentence imposed, regardless of how dramatically their circumstances have changed since sentencing.[33]

Even under determinate sentencing regimes, some opportunities for early release from prison remain. Nationally, the availability of discretionary early release mechanisms varies widely.[34] Wisconsin law provides a few limited paths for early release from prison for people sentenced after the transition to Truth-in-Sentencing.[35] Through sentence adjustment, the sentencing court can reduce someone's time in prison by 15 or 25 percent,[36] based on progress toward rehabilitation or several other grounds.[37] The sentencing court can also grant compassionate release (early release based on a serious or terminal medical condition) or geriatric release (early release based on advanced age and time served).[38] Finally, the sentencing court can reduce a prison sentence under the court's

31. Tonry, *supra* note 18, at 141–42.

32. Reitz & Rhine *supra* note 26, at 283; PETERSILIA, *supra* note 26, at 66–68; *see also* SHANNON E. HUBERTY, WIS. LEGIS. FISCAL BUREAU, ADULT CORRECTIONS PROGRAM 11 (2019), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2019/0054_adult_corrections_program_informational_paper_54.pdf [https://perma.cc/LSN2-AW5S].

33. HUBERTY, *supra* note 32, at 18.

34. *See generally* Klingele, *supra* note 13. Compassionate release—early release based on a serious or terminal medical condition—is available in nearly every state. *See* Renagh O'Leary, *Compassionate Release and Decarceration in the States*, 107 IOWA L. REV. (forthcoming 2022); MARY PRICE, FAMS. AGAINST MANDATORY MINIMUMS (FAMM), EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES 12 (2018), https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf [https://perma.cc/WQ7C-HC7A]. Other early release mechanisms are far less common. *See* Sarah French Russell, *Second Looks at Sentences Under the First Step Act*, 32 FED. SENT'G REP. 76, 78 (2019) ("[F]ew states across the country have mechanisms for judges to reassess sentences after an individual has served a period of time in prison. Nationally, parole is the more common release mechanism for prisoners, although in many states parole is unavailable for certain categories of offenses or available only after 85% of the sentence is served.").

35. *See* Huberty, *supra* note 32, at 11. For people sentenced before the year 2000, parole remains an option for release. *See id.*

36. WIS. STAT. § 973.195 (2019–20).

37. WIS. STAT. § 973.195(1r)(b) (2019–20).

38. WIS. STAT. § 302.11(9g) (2019–20).

common law authority to modify sentences based on new information.[39] LAIP students represent clients seeking early release through all of these mechanisms.

Nationally, the opportunities for early release advocacy are likely to expand in the near future. Leading advocacy organizations and legal scholars have called for the creation or significant expansion of early release mechanisms.[40] Proposed second look measures, which would create an automatic right to review of a sentence after someone has served a significant period of time in prison, such as 10, 15, or 20 years, have attracted particular attention.[41]

II. EARLY RELEASE ADVOCACY STRATEGIES

With the creation or expansion of early release mechanisms, defense attorneys will have the chance to represent clients in new types of court proceedings.[42] Law school clinics, like LAIP, that already represent incarcerated people seeking early release from prison can contribute to the development of best practices for early release advocacy. This Part

39. *State v. Harbor*, 797 N.W.2d 828 (Wis. 2011); *cf. Rosado v. State*, 234 N.W.2d 69, 73 (1975) (defining the grounds for sentence modification). *See generally* 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 (2010) (discussing judicial sentence modification authority in Wisconsin, Maryland, and the federal system).

40. *See, e.g.*, Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 111–12 (2019) (calling for the enactment of federal second look legislation); JANEANNE MURRAY, SEAN HECKER, MICHAEL SKOCPOL & MARISSA ELKINS, NAT'L ASSOC. OF CRIM. DEF. LAWS., SECOND LOOK = SECOND CHANCE: THE NACDL MODEL "SECOND LOOK" LEGISLATION 3 (2020), https://www.nacdl.org/getattachment/c0269ccf-831b-4266-bbaf-76679aa83589/second-look-second-chance-the-nacdl-model-second-look-legislation.pdf [https://perma.cc/Q9UF-CLA6] (proposing second look legislation for states).

41. The leading proposal for second look sentencing is Section 305.6 of the revised Model Penal Code: Sentencing. MODEL PENAL CODE § 305.6 (AM. L. INST., Proposed Final Draft 2017); *see also* Kevin R. Reitz & Cecelia M. Klingele, *Model Penal Code: Sentencing—Workable Limits on Mass Punishment*, *in* AMERICAN SENTENCING: WHAT HAPPENS AND WHY? 225, 257, 293–94 (Michael Tonry ed., 2019). In the federal system, Senator Cory Booker and Congresswoman Karen Bass have introduced legislation that would allow anyone who has served at least 10 years of prison for a federal conviction to seek resentencing. *See* Second Look Act of 2019, H.R. 3795, 116th Cong. § 3627 (2019). Recent proposed revisions to the California Penal Code include a similar second look provision. CAL. COMM. ON REVISION OF THE PENAL CODE, ANNUAL REPORT AND RECOMMENDATIONS 64–68 (Feb. 2020), http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2020.pdf [https://perma.cc/9EGX-NDVP].

42. French Russell, *supra* note 34, at 81 (describing defense attorney participation in "a new kind of proceeding" in federal court after the enactment of the First Step Act).

describes three strategies for early release advocacy in the hope that other clinicians and advocates will expand on and improve them.

New information about the client's positive change and personal growth while incarcerated (i.e., their "progress in rehabilitation"[43]) is a staple of early release advocacy.[44] For example, an advocate's case theory for early release litigation may be something like:

> The 24-year-old kid who broke into someone's garage trying to steal a stereo system is not the same as the 40-year-old man who has devoted himself to learning, gotten a degree and some well-developed technical skills, and wants desperately to return to be a better dad to his kids on the outside.[45]

The strategy of highlighting an individual client's growth and change in prison, and the likelihood of success upon release, is valuable and often effective. But early release advocacy need not be limited to this approach. This Part argues that to strengthen the case for early release, advocates should consider making arguments based on the client's experience of incarceration, mitigation investigation, and systemic injustice.

The legal "hook" for such expansive arguments is the broad grounds for early release. In Wisconsin, for example, sentence adjustment and compassionate or geriatric release require a finding that early release is in "the public interest."[46] Similarly, Wisconsin sentencing courts have inherent authority to modify a sentence based on any information that is "highly relevant" to the sentence imposed but was "not known to the trial judge at the time of original sentencing."[47] Similar judicial early release mechanisms in other states and in the federal system also define the grounds for early release broadly.[48]

---

43. WIS. STAT. § 973.195 (2019–20).

44. *See, e.g.*, Hopwood, *supra* note 40, at 89; French Russell, *supra* note 34, at 79.

45. Emily Galvin-Almanza, *Biden Must Fix the Broken Executive Clemency Process. This Is Who He Should Select to Lead that Effort*, THE APPEAL (Dec. 1, 2020), https://theappeal.org/biden-clemency-rachel-barkow/ [https://perma.cc/E6BJ-2QRE] (discussing situations in which clemency would be appropriate).

46. WIS. STAT. § 973.195(1r)(f) (2019–20) (sentence adjustment); WIS. STAT. § 302.113(9g)(e) (2019–20) (compassionate or geriatric release).

47. *Rosado v. State*, 234 N.W.2d 69, 73 (Wis. 1975).

48. Klingele, *supra* note 39, at 503–04 (describing the "broad discretionary authority" of Maryland judges to modify sentences); Hopwood, *supra* note 40, at 99–110 (describing federal district court judges' statutory authority to reduce a sentence whenever "extraordinary and compelling reasons warrant such a reduction" and identifying situations that would qualify (quoting 18 U.S.C. § 3582(c)(1)(A))).

A. The Client's Experience of Incarceration

Even as the number of people incarcerated in U.S. prisons has soared, the experience of prison has remained largely "invisible"[49] to the legal actors most involved in the sentencing process: judges, prosecutors, and defense attorneys.[50] This lack of knowledge reflects, in part, the structure of the criminal legal system: lawyers are heavily involved at the front end, from charging to sentencing, but almost entirely absent from the back-end, after the direct appeal process has concluded.[51] There are also significant structural obstacles to incarcerated people sharing their experiences with the public.[52]

---

49. M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1187 (2020) ("Life inside U.S. prisons is both the object of fascination and invisible in sentencing policy."); Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 126 (2018) ("[D]espite our system's dependence on incarceration, the conditions of the confinement imposed—which can include violence from staff and other prisoners, lack of medical and mental health care, contaminated food or water, and a host of other ills—are largely invisible.").

50. Hanan, *supra* note 49, at 1185 ("Judges evince a surprising lack of institutional interest in understanding the experience of imprisonment and applying this knowledge to sentencing."); Daniel Nichanian, *Prosecutor Sends Staff to Prison, in a Bid to Counter Their Reflex to Incarcerate*, THE APPEAL (Aug. 14, 2019), https://theappeal.org/politicalreport/vermont-prosecutor-sends-staff-to-prison-in-a-bid-to-counter-their-reflex-to-incarcerate/ [https://perma.cc/T3VP-BFCS] (quoting Sarah Fair George, the State's Attorney for Chittenden County, Vermont: "As prosecutors, we get very comfortable with just throwing out numbers as an amount of time."); French Russell, *supra* note 34, at 81–82 ("Public defenders and other lawyers representing clients facing federal criminal charges are focused on the front end of the case—challenging pretrial detention, negotiating pleas, trying cases, and advocating at sentencing. Absent an appeal, there is typically no formal role for public defenders after a client is sentenced. Although some lawyers may maintain some level of contact with their clients after sentencing, their focus is on new cases.").

51. Anthony Kennedy, Assoc. Just., Sup. Ct. of the U.S., Speech at the ABA Annual Meeting (Aug. 9, 2003) ("The focus of the legal profession, perhaps even the obsessive focus, has been on the process for determining guilt or innocence. When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest. When the prisoner is taken away, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it."); Webb, *supra* note 49, at 157–58 ("Because few lawyers represent prisoners, in part because the PLRA set limits on legal fees in prisoners' rights cases, prisoners have difficulty finding attorneys to represent them and must proceed *pro se*.").

52. Webb, *supra* note 49, at 156–57 ("Because prisons are often located in rural areas, have limited public access, and very little formal oversight, what happens within them is largely observed only by the people who manage the institution and who benefit from its existence. Prisoners themselves cannot easily speak out about their experiences, as their mail and visits can be monitored, phone calls are often prohibitively expensive and similarly monitored, and prisoners generally do not have access to tools such as social media."); Hanan, *supra* note 49, at 1231–33 (describing obstacles to incarcerated people sharing their experiences with the public).

In the early release context, however, the client has deep knowledge about the experience of incarceration. The client's firsthand account of prison—corroborated and expanded, as appropriate, by information from other sources—should drive the story of incarceration in early release filings. Because court proceedings, by their nature, center the voices of the attorney or advocate, early release advocacy is in no way a substitute for hearing the voices of incarcerated people directly and consistently.[53] But the client's story of their experiences in prison can be an important element of early release advocacy.

Consider compassionate release: early release based on a serious or terminal medical condition. The facts of a client's medical condition—diagnosis, prognosis, treatment—are the foundation of compassionate release advocacy. In LAIP's experience, however, the story of the client's day-to-day life in prison is often the most persuasive element of a compassionate release petition. Compassionate release filings can describe aspects of the client's experience that the decisionmaker has likely never considered. What happens when an incarcerated person requires medical care beyond what the prison infirmary can provide? What is it like to receive chemotherapy treatment or undergo major surgery while incarcerated? What does it mean to face the prospect of imminent death in prison? The harshness and cruelty of incarceration for someone with a serious or terminal medical condition is made most vivid by details that only the client can share. In LAIP's compassionate release advocacy, for example, judges and prosecutors have expressed their surprise and horror upon learning that incarcerated people who are admitted to a community hospital for treatment are shackled to their hospital beds, even if they are intubated and sedated or at the very end of life.[54]

B. Mitigation Investigation

Early release advocacy always occurs in the shadow of the original sentencing proceeding. Where an intensive mitigation investigation was

53. *See* Hanan, *supra* note 49, at 1229 (calling for the "[s]ustained political participation of incarcerated people in sentencing policy").

54. This is a common practice nationally. *See* Michele DiThomas, Joseph Bick & Brie Williams, *Shackled at the End of Life: We Can Do Better*, 19 AM. J. BIOETHICS 61, 61–62 (2019) ("Most custodial jurisdictions in the United States require shackling of the hands and feet when inmates are transported outside of the prison setting. Generally, prisoners who are hospitalized in the outside community are chained to their hospital beds, even in situations with minimal or no risk to public safety."); Emily E. Moin & Dominic A. Sisti, *Jailers at the Bedside: Ethical Conflicts in Provision of Community Hospital Care for Incarcerated Individuals*, 25 J. CORR. HEALTH CARE 405, 407 (2019) ("Any physician can easily discern that a patient who is intubated and sedated need not be shackled, yet such patients frequently remain physically restrained and subjected to the attendant insults to comfort and dignity.").

not conducted at the time of initial sentencing, such investigation can be a strong basis for early release advocacy.

Mitigation investigation expands the universe of facts beyond the crime of which the person has been convicted to include the client's life and social history. The strongest mitigation narratives situate the client's individual story in "widening circles of influence: individual, family, neighborhood, city, economic, historical, and geographical."[55] Robust mitigation investigation as a foundation of sentencing advocacy was pioneered by defense teams representing people facing the death penalty.[56] In the wake of the U.S. Supreme Court's opinions limiting when children may be sentenced to life without parole,[57] mitigation investigation has become the foundation of sentencing and resentencing proceedings in juvenile life without parole cases.[58]

Miriam Gohara has argued that intensive mitigation investigation should be the foundation of sentencing advocacy in a much wider variety of cases.[59] In practice, however, sentencing advocacy is "too often an afterthought of criminal practice."[60] Intensive life history investigations require significant investments of time and resources, both of which are usually in short supply for public defenders and court-appointed counsel in state court.[61] In jurisdictions with under-resourced defense counsel, the

---

55. Miriam Gohara, *Narrating Context and Rehabilitating Rehabilitation: Federal Sentencing Work in Yale Law School's Challenging Mass Incarceration Clinic*, 27 CLINICAL L. REV. 39, 45 (2020) [hereinafter *Narrating Context and Rehabilitating Rehabilitation*].

56. Miriam Gohara, *Grace Notes, A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 41 (2013) [hereinafter *Grace Notes*].

57. *Graham v. Florida*, 560 U.S. 48, 74 (2010); *Miller v. Alabama*, 567 U.S. 460, 465 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

58. *See, e.g.*, Dana Cook, Lauren Fine & Joanna Visser Adjoian, Miller, Montgomery, *and Mitigation: Incorporating Life History Investigations and Reentry Planning Into Effective Representation for "Juvenile Lifers,"* CHAMPION, Apr. 2017, at 45; Betsy Wilson & Amanda Meyers, *Accepting* Miller*'s Invitation: Conducting a Capital-Style Mitigation Investigation in Juvenile-Life-Without-Parole Cases*, CHAMPION, Apr. 2014, at 18; Heather Renwick, *Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence*, THE CAMPAIGN FOR THE FAIR SENT'G OF YOUTH (Mar. 2015), https://www.fairsentencingofyouth.org/wp-content/uploads/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf [https://perma.cc/ZQ5A-VAS9].

59. *See generally* Gohara, *Grace Notes*, *supra* note 56; Gohara, *Narrating Context and Rehabilitating Rehabilitation*, *supra* note 55.

60. Kimberly A. Thomas, *Sentencing: Where Case Theory and the Client Meet*, 15 CLINICAL L. REV. 187, 187 (2008).

61. *See generally* Heather Baxter, *Too Many Clients, Too Little Time: How States Are Forcing Public Defenders to Violate Their Ethical Obligations*, 25 FED. SENT'G REP. 91 (2012). While most jurisdictions authorize or require pre-sentence investigation (PSI) reports by a probation officer, PSI reports rarely include the information I discuss here. *See* ANTHONY G. AMSTERDAM & RANDY HERTZ, TRIAL MANUAL 6 FOR THE DEFENSE OF CRIMINAL CASES 1033–34 (6th ed. 2017) ("Most probation officers have a heavy

result is that a defense attorney's sentencing advocacy is frequently based on the sort of basic biographical information found on a fill-in-the-blank job application: educational attainment, employment history, current residence, and criminal record. Even in serious felony cases, sentencing arguments are often thin and formulaic: "Your Honor, my client has a GED. He has two children and before his arrest in this case, he was working a warehouse job to support them. He is deeply remorseful for the harm he has caused."[62]

Mitigation investigation is a powerful tool in early release advocacy because the crime of conviction remains highly relevant in early release proceedings. The purpose of mitigation investigation is not to "excuse, justify, or diminish the significance" of the crime of conviction, but rather to "help explain it."[63] Like effective sentencing advocacy, early release advocacy seeks to challenge flat, simplistic narratives that frame the client as an "offender" to be feared and loathed. Mitigation investigations serve this goal by situating the client's actions in a broader context, providing the decisionmaker with "a basis for empathy."[64]

C. Systemic Injustice

The broad grounds for early release permit a variety of advocacy strategies that broaden the lens beyond the client's individual case to consider systemic injustice. Early release advocacy can, for example, ask the court to consider the devastating effects of mass incarceration, by documenting the ongoing family and community impact of incarceration[65] or mapping geographies of incarceration, as with the well-known "million dollar blocks" project in New York.[66] Similarly, the broad grounds for

caseload and are hurried for reports; they tend to use investigative leads that they are given rather than seek out their own. Frequently they will miss favorable background facts unless counsel calls these to their attention.").

62. This is a hypothetical but realistic example of defense advocacy at sentencing.

63. Craig Haney, *Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 560 (1995).

64. Gohara, *Narrating Context and Rehabilitating Rehabilitation*, *supra* note 55, at 52.

65. *See* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1280 (2004) ("Empirical evidence of community-level harm presents a compelling moral indictment of mass imprisonment, regardless of the moral deserts of individual offenders."); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 464 (2013) (proposing the introduction of a "family and community impact statement" at sentencing).

66. *Million Dollar Blocks*, CTR. FOR SPATIAL RSCH., COLUM., https://c4sr.columbia.edu/projects/million-dollar-blocks [https://perma.cc/W5UE-MALX] (last visited Mar. 24, 2021) (mapping incarceration patterns in Phoenix, Wichita, New Orleans, and New York).

early release also permit consideration of whether the sentence imposed reflects a trial penalty[67] or racial disparities in sentencing.[68]

In Wisconsin, for example, a recent report by the Wisconsin Court System identified significant racial disparities in the likelihood that a felony conviction will result in a prison sentence (rather than jail time or probation).[69] The study concluded that, controlling for six other factors, white men were 21% less likely than similarly situated men of color to receive a prison sentence for a felony conviction.[70] Black men were 28% more likely than similarly situated white men to receive a prison sentence; American Indian men were 34% more likely than similarly situated white men to receive a prison sentence.[71] In some parts of the state, and for certain classes of felonies, the racial disparities in the likelihood of a prison sentence are even higher.[72] These findings could be grounds for a sentence adjustment (a 15% or 25% reduction of time in prison) "in the interests of

---

67. *See* Hopwood, *supra* note 40, at 113.

68. In the pretrial context, Robin Walker Sterling has argued that defense attorneys can use motions to dismiss pending charges "in the interests of justice" to raise issues of racial injustice that would otherwise go unheard by the court. Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2265–66 (2014).

69. WIS. CT. SYS., OFF. OF RSCH. & JUST. STAT., RACE AND PRISON SENTENCING IN WISCONSIN: INITIAL OUTCOMES OF FELONY CONVICTIONS, 2009–2018 DRAFT (Jan. 2020), https://www.documentcloud.org/documents/20478391-race-prison-sentence-felony-report-draft_2020_02_05 [https://perma.cc/R3DL-E3SU] [hereinafter RACE AND PRISON SENTENCING IN WISCONSIN]; *see also* Daniel Bice, *Supreme Court Didn't Release Study Showing Black Men 28% More Likely to Do Prison Time in Wisconsin*, MILWAUKEE J. SENTINEL (Feb. 12, 2021), https://www.jsonline.com/story/news/investigations/daniel-bice/2021/02/12/bice-high-court-sat-on-report-showing-racial-disparities-in-wisconsin-sentencing/6729261002/ [https://perma.cc/WQ83-TNF7] (describing the report and noting that "it doesn't appear that [the report] was ever shared with the general public or even with the Wisconsin judiciary").

70. RACE AND PRISON SENTENCING IN WISCONSIN, *supra* note 69, at 3–4. The study accounted for six variables beyond race:

> (1) Highest Severity among Convicted Charges. This considers the highest severity class of the convicted felony charges and assigns a weight to each class . . . . (2) Highest Severity among Initial Charges. This considers the highest severity class of the initial felony charges and assigns a weight to each class. (3) Trial-Determined Guilt. This explores whether a defendant was found guilty at trial versus the defendant pleading guilty or no contest. (4) Exclusively Drug Offenses. This examines whether the defendant was convicted of only drug charges. (5) Criminal History. This explores whether the defendant was convicted of a felony or misdemeanor in the previous five years to the case. (6) Age at Offense Date. This accounts for the defendant's age when the offense was committed.

Id. at 3.

71. *Id.* at 4.

72. *Id.* at 5–6.

justice" for a client of color who received a prison sentence, rather than jail or probation, for a felony conviction.[73]

Including arguments about systemic injustice in early release advocacy may seem like a stretch: shouldn't early release advocacy be focused narrowly on this individual client's case for release? The same argument is frequently made about the irrelevance of systemic considerations to individual sentencing proceedings. But as Anne Traum has argued convincingly in the sentencing context, systemic injustice and mass incarceration are relevant to "the systemic purposes of sentencing, including whether the sentence will enhance public safety and foster respect for the law."[74]

III. FROM BACK-END TO FRONT-END

The purpose of the three advocacy strategies described in Part II is to strengthen the argument that an individual client should be granted early release from prison. At the same time, however, the impact of these advocacy strategies may extend beyond securing early release for one individual client. This Part describes three ways in which early release advocacy, which occurs at the back-end of the criminal legal system, may affect front-end sentencing practices.[75] In this way, early release advocacy can contribute to the fight against mass incarceration.[76]

First, early release advocacy brings incarcerated people's voices and experiences back into the sentencing courtroom. Typically, judges only

73. WIS. STAT. §§ 973.195(1g), (1r)(b)5 (2019–20). Of course, deploying this advocacy strategy—or any of the others I have described—is only appropriate when doing so advances the client's litigation goals. *See* Walker Sterling, *supra* note 68, at 2263 ("[T]here may be a tension between what is commonly called 'cause-lawyering' and fidelity to the individual client that may present itself when criminal defense counsel is faced with an opportunity to combat racial bias. But the theoretical tension between the defense attorney's ethical obligation to represent the stated interests of her individual client, and any larger obligation she may feel to combat invidious race discrimination, in many cases, presents a false binary in practice.").

74. Traum, *supra* note 65, at 425.

75. *See* Klingele, *supra* note 39, at 519 ("Ordinarily, the criminal justice system provides no feedback loop informing judges of what happens to defendants after sentencing. With limited exception, the pronouncement of sentence is the judge's last word on the matter; regardless what follows, there is no mechanism that later disabuses her of any misconceptions she may have with respect to a particular offender or to the operation of the prison system more generally. Judicial sentence modification therefore could provide a valuable way for judges to hear 'the rest of the story.' Information thus gained might well affect not only early decisions, but front-end sentencing decisions, too. Over time, these front-end effects could be significant, particularly for judges who find they have overestimated the amount of confinement necessary to accomplish the purposes for which a sentence was imposed.").

76. Elsewhere, I have argued that early release measures are an important tool for ending mass incarceration. *See* O'Leary, *supra* note 34.

see people whom they have sentenced when someone is facing new charges or a revocation of supervision. In the early release context, however, judges hear remarkable stories of personal growth while incarcerated, underscoring people's profound capacity for change.[77] Sarah French Russell has argued that exposing judges to stories of rehabilitation will make them "more reluctant in future cases to give up entirely on individuals at the time of sentencing."[78]

At first glance, optimistic stories of positive change may seem to obscure the "isolation, deprivation, [and] violence" of prison.[79] But these stories are even more compelling when judges have a fuller picture of the client's experience of incarceration. Every year, clinic students in LAIP discover the disconnect between the rosy view of prison sometimes presented at sentencing and the reality of clients' experiences in prison. At sentencing, judges frequently express their belief that the person they are sending to prison will have access to education, vocational training, and mental health treatment.[80] But when students interview their incarcerated clients, they learn about the immense obstacles to program participation, work, and treatment.[81] The client's account of incarceration, while grounded in their specific experiences, speaks to larger truths about the reality of prison—truths that should shape sentencing decisions.[82]

Second, early release advocacy grounded in intensive mitigation investigation challenges the dominant understandings of why people commit crimes and what kind of punishment they deserve. This is especially true for people convicted of violent crimes, who are frequently demonized (as the pernicious label of "violent offender" suggests).[83]

---

77. Hopwood, *supra* note 40, at 87–89 ("What decisionmakers can't measure at sentencing, however, is the capacity for people to change.").

78. French Russell, *supra* note 34, at 519.

79. Hanan, *supra* note 49, at 1189.

80. In Wisconsin, judges are required to put on the record their reasons for imposing a particular sentence. *See State v. Gallion*, 678 N.W.2d 197 (Wis. 2004).

81. *See generally* Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J.L. & POL'Y 265 (2006) (describing the impact of prison overcrowding on the availability of prison programming). Wisconsin prisons routinely operate above their design capacity. WIS. DEP'T OF CORR., *supra* note 10; *see also* Kelly Meyerhofer, *State Prisons Got 21 Cents for Every Dollar They Requested for Facilities Over Decade*, WIS. STATE J. (Aug. 1, 2019), https://madison.com/wsj/news/local/govt-and-politics/state-prisons-got-21-cents-for-every-dollar-they-requested-for-facilities-over-decade/article_4e0f09ff-6479-5d4d-b727-f25df16a9440.html [https://perma.cc/Q6C4-GKQ8] (pointing to a Wisconsin DOC report from 2009 describing overcrowding in Wisconsin prisons as "critical").

82. Hanan, *supra* note 49, at 1243–44 ("If legal and policy actors responsible for sentencing decisions do not have a robust sense of prison-as-experienced, sentencing decisions will continue to be unmoored from ethical considerations of the actual harms of incarceration.").

83. JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 230–31 (2017) ("[T]he label 'violent offender,' tossed out to describe a

Though "[v]iolent acts are often explained solely in terms of [individual] behavioral propensities," mitigation narratives reveal that "violence is contextual."[84] Mitigation narratives, while grounded in an individual client's history, also frequently rely on widely applicable social science research to provide context. For example, early release advocacy for an individual client may draw on the robust body of social science research on adverse childhood experiences to frame aspects of the client's individual story.[85] This sort of advocacy educates the judge, prosecutor, and other stakeholders about adverse childhood experiences—and once they learn about these impacts, "they cannot unlearn them."[86] As Miriam Gohara has pointed out, this is a mechanism through which "individual case representation and systemic reform [can be] mutually reinforcing."[87]

Finally, early release advocacy that highlights mass incarceration, racial disparities, and other systemic injustices underscores their relevance for front-end sentencing decisions, as well. As Anne Traum has argued, "there is a 'mismatch' between mass incarceration, which is a systemic problem stemming from the aggregate impact of criminal enforcement decisions, and our case-by-case system of criminal adjudication."[88] Because mass incarceration is a systemic problem "that results from, and is recognized as, the aggregation and concentration of many convictions and sentence," it "does not fit neatly into the criminal adjudication model."[89] Mass incarceration is rarely treated as relevant at sentencing, which focuses narrowly on this particular person and this particular crime. Early release advocacy can zoom out to consider the social context in which punishment is imposed and experienced: prisons that incarcerate

shadowy group for whom we are supposed to have no sympathy, encourages us to overlook their individual stories. It causes us to separate those other people—the ones who did something violent, the ones who belong in cages—from the rest of us. It leads us, as Bryan Stevenson has written, to define people by the worst thing they have ever done. And it ensures that we will never get close to resolving the human rights crisis that is 2.2 million Americans behind bars.").

84. JAMES AUSTIN, VINCENT SCHIRALDI, BRUCE WESTERN & ANAMIKA DWIVEDI, RECONSIDERING THE "VIOLENT OFFENDER," THE SQUARE ONE PROJECT 7 (May 2019), https://squareonejustice.org/wp-content/uploads/2019/09/executive-session-pdf-Reconsidering-the-violent-offender-report-ONLINE_FINAL.pdf [https://perma.cc/GC3P-EBV2].

85. Gohara, *Narrating Context and Rehabilitating Rehabilitation*, *supra* note 55, at 62.

86. *Id.* at 57.

87. *Id.*

88. Traum, *supra* note 65, at 436.

89. *Id.* at 437.

more people than ever before[90] and a criminal legal system defined by racial injustice.[91]

CONCLUSION

When representing a client seeking early release from prison, advocates should consider making arguments based on the client's experience of incarceration, mitigation investigation, and systemic injustice. The purpose of these advocacy strategies is to strengthen an individual client's chances of early release, but their impact may extend beyond any one case. The early release advocacy strategies described in Part II have the potential to change front-end sentencing practices and, in this way, challenge mass incarceration.

To be clear, the contributions of early release advocacy to the fight against mass incarceration may be modest. But mass incarceration was built brick by brick, and it will be dismantled the same way.[92]

90. *See* THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES, *supra* note 2, at 2–3.

91. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4 (2019) ("[C]riminal procedure and punishment in the United States still function to maintain forms of racial subordination that originated in the institution of slavery—despite the dominant constitutional narrative that those forms of subordination were abolished.").

92. FORMAN JR., *supra* note 83, at 229 ("I have described mass incarceration as the result of a series of small decisions, made over time, by a disparate group of actors. If that is correct, mass incarceration will likely have to be undone in the same way.").